

(1992) 12 OHC CK 0004

In the Orissa High Court

Case No : Original Jurisdiction Case No. 5146 of 1992

Smt. Urmila Senapati

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 03-12-1992

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 226, 227

Citation : (1993) 76 CLT 250 : (1993) 1 OLR 348

Hon'ble Judges : S.K. Mohanty, J;G.B. Pattnaik, J

Bench : Division Bench

Advocate : J. Patnaik, for the Appellant; Debasia Das, Additional Government Advocate, for the Respondent

Final Decision : Allowed

Judgement

G.B. Pattnaik, J.—The petitioner has approached this Court for a direction to the opposite parties to regularise her services in the post of Trac3r and for a further direction that until such regularisation she should be paid the same pay as that of her counterparts in regular service.

2. The petitioner alleges that on completion of her training as Draughtsman (Civil) she has undergone some practical training in the office of the Chief Engineer, Minor Irrigation, Orissa, and as an appreatice trainee was continued from 1-2-1986 till 31-1-1887. The certificate of the concerned Engineer dated 18th of September, 1986, has been annexed an Annexure-2 and the certificate of the Superintending Engineer for the entire period from 1-8-1986 to 31-1-1987 has been annexed as Annaxure-1. On being relieved from the office of the Chief Engineer as an Apprentice Trainee, the petitioner's case is that she joined the office of the Executive Engineer,. Minor Irrigation Division, Cuttack, against a post of Tracer as a casual worker and is continuing as such even till today and she has been discharging her duties to the satisfaction of all concerned. In support of her such continuance, Annexure-3 series have been appended. After she completed-five years of such service, she represented before the competent

authority for regularisation of her service and she was called for a test on 7-6-1992. To the said test along with the petitioner several other outsiders had also been called and ultimately some others were appointed and the petitioner was not appointed and hence she has filed the present writ application.

3. It is urged in the writ application that the petitioner having been continued in service . though on daily wage basis for a period of more than five years, she has proved her ability and competence and she being duly qualified should have been absorbed on regular basis without being required to compete with several outsiders in the test that was held and the so-called test was merely to exclude the petitioner.

4. On behalf of the opposite parties, a counter affidavit has been filed wherein it has been admitted that the petitioner has been continuing in service on NMR basis as a skilled labourer since last five years and when posts of Tracer fell vacant, in accordance with the prescribed procedure, the Employment Exchange, was required to sponsor candidates and petitioner was also given the opportunity to appear at the test that had been held to adjudge the suitability of the candidates. The petitioner did appear at the test and stood 7th in order of merit, whereas only two posts were filled up from the general candidates. Consequently, petitioner's services could not be regularised. It is also stated in the counter affidavit that the petitioner was not serving as a Tracer, but was engaged in the office on daily wage basis as a skilled labourer to assist in the tracing work. She having been given opportunity to compete with others for the recruitment in question, no illegality has been committed in not regularising her services as she was found to have secured 7th. position in merit whereas only two posts were vacant.

5. Mr. Patnaik appearing for the petitioner raises the sole contention that after five years of service rendered by the petitioner, requiring her to appear at a test is contrary to law and, therefore, it must be held that petitioner has been deprived of her legitimate right of being regularised after lapse of 6 years of service on daily wage basis, Learned Additional Government Advocate appearing for the opposite parties, on the other hand, contends that the employer is entitled to adjudge the suitability of a person before regularising an employee to hold a post on regular basis and when such test being held the petitioner was found to be placed in the 7th position and only two posts were vacant, there has been no infirmity with the action of the opposite parties. According to the learned Additional Government Advocate, continuance in a post on daily wage basis and continuance on regular basis stand on different footing and even if a person is permitted to continue on daily wage basis for some period, but before regularisation of her services the employer is entitled to adjudge the suitability of the person and, therefore, no error has been committed by the employer in requiring the petitioner to appear at a test that was conducted for selecting competent person to hold the post of Tracer.

