
(2010) 04 AHC CK 0260
In the Allahabad High Court

State of U.P. and Others

APPELLANT

Vs

Smt. Aakila Bano and Another

RESPONDENT

Date of Decision : 09-04-2010

Acts Referred:

Constitution of India, 1950 — Article 309

Citation : (2010) 04 AHC CK 0260

Hon'ble Judges : Uma Nath Singh, J;D.K. Arora, J

Bench : Division Bench

Final Decision : Allowed

Judgement

D.K. Arora, J.—Heard Sri Sanjay Bhasin, learned Additional Chief Standing Counsel for the petitioners and learned Counsel for the opposite party No. 1.

2. By means of present writ petition, the petitioners have challenged the judgment and order dated 08.01.2010 passed in Review Petition No. 02 of 2010 and the order dated 29.07.2009 passed in Claim Petition No. 732 of 2009 by the U.P. State Public Services Tribunal, Lucknow.

3. The brief facts of the case, as culled out from the pleadings of the writ petition, are that the opposite party No. 1 filed a claim petition before the learned U.P. State Public Services Tribunal, Lucknow with the prayer that the opposite parties be directed to consider the claimant as a regular employee of the department and to provide her all service benefits etc. alongwith the benefit of Vith Pay Commission like regular employee of the department. From perusal of record, it reveals that the opposite party No. 1 filed claim petition before the U.P. State Public Services Tribunal thereby claiming that her husband Sri Rashid Ali was employed as Helper in the Public Works Department and he died in harness on 13.02.2000 after putting 18 years of continuous service and she being the dependent of the deceased was given appointment under Dying-in-Harness Rules, 1974 and, as such, her appointment is deemed to be a regular appointment.

4. It is also submitted that ever since from the date of her appointment i.e. 10.03.2000 she is regularly working with the department but her services have not been regularized and she has also been deprived of all the service benefits admissible to a regular employee. The claim petition was opposed by the petitioners by filing a written statement, in which it has been stated that the claimant/ opposite party No. 1 was not appointed under the provisions of the Uttar Pradesh Recruitment of Dependent of Government Servants Dying-in-Harness Rules, 1974 (here-in-after referred to as the Rules, 1974). The deceased husband of the claimant/opposite party No. 1 was not a regular employee of the Public Works Department. He was appointed as Helper on daily wages basis in the work charge establishment and since her husband was not a regular employee of the department, as such, the claimant/opposite party No. 1 was not covered under the definition of public servant and, therefore, the provisions of Rules, 1974 were not attracted. It is also stated that since the claimant/ opposite party No. 1 was not appointed under Rules, 1974, as such, she cannot be treated to have been appointed on a regular post or against the supernumerary post. Therefore, she cannot be granted regular salary or the benefit of VIth Pay Commission.

5. The further submission of learned Counsel for the petitioners is that from perusal of the impugned judgment, it transpires that there were two questions before the learned Tribunal for determination:

(1) Whether the appointment of the claimant/ opposite party No. 1 was made under the provisions of Rules, 1974 or whether the same was under the executive instructions on the subject?

(2) Whether the claimant/ opposite party No. 1 could be appointed as a work-charge employee under the provisions of Rules, 1974.?

6. It is further submitted by the learned Counsel for the petitioners that learned Tribunal brushed aside the contention of the opposite party No. 1/ present petitioner that the husband of the claimant/ opposite party No. 1 was not a government servant and, therefore, Rules, 1974 were not applicable to her case by saying that merely because the present petitioner had given appointment to the claimant/ opposite party No. 1, she would be held to have been appointed under the provisions of Rules, 1974. It is also submitted that learned Tribunal completely ignored the letter dated 10.03.2000 (Annexure-1 to the claim petition) by which work superintendent has asked for appointment of the claimant/ opposite party No. 1 in accordance with law. It is also submitted that the said letter of work superintendent is not even a letter of appointment. It only asks the claimant/ opposite party No. 1 to submit her joining and the said letter nowhere indicates that the appointment which was being made was under the provisions of Rules, 1974 and not under the administrative/ executive orders on the subject. It is also submitted that the claimant/ opposite party No. 1 is also not covered under the provisions of U.P. Regularisation of Daily Wager Appointment on Group-D Posts Rules, 2001 (here-in-after referred to as the

Rules, 2001) since she was appointed on daily wage basis on compassionate ground after cut off date i.e. 29.06.1991 and for the purpose of regularisation as per Rule 4 of Regularization Rules, 2001 a seniority list has been prepared from which upto serial No. 36 have been regularised so far and there are 643 work-charge employees over and above the claimant/ opposite party No. 1 who have not yet been regularized.

