
(2001) 09 RAJ CK 0133
In the Rajasthan High Court
Case No : Civil Special Appeal No. 984 of 2000

State of Rajasthan

APPELLANT

Vs

Veer Bhan

RESPONDENT

Date of Decision : 15-09-2001

Acts Referred:

Rajasthan Subordinate Offices Ministerial Staff Service Rules, 1957 — Rule 25(7)

Citation : (2003) 3 RLW 1670 : (2002) 1 WLC 593 : (2002) 4 WLN 310 : (2002) 2 WLN 179

Hon'ble Judges : Rajesh Balia, J; Jagat Singh, J

Bench : Division Bench

Advocate : Vimal Mathur, for the Appellant; C.S. Bissa, for the Respondent

Final Decision : Dismissed

Judgement

Balia, J.—State Government through P.H.E.D. Department is in appeal against the order dated 8.8.2000 allowing the writ petition filed by the respondent Veerbhan Singh wherein he claims that his services may be regularised as Lower Divisional Clerk in office under Rule 25(7) of the Rajasthan Subordinate Officers Ministerial Staff Rules 1957 (hereinafter referred as "the Rules of 1957") the petition has been allowed by following the earlier decision in Ram Karan v. State (1).

2. The case of the petitioner respondent as emerging from the petition is that he was appointed on 22.11.81 by a verbal order on daily wages and since then he is discharging the duties of the clerk. He holds all the qualifications for being appointed as a Lower Divisional Clerk and at the relevant time he was working as Hindi typist and Lower Divisional Clerk. His claim is that under Rule 25(7) of the Rules of 1957 any person employed on work charged basis in P.H.E.D. and who has put in at least 2 years continuous service on 1.4.98 and has passed High School or Secondary/Praveshika Examination of Board of Secondary Education, Rajasthan or of a Board recognized by the Govt. or other qualification prescribed for the post for the purpose may be absorbed on the post of Lower Divisional

Clerk on regular basis against the vacant post of Lower Divisional Clerk in the respective department to the extent of 50% of the total vacant posts of Lower Divisional Clerk adjudging their suitability by the Committee consisting of the Members as prescribed. The petitioner fulfills all the conditions for being considered and regularised for the post of Lower Divisional Clerk and the vacancies are also did exist at the relevant time. In support of his claim the petitioner has submitted Certificate Annex. 1 issued by the Assistant Engineer under whom he was working from 8.1.90 stating that since 22.11.85 the petitioner is discharging functions of Lower Division Clerk at Sub-Divisional, Taranagar. Annexure 2 is the application filed by the petitioner disclosing his qualification as Post Graduate and the work which is discharged by him for increasing his daily rated wages from Rs. 17 to Rs. 20 and which was recommended by his immediate superior officer on 3.11.87. Annex. 6 is a document emanating from the office of Assistant Engineer P.H.E.D., Taranagar in response to the letter received from the Deputy Secretary, P.H.E.D., Jaipur dated 16.3.90 requiring the information that how much work charged employees are available and still employed in the Department who are discharging the functions of Lower Divisional Clerk or equivalent thereto in which it has been found that the name of the petitioner is at Serial No. 6 which also supports Certificate Annex. 1 that the petitioner is working since November 1985 as a Lower Divisional Clerk or position equivalent thereto. The reference to this letter also shows that the work charged labourers from whom the work of Lower Divisional Clerk or equivalent thereto is being taken and that report has been made for the purpose of making them payment commensurating with the work which they are discharging. This Annex. 6 denotes that if he is to be paid according to remuneration payable for the work discharged by him his salary should go up by Rs. 820 per month. Annex. 6 is a document which has not been denied though veracity of Annex. 1 has been contested in reply to the writ petition.

3. We are of the opinion that Annex. 6 proves beyond doubt positive fact that while the petitioner was labelled as labour/labourer but he was made to discharge functions of Lower Divisional Clerk or equivalent thereto under the work charged establishment since November 1985. It was not disputed before learned Single Judge, nor before us that the petitioner is eligible to be considered under Rule 25(7) of the Rules of 1957 for being regularly absorbed on the regular establishment of the P.H.E.D. Department. The only contention raised is that Rule 25(7) is only enabling power and appellants are not bound to exercise that power and it does not vest in petitioner an enforceable right.