6. In view of the rival stand of the parties, the sole question that requires

consideration is whether requiring the petitioner to appear at a test along with others who are fresh candidates to adjudge their suitability to fill up the post of Tracer on regular basis, can be said to be violative of Articles 14 and 16 of the Constitution. The admitted facts are that the petitioner had the minimum qualification for being appointed as a Tracer. After completion of one year of apprenticeship she was permitted to continue as a Tracer on daily wage basis and by now she has completed more than five years. She was asked to appear at a test that had been held by the employer to fill up the post of Tracer on regular basis and she had appeared at the said test along with others who were fresh candidates and who had been sponsored by the Employment Exchange and in the test, her position has been found to be at number seven and since two posts of Tracer were to be filled up from amongst the general candidates, the petitioner has not been appointed on regular basis.

7. The question of absorption of ad hoc, temporary, daily-wage and N. M. R. employees on regular basis has been receiving the attention of all Courts throughout the country including the apex Court. It has been found that the employer instead of making appointments on regular basis through the prescribed procedure appoints people either on a temporary or ad hoc basis or on daily wage and N M R basis, even though there exists permanent need for such employment and after employing people with such precarious tenure terminates them without assigning any reason or continue them with such precarious tenure for indefinite period and those employees lose their opportunity of being regularly absorbed either being over-aged or they serve with such precarious tenure with lot of heart-burning and grievances. Courts have interpreted such action of the employer to be a naked explanation of poverty and consequently from time to time directions have been issued for regularisation of such services either through a phased manner by evolving a scheme or by some other method. A Bench of this Court in a batch of writ applications in *Bachan Kumar Sahoo etc v. The Orissa State Housing Board and Anr.* 73(1992) CLT 148 considered this question and relying upon the decisions of the Supreme Court in *The Dharwad Distt. P.W.D. Literate Daily Wages Employees Association and others, etc. Vs. State of Karnataka and others etc.,* , *Bhagwati Prasad Vs. Delhi State Mineral Development Corporation*, as well as the decision of the Supreme Court in *Daily Rated Casual Labour Employed under P and T Department Vs. Union of India (UOI) and Others*, held :

"...Having employed them for about 2 years, it was unfair on the part of the opposite party corporation to require them to appear before the Selection Committee for a test. If a test of their ability, competence was necessary, they stood it satisfactorily during the course of 7 years they served from 1983-84 till 1990. Had they not served satisfactorily and with competence, they could not have been given temporary appointments having; a scale of pay. We have therefore, no hesitation in observing that failure of the Board to regularise the service of petitioners was unjust and unfair and infringed Arts. 14 and 16 of the Constitution and infringed the declaration of law made by the Supreme Court and

by this Court in the cases referred to above and other cases."

Their Lordships of the Supreme Court in dealing with similar matters in several cases have held unhesitatingly that security for service is of paramount consideration and regularising the casual, employment within a reasonable period is accepted to be a constitutional goal to our socialistic polity. In *Bhagwati Prasad Vs. Delhi State Mineral Development Corporation*, even their Lordships ignored the minimum educational qualification prescribed for different posts on the ground that though such educational qualification is a factor to be reckoned with, but it is so at the time of initial entry into the service and once the appointments are made as daily rated workers and they are allowed to work for a considerable length of time, it would be hard and harsh to deny them the confirmation in the respective posts. on the ground that they lack of the prescribed educational qualification. In that particular case, the Supreme Court directed that three years of experience would be sufficient for the worker for being regularly absorbed.

The question has again cropped up recently before the apex Court in the case of *State of Haryana and Ors., etc. etc v. Piara Singh and Ors. etc. etc.* AIR 1992 SCW 2315 wherein certain direction given by the Punjab & Haryana High Court was under challenge at the instance of the State of Haryana. In the said case, their Lordships of the Supreme Court have discussed in detail both with regard to the ad hoc and temporary employees as well as with regard to the N M R and work-charged employees. Their Lordships have quoted a passage from the earlier judgment of the Supreme Court in *The Dharwad Distt. P.W.D. Literate Daily Wages Employees Association and others, etc. Vs. State of Karnataka and others etc.,* and we think it appropriate to extract the said passage hereunder ;

"We are alive to the position that the scheme which we have finalised is not the ideal one but as we have already stated, it is the obligation of the Court to individualise justice to suit a given situation in a set of facts that are placed before it. Under the scheme of the Constitution the purse remains in the hands of the executive. The legislature of the State controls the Consolidated Fund out of which the expenditure to be incurred, in giving effect to the scheme, will have to be met. The flow into the Consolidated Fund depends upon the policy of taxation depending perhaps on the capacity of the payer. Therefore, unduly burdening the State for implementing the constitutional obligation forthwith would create problems which the State may not be able to stand. We have, therefore, made our directions with judicious restraint with the hope and trust that both parties would appreciate and understand the situation. The instrumentality of the State must realise that it is charged with a big trust. The money that flows into the Consolidated Fund and constitutes the resources of the State comes from the people and the welfare expenditure that is meted out goes from the Fund back to the people. May be that in every situation the same tax payer is not beneficiary. That is an incident of taxation and a necessary concomitant of living within a welfare society."