7. Learned Counsel for the petitioners drawn attention of this Court towards the policy decision of the State Government dated 16.03.1996 and office Memorandum dated 27.06.1996, by which, it was provided that the dependent of work-charge employees dying in harness, would be appointed as work-charge employee in the work-charge establishment and in pursuance of the same and considering the application of the claimant/ opposite party No. 1 she was appointed on 10.03.2000 on compassionate ground as work-charge employee. The learned Tribunal was apprised of the fact by means of review petition dated 01.01.2010 but the same was summarily rejected vide impugned order dated 08.02.2010.

8. The learned Counsel for the petitioner has very vehemently further submitted that the impugned judgment and order of learned Tribunal is not in consonance with law as it is settled position of law that any appointment to any service can only be governed by the applicable rules governing such appointments and the husband of the claimant/ opposite party No. 1 does not fall under the definition of Rules, 1974. It is further submitted that the claimant/ opposite party No. 1 was entitled for appointment in accordance with the policy decision taken vide Government Order dated 16.03.1996 read with office memorandum dated 27.06.1996, which provides that the dependents of a work-charge establishment employee dying in harness would be engaged as a work-charge employee in the work-charge establishment and which naturally means an engagement as a work-charge employee and not as a regular employee. It is also submitted that work-charge employee does not hold any post and no such appointment can even be treated as pensionable in accordance with the civil service regulations and it was not a case of the claimant/ opposite party No. 1 before the learned Tribunal that her husband was appointed against a regular vacancy in accordance with the regular procedure of appointment and the learned Tribunal committed a serious error in holding the deceased husband of the claimant/ opposite party No. 1 to be a government servant and also accordingly held claimant/ opposite party No. 1 to be entitled for the benefit of Rules, 1974.

9. Learned Counsel for the opposite party No. 1 submitted that since the claimant/opposite party No. 1 was appointed under the provisions of Rules, 1974, therefore, she is entitled for regular appointment and accordingly she deserves to get all the benefits of regular employee. It is further submitted that appointment under Rules, 1974 are permanent in nature. Hence, there is no infirmity in the judgment and order of learned Tribunal and the present writ petition is liable to be dismissed with cost.

10. Learned Counsel for the opposite party placed reliance on the following judgments:

1. Shyam Narain Singh vs. District Inspector of School Ghazipur and Ors. reported in : (1992) 2 UPLBEC 879.

2. Ravi Karan Singh v. State of U.P. and Ors. reported in 1999 (17) LCD 641.

3. Meena Devi Chaudhary (Smt.) Vs. Chief Engineer, U.P. Public Works Department and Others,

4. Santosh Kumar Mishra Vs. State of U.P. and Others,

5. Prem Prakash v. State of U.P. and Ors. reported in 2004 (22) LCD 1583.

11. In order to appreciate the controversy, it is necessary to go through the provisions of U.P. dependents of Government Servants Dying-in-Harness Rules, 1974;

12. The State Government in exercise of powers under the proviso of Article 309 of the Constitution of India framed the Uttar Pradesh Dependent of Government Servants Dying-in-Harness Rules, 1974. The Rule 2 (a) of the Rules defines "Government Servant", for ready reference the same is being reproduced as hereunder:

2. (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.

Explanation-"Regularly appointed" means appointed in accordance with the procedure laid down for recruitment to the post or service, as the case may be."

Rule 3 provides that the Rules would be applied to recruitment of the dependents of the deceased government servants to public services and posts in connection with the affairs of the State of Uttar Pradesh. Rule 4 provides for a non obstante clause stating that the same shall have effect notwithstanding anything to the contrary contained in any rules, regulations or orders in force at the commencement thereof.

Rule 5 provides for recruitment of a member of the family of the deceased. It reads as under:

5. Recruitment of a member of the family of the deceased. (1) In case a government servant dies in harness after the commencement of these Rules and the spouse of the deceased government servant is not already employed under the Central Government or a State Government or a Corporation owned or

controlled by the Central Government or a State Government, one member of his family who is not already employed under the Central Government or a State Government or a Corporation owned or controlled by the Central government or a State Government shall, on making an application for the purposes, be given a suitable employment in government service on a post except the post which is within the purview of the Uttar Pradesh Public Service Commission, in relaxation of the normal recruitment rules, if such person-

(i) fulfils the educational qualifications prescribed for the post,

(ii) is otherwise qualified for government service, and

(iii) makes the application for employment within five years from the date of the death of the government servant: Provided that where the State Government is satisfied that the time-limit fixed for making the application for employment causes undue hardship in any particular case, it may dispense with or relax the requirement as it may consider necessary for dealing with the case in a just and equitable manner.