4. We fail to see the reason for challenging the order made by the learned Single Judge in terms of the order passed in Ram Karan's case by which the respondents were directed that the petitioner's case shall be considered in pursuance of the Rules amended under Notification dated 18.12.89. The petitioner shall be given same treatment as the petitioner in the aforesaid decision has been given. This exercise shall be taken and completed within the period of four months from the date of order.

5. In the decision of learned Single Judge in Ram Karan's case he has referred to the decision rendered in Naga Ram Choudhary v. State of Raj. (2). That order also arose in similar circumstances in respect of the employee of work charged establishment of P.H.E.D. from Barmer Division. The court has held as under :

"It is apparent that while appointment of the petitioner was made on the post of Helper, he has been made to discharge duties of L.D.C. has come on record. It is true that ordinarily for regular appointment on the post of L.D.C. one has to go through the process of the examination conducted by the Raj. Public Service Commission. However, it is apparent that in relaxation of general criteria, the Govt. has worked on work charged and muster roll establishment at least for a period of two years or more as on 1.4.98 by absorbing them against 50% vacancies of L.D.C. available in various departments provided otherwise eligible to be appointed on the post without going through the regular examination of Rajasthan Public Service Commission. In view of their own decision, petitioner can not be denied benefit on it. It is clear that petitioner fulfils all the qualification required for the post of L.D.C. and post is also available. The conditions for availing benefit of amendment in Rules by Notification dated 18.12.88 an existing in the case of the petitioner as in apparent from Ex.3."

6. And the petitioner was allowed with the following directions.

"The respondents are directed to regularize the petitioner's services on the post of L.D.C. in pursuance of rules as amended by notification dated 18.12.89 as he fulfils all the conditions laid down therein within a period of three months from today. The petitioner will be placed in the regular pay scale with effect from the date his services are regularised. There will be no order as to costs."

7. We are told that the decision in Naga Ram's case has not been challenged and has attained finality.

8. We are constrained to observe that stand taken by the appellants is wholly unreasonable, when they say that though the petitioner is entitled to be considered, appointed and absorbed as L.D.C. under Rule 25(7) of the Rules of 1957, it being the discretion of the Appointing Committee, no mandamus can be issued.

9. Rule 25(7) in our opinion casts an obligation that such power is exercised for the purpose for which the power has been vested with the authority on fulfillment of the conditions for exercise of such power under the Rules. Once it is not disputed or shown that all conditions for absorbing a person from workcharged establishment on the regular establishment, existed it becomes duty that such power is exercised for the purpose for which such power has been vested in the authority.

10. Principle is succinctly stated by Lord Cairns more than a century ago in Julius v. Lord Bishop of Oxford (3) :

"There may be something in the nature of the thing empowered to be done,

something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed to exercise that power when called upon to do so."

11. About enforceability of duty to exercise such power when conditions for the exercise of such power is established, through court was too accepted Lord Cairns said :

"Where a power is deposited with a public officer for the purpose, of being used for the benefit of persons specifically pointed out with regard to whom a definition is supplied by the Legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised and the court will require it to be exercised."

12. The principle has withstood the test of time. The Supreme Court has consistently approved and applied the principle. The principle laid in *Julius v. Lord Bishop* was approved and applied in *P.S.R. Motor Service v. RTA Raipur* (4) by a Constitution Bench of the Apex Court, while construing enabling power to renew a permit whose period has expired. The Court said :-

"The exercise of such power of renewal depends not upon the discretion of the Authority but upon proof of particular case out of which such power arises."

13. In *L. Hirday Narain v. I.T. Commr.* (5), the Apex court approving the principle enunciated by Lord Cairns said :

"If a statute invests a public officer with authority to do an act in a specified set of circumstances, it is imperative upon him to exercise his authority in a manner appropriate to the case when a party interested and having a right to apply moves in that behalf and circumstances for exercise of authority are shown to exist. Even if the words used in the statute are prima facie enabling the Courts will readily infer a duty to exercise power which is vested in aid of enforcement of a right public or private of a citizen."