These observations had been made as the Supreme Court was issuing a direction in respect of 50,000 persons who had been employed on daily rate basis for more than 15 to 20 years. In the present case, of course, we are not faced with such a situation where an individual case of the petitioner is for consideration before us.

In Piara Singh's case AIR 1992 SCW 2315 their Lordships of the Supreme Court analysed the question of the employees in a work charged establishment. Their Lordships considered the earlier view of the Supreme Court in the case of Jaswant Singh and Others Vs. Union of India (UOI) and Others, and ultimately observed thus :

"So far as the work-charged employees and casual labour are concerned, the effort must be to regularise them as far as possible and as early as possible subject to their fulfilling the qualifications, if any, prescribed for the post and subject also to availability of work. If a casual labourer is continued for a fairly long spell-say two or the three years-a presumption may arise that there is regular need for his services. In such a situation, it becomes obligatory for the concerned authority to examine the feasibility of his regularisation. While doing so, the authorities ought to adopt a positive approach coupled with an empathy for the person. As has been reportedly stressed by this Court, security of tenure is necessary for an employee to give his best to the job....."

In a recent case of such an NMR worker serving under the Orissa Lift Irrigation Corporation-OJC No. 5081 of 1990 (Harihar Pradhan v. Orissa Lift Irrigation Corporation Ltd. and Ors.) decided on 16th April, 1991, this Court had directed to consider the case of the workman for absorption on regular basis and had further indicated to evolve a scheme if such a scheme is not yet under operation on a rational basis for absorbing casual/daily rated workers who have been serving under the Corporation for more than one year. The Corporation being aggrieved by the judgment of this Court had carried the matter to the Supreme Court in Civil Appeal Nos. 3615, 3628 of 1991. The Supreme Court disposed of the matter by its order dated 13th of October, 1992, a copy whereof was produced before us by Mr. Patnaik appearing for the petitioner observing therein that there is no ground to interfere subject to the modification that the scheme for absorption prepared by the Corporation should provide for regularisation of all the workmen who have put in five years of service with the the Corporation instead of one year as directed by the High Court. The petitioner in the present case having served for more than five years also satisfies the guidelines indicated by their Lordships of the Supreme Court in relation to regularisation of daily rated workers under the Orissa Lift Irrigation Corporation.

8. In view of the position of law as discussed above, and applying the same to the present case, we have no hesitation to come to the conclusion that the opposite parties having allowed the petitioner to continue for more than five years as a Tracer on daily wage basis, have acted with discrimination by requiring her to appear at a test along with other fresh candidates who had been

sponsored from the Employment Exchange and adjudicated their relative merit and suitability. It is not the case of the opposite parties that the petitioner does not possess the minimum qualification and, as has been stated earlier, the very fact of her continuance for more than five years was sufficient to adjudge her suitability for regular absorption. If it would have been a case of holding a test for all such work-charged or daily wage Tracers, then that would have stood on a different footing. In this view of the matter, we are of the considered opinion that the authorities have not adopted a positive approach with an empathy for the petitioner, as was observed by their Lordships of the Supreme Court in Piara Singh's case, referred to supra. But the persons who have been selected and appointed pursuant to the test held are not parties before us and, therefore, we are not in a position to annul their appointment. While, therefore, we are not annulling the selection already made pursuant to the test that had been held on 7-6-1992 as well as the appointments made thereunder, we would direct the opposite parties to regularise the services of the petitioner as a Tracer on regular basis in the existing vacancy, if there is any, and in the absence of such vacancy in the next vacancy that is likely to arise immediately hereafter.

The writ application is accordingly allowed with the aforesaid directions and observations, but without any order as to costs.

S.K. Mohanty, J.

9. I agree.