(2) As far as possible, such an employment should be given in the same department in which the deceased government servant was employed prior to his death.

13. From examination of Rules, 1974, it is crystal clear that Rule 5 of Rules, 1974 would apply provided the deceased was a government servant. From perusal of the pleadings and the record of the writ petition, it is undisputedly evident that the deceased husband of the claimant/ opposite party No. 1, Late Rashid Ali was neither in permanent nor was appointed on temporary basis as he was working as Helper in the work-charge establishment on daily wages basis. The husband of the claimant/opposite party No. 1 being the work-charge employee does not fall under the definition of government servant and, therefore, there is no question of applicability of Rules, 1974 in the case of claimant/ opposite party No. 1.

14. In view of the aforesaid definition, it is apparent that the husband of the claimant/opposite party No. 1 admittedly does not fall within the definition of "Government Servant" being a work-charge employee and the provisions of Rules, 1974 does not apply in the case of claimant/ opposite party No. 1, therefore, she cannot said to be appointed under the provisions of Rules, 1974 on compassionate ground.

15. The Hon"ble Supreme Court in the case of State of Haryana and Others Vs. Jasmer Singh and Others, pleased to observed that daily wagers cannot be treated at par with the persons in regular service nor they can claim minimum of regular pay scale of regularly employees and if a minimum wage is prescribed for such workers, they will be entitled to it if it is more than what they are being paid. The paras-10 and 11 of the same read as under:

10. 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 fulfil 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 requirements 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.

11. 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.

16. In the case of State of Haryana and Ors. v. Tilak Raj and Anr. 2003 SCC (L & S) 828 the Hon''ble Apex Court in para-11 pleased to hold that; "a scale of pay is attached to a definite post and in case of a daily wagers, he holds no post."

17. Similarly in the matter of Punjab State Electricity Board and Others Vs. Jagjiwan Ram and Others, the Hon''ble Apex Court while examining the status of a work-charge employee viz-a-viz a regular employee pleased to observe as under:

9. We have considered the respective submissions. Generally speaking, a work-charged establishment is an establishment of which the expenses are chargeable to works. The pay and allowances of the employees who are engaged on a work-charged establishment are usually shown under a specified sub-head of the estimated cost of works. The work-charged employees are engaged for execution of a specified work or project and their engagement comes to an end on completion of the work or project. The course and mode of engagement/recruitment of work-charged employees, their pay and conditions of employment are altogether different from the persons appointed in the regular establishment against sanctioned posts after following the procedure prescribed under the relevant Act or rules and their duties and responsibilities are also substantially different than those of regular employees.

10. The work-charged employees can claim protection under the Industrial Disputes Act or the rights flowing from any particular statute but they cannot be treated on a par with the employees of regular establishment. They can neither claim regularisation of service as of right nor can they claim pay scales and other financial benefits on a par with regular employees. If the service of a work-charged employee is regularised under any statute or a scheme framed by the

employer, then he becomes member of regular establishment from the date of regularisation. His service in the work-charged establishment cannot be clubbed with service in a regular establishment unless a specific provision to that effect is made either in the relevant statute or the scheme of regularisation. In other words, if the statute or scheme under which service of work-charged employee is regularised does not provide for counting of past service, the work-charged employee cannot claim benefit of such service for the purpose of fixation of seniority in the regular cadre, promotion to the higher posts, fixation of pay in the higher scales, grant of increments, etc.

18. The Hon''ble Supreme Court in the matter of General Manager, Uttaranchal Jal Sansthan Vs. Laxmi Devi and Others, pleased to observe that the rules providing compassionate appointment have to be given strict interpretation and before a person can claim a status of a government servant not only his appointment must be made in terms of the recruitment rules, he must otherwise fulfil the criteria thereof. Paras-20, 29, 32 and 33 are relevant for the present controversy and the same are being reproduced as hereunder:

20. The provision of law which ex-facie violates the equality clause and permits appointment through the side-door being unconstitutional must be held to be impermissible and in any event requires strict interpretation. It was, therefore, for the respondents to establish that at the point of time the deceased employees were appointed, there existed regular vacancies, Offers of appointment made in favour of the deceased have not been produced.