14. The principle was restated by the Apex Court in *official Liquidator v. Dharatidhan (P) Ltd.* (6), *Delhi Administration v. I.K. Nangiar* (7), *Supdt. Engineer Public Health v. Kuldeep Singh* (8), and *Jaswant Rai v. CBDT* (9). In the last mentioned case the court said while considering the question of nature of power conferred on Commissioner to reduce or waive penalty imposed/imposable under the I.T. Act 1961:

"A reading of provisions of Section 271 (4A) (....) will indicate that it is a power coupled with a duty to do justice and the Commissioner is under statutory obligation to exercise the power in favour of an assessee which has fulfilled all the conditions of the provisions."

15. Continuance for an employee for indefinitely long period by labelling him

an appointee of a lower post for the purpose of discharging duties of a higher post, results in denial of legitimate emoluments due for the work discharged by such employee for the employer and a presumption arises that there exist permanent work for continued employing such person for that purpose. Such a practice amounts to unfair labour practice and exploitation of the employee. This practice clearly violates Article 14 & 16 of the Constitution also and cannot be defended on the jejune ground that exercise of power being in the discretion of authority, such authority is not bound to exercise such power, and that there does not vest correspondingly any enforceable right in a person for whose benefit such provision has been made.

16. It now stands firmly ingrained in constitutional guarantee under Article 14 for equal protection of law that its protecting umbrella reaches all areas of state action which is unreasonable and arbitrary. Arbitrariness is antithesis of equality. We remind ourselves of what Supreme Court said while laying bare the far reaching third but hither to undiscovered dimension of fundamental rights enshrined in Articles 14 and 16, one of the specie of Article 14, said in *E.S. Rayappa v. State of Tamil Nadu* (10).

"Article 14 is the genus while Article 16 is a species....The basic principle which therefore, informs both Articles 14 and 16 is equality and inhibition against discrimination.Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed, cabined and confined within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it affects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment."

17. It is no more in doubt that equal pay for equal work forms intrinsic part of fundamental right of equality guaranteed under Articles 14 & 16 and protection against exploitation guaranteed under Article 23 of the Constitution. Extraction of labour by paying less than minimum living wages amounts to forced labour prohibited under Article 23 is established vide pronouncement made in *People's Union for Democratic Rights v. Union of India* (11).

18. So also the practice of continuance for long any person in employment with a casual/ad hoc/or temporary status too is well recognised to be an act of arbitrariness.

19. While cautioning that appointments made in public employment on ad hoc/casual/temporary basis breeds the abuse of Article 16 and is not to be counteracted, at the same time the court has recognised as a part of fair deal at the hands of state to its employees need to frame scheme for regularising

services of such persons who had been working for long in such state of affairs, without a permanent status and rights equal to those who have been appointed permanently for discharging the same or similar work. The obligation of the state in this regard is explained and enunciated in *State of Haryana v. Piarya Singh* (12). The Apex Court said :

"The normal rule is regular recruitment through prescribed agency but exigencies of administration may sometimes call for an ad hoc or temporary appointment to be made. Secondly an ad hoc or temporary , employee should not be replaced by another ad hoc or temporary employee; he must be replaced only by a regularly selected employee. If for any reason an ad hoc or temporary employee is continued for a fairly long spell, the authorities must consider his case for regularisation provided he is eligible and qualified according to rules and his service record is satisfactory and his appointment does not run counter to the reservation policy of the State."

20. These observations were made in regard to the appointments made on the regular establishment of the employee. However, the court clearly drew distinction between the ad hoc employee appointed to any post in the regular establishment and the work charged employees which are employed as a casual labour on need basis. The Court observed :

"So far as the members of 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 2 or 3 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 repeatedly stressed by this court, security of tenure is necessary for an employee to give his best to the job."

21. The Court clearly mandated to adopt a positive approach in regularising services of a person employed on work charged establishment or as a casual labour for long. The long term of service which necessitate such positive action was estimated to be two to three years. We here are concerned with a case of person who is demanding treatment according, to rule on the basis of long continuation since 1981. He has already served over a decade when he approached the Court for remedy and today it crosses two decades mark.

