

(2012) 07 CHH CK 0071
In the Chhattisgarh High Court
Case No : Writ Petition (S) No. 3168 of 2010

Smt. Pramodani Mishra

APPELLANT

Vs

State of Chhattisgarh and Others

RESPONDENT

Date of Decision : 04-07-2012

Acts Referred:

Constitution of India, 1950 — Article 12

Citation : (2013) 2 SCT 422

Hon'ble Judges : Satish K. Agnihotri, J

Bench : Division Bench

Advocate : Sunil Otwani, for the Appellant; Y.S. Thakur and D.A.G. with Pankaj Shrivastava, for the Respondent

Final Decision : Dismissed

Judgement

Satish K. Agnihotri, J.—By this petition, the petitioner seeks a direction to the respondents to consider the service period which the petitioner has rendered as a daily wager for the purpose of calculation of pension and gratuity. The facts are, in narrow compass, that the petitioner was initially appointed on 01.01.1980 on daily wages basis on the post of Copyist and continued as daily wager till he was regularized i.e. on 11.01.1988. The petitioner retired from service on attaining the age of superannuation on 31.05.2008.

2. According to learned counsel for the petitioner, on 15.10.2008 (Annexure P/6), it was proposed by the Divisional Joint Director. Treasury, Accounts & Pension, Raipur that the case of the petitioner be considered under the provisions of Madhya Pradesh Work-charged Contingency Paid Employees Rules, 1974 and accordingly, proposal for pension was made. It appears that the period before the petitioner was regularized was not considered for the purpose of calculation of gratuity and pension. Thus, this petition seeking a direction to the respondents to consider the service period spent as daily wager for calculation of gratuity and pension.

3. Shri Otwani relies on section 12(2) of the M.P./C.G. Civil Services (Pension) Rules, 1976 (for short, "the Rules 1976") whereunder it is provided that the qualifying service of a government servant shall commence from the date he takes charge of the post to which he is first appointed either substantively or in an officiating or temporary capacity. Shri Otwani further submits that a daily wager comes within the definition of temporary capacity. Thus, the period spent by the petitioner as daily wager be also taken into consideration for the purpose of determination of pension and other retiral benefits.

4. On the other hand, Shri Thakur, learned Deputy Advocate General appearing for the State/respondents submits that a daily wager cannot be treated as a temporary employee as the daily wager is not an employee of the State Government. Rule 12(2) of the Rules, 1976 contemplates that if a regular member is substantively or officiatingly or temporarily occupying a post, the same should be counted. Thus, the petitioner cannot take advantage of his appointment on daily wages basis. The period spent by the petitioner as daily wager cannot be counted for the purpose of calculation of pension and other retiral benefits. He relies on Rule 2(d) of the Madhya Pradesh Government Servants (Temporary and Quasi-Permanent Service) Rules, 1960 wherein the term "temporary service" has been defined. The same reads as under:

(d) "Temporary service" means officiating or substantive service in a temporary post, and officiating service in a permanent post, under State Government and also includes the period of leave with allowance taken while on temporary service and compete years of approved war-service, which have been counted for fixation of pay and seniority.

5. Heard learned counsel appearing for the parties, perused the pleadings and documents appended thereto.

6. Law in this respect is well settled. Appointment of a daily wager cannot be held as a regular employment as the same is not in accordance with law or constitutional scheme of employment. It is also not the case of the petitioner that the petitioner was appointed through proper selection process after inviting applications from all the similarly situated candidates for selection and appointment. Thus, it has been held that such appointment is not legal appointment and an appointment which is not legal or not in accordance with the constitutional scheme of employment, the petitioner cannot take advantage of it for the purpose of any service benefits. The petitioner was born in service only after he was regularized. To say the least, even there is a question mark with regard to regularization of the petitioner. However, this Court does not propose to go into the question with regard to regularization of the petitioner.

7. Rule 12(2) of the Rules, 1976 contemplates that only an employee who is first appointed either substantively or in an officiating or temporary capacity will be eligible to take benefit of the said provision. Appointment means legal appointment in accordance with law and constitutional scheme of employment.

The petitioner is not entitled to the said benefit.

8. If the initial appointment of the petitioner itself was illegal, the subsequent grant of regular pay scale and regularization does not change the status of the employee. The Supreme Court, in *Ashok Kumar Sonkar Vs. Union of India (UOI) and Others*, observed as under:

34. It is not a case where appointment was irregular. If an appointment is irregular, the same can be regularized. The court may not take serious note of an irregularity within the meaning of the provisions of the Act. But if an appointment is illegal, it is non est in the eye of law, which renders the appointment to be a nullity.

9. Further, in *Municipal Corporation, Jabalpur Vs. Om Prakash Dubey*, , the Supreme Court observed as under:

11. The question which, thus, arises for consideration would be: Is there any distinction between "irregular appointment" and "illegal appointment" In the event the appointment is made in total disregard of the constitutional scheme as also the recruitment rules framed by the employer, which is State within the meaning of Article 12 of the Constitution of India, the recruitment would be an illegal one; whereas there may be cases where, although substantial compliance with the constitutional scheme as also the rules has been made, the appointment may be irregular in the sense that some provisions of the rules might not have been strictly adhered to.

10. This Court has considered the issue in the matter of *Jhadu Ram Vs. C.G. State Electricity Board and Another*,) wherein it was observed as under:

5. Engagement of the petitioner on daily wages cannot be counted as service in the department. It is well settled principle of law that any appointment dehors the constitutional scheme of the employment and not in consonance with the provisions of law on daily wages, contract or temporary, is not legal and the employee does not acquire any right to continue in service and other benefits of the regular service.

11. Applying the well settled proposition of law to the facts of the case on hand, the petitioner is not entitled to any relief, as sought for in this petition. The petition, being devoid of merit, is dismissed. No order as to costs.