29. ...Secondly, before a person can claim a status of a government servant not only his appointment must be made in terms of the recruitment rules, he must otherwise fulfil the criterion therefor. Appointment made in violation of the constitutional scheme is a nullity. Rendition of service for a long time, it is well known, does not confer permanency. It is furthermore not a mode of appointment.

32. Learned Counsel for the respondents submits that the daily-wage employees would be entitled to the benefit of the Rules. They are, in our opinion, not covered in the definition of the "government employee".

33. Ms Issar urged that the daily wagers are not excluded from the purview of the Rules. The said question, in our opinion, is irrelevant. The question which should have been posed is as to whether the daily wagers are included within the definition of "government servant". If daily wagers are not government servants, question of applicability of the Rules does not arise.

19. The perusal of record reveals that Work Superintendent on the basis of letter of Superintending Engineer 17th Circle dated 09.03.2000 directed the Resident Engineer (4th) P.W.D., Lucknow on 10.03.2000 for making appointment of Smt. Aakila Bano, the claimant/ opposite party No. 1 on the post of Helper as dependent of the deceased as per rules and information of the same be sent to the Divisional Officer. The copy of the said letter was also forwarded to Smt.

Aakila Bano with the endorsement that she may submit her joining before the Resident Engineer (4th), P.W.D., Lucknow and Annexure-2 of the claim petition is a joining report, submitted by Smt. Aakila Bano before the Resident Engineer (4th) P.W.D., Lucknow on 10.03.2000. Except these two documents, the claimant/ opposite party No. 1 has not filed any document before the learned Tribunal. It indicates that in pursuance to the letter dated 10.03.2000 of the Work Superintendent, an appointment letter was required to be issued by the Resident Engineer (4th), P.W.D., Lucknow to the claimant/ opposite party No. 1 as per Rules.

20. It appears that no letter of appointment was issued by the Resident Engineer (4th), P.W.D., Lucknow to the claimant/ opposite party No. 1 and in case any appointment letter would have been issued to the claimant/ opposite party No. 1, definitely the same should have been filed alongwith the claim petition before the learned Tribunal. The Resident Engineer (4th) P.W.D., Lucknow rightly has not issued any appointment letter to the claimant/ opposite party No. 1 because as per Rules, 1974, her husband did not fall under the definition of government servant and, therefore, the claimant/ opposite party No. 1 was not entitled to get the appointment in pursuance of Rule 5 of the Rules, 1974. It is rightly submitted by the learned Additional Chief Standing Counsel for the petitioners that the claimant/ opposite party No. 1 was engaged in pursuance to the policy decision of the State Government dated 16.03.1996, which provides for engagement of dependent of an employee of work-charge establishment dying-in-harness as work-charge employee in the work-charge establishment and for engaging as a work-charge employee in the work-charge establishment no appointment letter is issued, only record is maintained for the purpose of daily wages. The order of Work Superintendent dated 10.03.2000 does not make any reference of Rules, 1974, apparently for the reasons, there was a policy decision of making engagement of dependent of the deceased work-charge employee in the work-charge establishment and, therefore, Work Superintendent directed the Resident Engineer (4th), P.W.D., Lucknow to act as per rules. This direction cannot be treated to make an appointment of claimant/ opposite party No. 1 under Rules, 1974.

21. Apart from this, admittedly, the claimant/ opposite party No. 1 was appointed on 10.03.2000 and she was being paid wages as a work-charge employee. After gap of about 9 years, she approached the Tribunal stating that first cause of action arose to her on 10.03.2000 when the petitioners/ opposite parties have not treated her as a regular employee and not provided her all the service benefits like other employees of the department and secondly, it arose on 08.12.2008 when the claimant/ opposite party No. 1 has not been provided the pay and allowances in compliance of VI Pay Commission.

22. Apart from this, in para-4.8 of the claim petition, it has been mentioned that her husband expired while he was in service as a work-charge employee after completing 18 years of service but because of being treated him an un-regular