22. The principle that long continuance of any person in the temporary status to deny him the benefit of long from permanent status has been statutorily recognised by Parliament is including such practice to be an unfair labour practice under the Industrial Disputes Act, 1947. Entry 10 in Schedule V of the Act read with Section 2(ra) the Act of 1947 inserted vide amending Act No. 46 of 1982 and made operative with effect from 21.8.84.

23. The very term "unfair labour practice" indicates arbitrariness inherent in it. If the remedy against such arbitrariness in the action of employer in general has been accepted by legislature it cannot be less arbitrary if adopted by State or any of its instrumentality. Such an arbitrariness is State action results in violation of Articles 14 and 16 cannot be over emphasised. In case an unfair labour practice is adopted by the State or its instrumentality, it brings in violation of Articles Hand 16 of the Constitution. With this, comes in existence his right to seek its enforcement, even through constitutional remedies by invoking extraordinary jurisdiction of High Court. Any arbitrary action of the State, correspondingly vest in the citizen so attested an enforceable right in not to be treated unfairly arbitrating and unjustly by the State in any sphere of its activities.

24. Rule 25(7) was to remove such arbitrariness. The rule effectuates the obligation of the state in its duty to act fairly in the matter of employment which is free from arbitrariness and unreasonableness. It also protects an employee on work-charged establishment from languishing for long period under the employment without status of permanency. It also opens the way for providing a statutory scheme of regularly absorbing such person on the post of Lower Divisional Clerk who is otherwise qualified to hold the post subject to availability of vacancies. It appears fairly clear that object behind enacting fulfills that object actually by providing a regular employee by absorbing the persons who are necessitated to be appointed as casual labour on work charged establishment for a period of service rendered by them provided they are eligible for the post of L.D.C. on 50% of the available vacancies at any particular time.

25. In these circumstances, the contention of the learned counsel for the appellant based on the plea of impermissibility of regularisation of irregularly appointed persons cannot be sustained.

26. Moreover, the appointment of casual labour on the work charged establishment is not an irregular appointment, it does not become de hors the rules merely because the person is not appointed on a regular establishment under the Rules for regular recruitment but is appointed as casual labour or daily rated workman for particular work under work charged Rules under Workcharge Establishment. It is not de hors the rules when appointment of casual labour on the work charged establishment is permissible under the work charged establishment rules which provides its own mechanism of conferring the status of semi permanent or permanent where the casual labourer is employed fairly for a long period in continuation. It is only absorbing persons appointed under one set of rules for estimated casual work but in course of time which resulted in long continuous appointment.

27. Thus looking to object of Rule 25(7) and right of a citizen to the equal protection of law, which is an enforceable right as a constitutional guarantee, it must be held that Rule 25(7) which confers a power on the State to absorb on regular establishment as Lower Divisional Clerk such employees who are working

on work charge establishment for a continuous period as prescribed in the Rule, provided the incumbent holds necessary academic qualification for the post, though couched in enabling term, but in fact obligates the state to exercise such power when conditions for exercise of such powers are shown to exist. We have also found as discussed above that in the present case the petitioner respondent has established that he otherwise fulfills all such conditions for invoking Section 25(7) of the Rules of 1957, He has also established that in fact he had been discharging duties of a clerk since 1985, though labelled as "beldar" and helper Gr. II successively. He thus has a right to a mandamus that the respondent exercise the power under Rule 25(7) in his favour.

28. As a result this appeal fails and hereby dismissed. We are in agreement with the learned Single Judge that the respondent No. 1 was entitled for a mandamus that the appellants be directed to consider the case for absorbing services of the petitioner-respondent, who was working on work charged establishment since 1985 undisputedly and fulfills all other conditions of eligibility, and if find suitable otherwise be given appointment against the existing vacancies. He shall be entitled to rules and regular pay scale from the date with effect from which he is absorbed as Lower Divisional Clerk by the Department under the Rules which shall in case be latter than a date from which any person Junior to him in establishment has been given regular appointment under that Rule. This exercise shall be completed within a period of three months from today.

29. No order as to costs.