employee, the opposite parties have not provided any pensionary dues relating to her husband who was posted as a Helper on work-charge basis. From the examination of pleadings and record of the writ petition, it is undisputed fact that the husband of the claimant/ opposite party No. 1, late Sri Rashid Ali was working as a work-charge employee in the work-charge establishment and on his death on 13.02.2000 the claimant/ opposite party No. 1 was allowed to work as work-charge employee in the work-charge establishment on 10.03.2000 and she had continued to get the wages admissible to a work-charge employee from 2002 to 2009 without any protest and for the first time the claimant/ opposite party No. 1 approached the learned Tribunal seeking directions to the opposite parties to treat her as a regular employee of the department and provide all service benefits etc. alongwith the benefits of VIth Pay Commission like other regular employees of the department. It is also admitted position that the husband of the claimant/ opposite party No. 1 has not been paid any service benefits except Insurance amount of Rs. 25,000/-. The learned Tribunal in its judgment and order dated 29.07.2009 on the basis of letter of Work Superintendent dated 10.03.2000 treated her appointment under the provisions of Rules, 1974 without appreciating the fact that Work Superintendent only directed the Resident Engineer (4th), P.W.D., Lucknow to make appointment of the claimant/ opposite party No. 1 as a dependent of the deceased employee as per rules. Admittedly, no order of appointment was placed on record, issued by the Resident Engineer (4th) P.W.D., Lucknow and learned Tribunal misread the letter dated 10.03.2000 of the Work Superintendent as in para-3 it has been recorded that "it would appear from the material on record that pursuant to the direction given by the Superintending Engineer, Office Superintendent issued a communication on 10.03.2000 commanding the Resident Engineer (4th) to appoint the petitioner as a dependent of a Government servant dying in harness" whereas in the letter dated 10.03.2000 nowhere it has been mentioned to make appointment as a dependent of a government servant dying in harness. The letter only says that Smt. Aakila Bano w/o of lat Sri Rashid Ali be appointed on the post of Helper as dependent of the deceased as per rule and the information be sent to the divisional office and the endorsement to Smt. Aakila Bano shows that she may give her joining before the Resident Engineer (4th), P.W.D., Lucknow.

23. This Court is of the considered view that the letter dated 10.03.2000 cannot be termed as or treated as appointment letter and also comes to the conclusion that the learned Tribunal erred in reading the letter dated 10.03.2000, before making presumption of applicability of the Rules, 1974. It was incumbent upon the learned Tribunal to enquire the matter thoroughly and on the basis of just two letters dated 10.03.2000 and joining letter dated 10.03.2000 (Annexures-1 and 2 of the claim petition) could not have been treated the claimant/ opposite party No. 1 appointed under Dying-in-Harness Rules, 1974 as her husband was working as a work-charge employee in a work-charge establishment. Further, in paras-4.8 and 4.9 of the claim petition, it has been specifically mentioned by the

claimant/ opposite party No. 1 that she is not being paid any pensionary dues relating to her husband as he was being treated as un-regular employee. All the judgments relied upon by the learned Tribunal do not apply to the present case. The learned Tribunal without there being any record and even contrary to the pleadings of the claim petition, in para-13 of the judgment come to the conclusion that the claimant's/ opposite party No. 1 husband was employed in the department prior to his death and the Rule says for giving her employment without any delay.

24. It is very surprising that in para-7 of the judgment of the learned Tribunal, it is mentioned that "it was specifically mentioned that she was being granted appointment under the aforesaid Rules, 1974" and thereafter reproducing the words of the letter observed that claimant/ opposite party No. 1 was appointed under the provisions of Rules, 1974 and not under the executive instructions. In the order dated 10.03.2000, there is no mention about the Rules, 1974 and inspite of the admitted position that the claimant/ opposite party No. 1 was not given separate appointment letter, she joined and was allowed to work on 10.03.2000. The learned Tribunal presumed that this appointment was under the provisions of Rules, 1974 and since the appointment under Rules, 1974 is of the permanent nature, the Tribunal allowed the claim petition with the directions to treat the appointment of the claimant/ opposite party No. 1 as a regular appointment in Class-IV cadre of the department against the vacancy if available and in case there is no vacancy, then against a supernumerary post, deemed created as provided under the Rules, 1974 and to grant her all the benefits of regular employee.

25. It is very unfortunate that the learned Tribunal did not look into the review petition of the petitioners and summarily rejected the same vide order dated 08.01.2010.

26. None of the judgments relied upon by the learned Counsel for the opposite party No. 1 is applicable in the present controversy.

27. Looking into the entirety of the facts and circumstances of the case, this Court has no hesitation in saying that the judgment and order of learned Tribunal is based on the misconception and misreading even without appreciating the pleadings of the claim petition and record. Hence, the judgment and order dated 29.07.2009, passed in Claim Petition No. 732 of 2009 and the order dated 08.01.2010, passed in Review Petition No. 02 of 2010 by the learned Tribunal are liable to be set aside.

28. Accordingly, the writ petition is allowed. The judgment and order dated 29.07.2009 passed in Claim Petition No. 732 of 2009 and the order dated 08.01.2010 passed in Review Petition No. 02 of 2010 by the learned Tribunal are hereby quashed.

29. There shall be no order as to costs.