

(2013) 04 AHC CK 0080
In the Allahabad High Court
Case No : Writ Petition No. 8363 (S/S) of 2010

Surya Prakash Tewari and Others

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 09-04-2013

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : (2013) 5 ALJ 295

Hon'ble Judges : Anil Kumar, J

Bench : Single Bench

Advocate : Ramesh Pandey, for the Appellant;

Judgement

Anil Kumar, J.—Heard Sri. Ramesh Pandey, learned counsel for petitioners, Sri. A.N. Trivedi, learned Additional Chief Standing Counsel and perused the record. On 07.12.1993, an advertisement was issued/published for selection/appointment on the post of Part-Time Tube Well Operator/Assistant Tube Well Operator. In response to the said advertisement, the petitioners and other candidates submitted their candidature, appeared in the written test as well as interview.

2. On 09.09.1994, the select-list was declared. However, in the meantime, against the judgment and order dated 18.05.1994 passed in Writ Petition No. 3538 of 1992 (Suresh Chand Tiwari v. State of U.P. and others), a SLP No. 16219 of 1992 was filed before Hon'ble the Supreme Court in which an interim order dated 18.03.1994 was passed, as a result of which, an order dated 04.10.1994 (Annexure No. 3) has been issued by the Engineer-in-Chief, Department of Irrigation, U.P., Lucknow that no person shall be appointed on the post of Part time Tube Well Operator/Assistant Tube Well Operator.

3. Thereafter, in the matter in issue Writ Petition No. 3144 (SS) of 1995 (Vinay Kumar Upadhyay v. State of U.P.) and Writ Petition No. 1453 (SS) of 1998 (Surya Prakash Tiwari v. State of U.P. and others) have been filed, disposed by this

Court by means of the order dated 21.01.2000 with a direction to authority concerned to look into the controversy involved in the matter, in pursuance to the said fact, an order dated 17.03.2005 has been passed by Engineer-in-Chief/O.P. No. 2 that although cadre of Part time Tube Well Operator/Assistant Tube Well operator has been declared as dying cadre by Government Order dated 17.12.1996 and 14.01.1997, so the post in question are not in existence, however, in terms of the direction given by this Court in the aforesaid matter, a request has been made to the Secretary, Irrigation Department of U.P., Lucknow for giving appointment to the petitioners etc. the relevant portion as mentioned in this regard is quoted below:

(Vernacular Matter Omitted.... Ed.)

4. However, the recommendation as made in the letter/order dated 17.03.2005 passed by O.P. No. 2/Chief Engineer, Irrigation Department has not been adhered to. The petitioners had filed the contempt petition for the purpose of their appointments. Thereafter, Executive Engineer has issued appointment orders on 23.05.2006 (Annexure No. 5) and 28.06.2006 (Annexure No. 6) of the petitioners and in pursuance to the said fact, they were sent for training, after completing the same, posted/given appointment on the post in question in the pay scale of Rs. 3050-4950/- from the date of their joining.

5. Further, for the purpose of regularization of services on Part time tube well operator, in terms of the direction issued by Hon''ble the Apex Court by order dated 18.03.1994 in SLP No. 16219 of 1994, a scheme for regularization has been framed in the light of the judgment given by the Apex Court earlier in the case of Piyare Singh.

6. Subsequently, the State of U.P. promulgated the rules known as the Uttar Pradesh Irrigation, Department Regularisation of Part-Time Tube-Well Operators on the post of Tube-Well Operators, Rules, 1996, the said regularization rules provided that those part time Tube-Well Operators who are engaged on or before 20.10.1986 are working on the date of promulgation of rules, shall be considered for regularization and hereafter the State of U.P. amended the cut off date also presented under rule 4 of Regularization Rules 1996 by means of Uttar Pradesh Irrigation Department Amendment Rules, 2008 and the cut off date in Rule of 1996 was replaced by 30.06.1998, the said amendment Rules 2008 were notified on 05.05.2008.

7. In view of the abovesaid facts, petitioners made a representation claiming the regularization of their services, but no heed paid, so for redressal of their grievances, they approached this Court by filing Writ Petition No. 7671 (SS) of 2008, disposed of by order dated 05.12.2008 with a direction to consider and decide the case of the petitioners for regularization by way of passing speaking and reasoned order. When the matter was under consideration before the Engineer in Chief, Irrigation Department, State of U.P. as per the direction given by this Court, the petitioners submitted another representation on 23.01.2009

(Annexure No. 10) requesting that their services may be regularized under the provisions of Regularization Rules 1996 as amended in 2008. In support of their claim they also stated that the services of similarly situated persons of District Bahraich and Barabanki has been regularized. However, by order dated 24.01.2009, the claim of the petitioners has been rejected by Engineer in Chief, Irrigation Department, State of U.P.

8. In addition to the said fact, it is also submitted by learned counsel for petitioners that although the petitioners are for regularization of their services as per Regularization Rules has been rejected by order dated 21.01.2009 in an arbitrary manner. Thereafter, in the year 2010, a process has been initiated for direct recruitment on the post of Tube-Well Operator, so they again submitted a representation dated 11.11.2010 before State Government for regularization of their services on the existing post, but pending consideration. On 06.11.2010, Superintending Engineer, Nalkput Mandal, Gonda issued an advertisement for the purpose of selection/appointment on 32 post by way of directed recruitment. So the present writ petition has been filed challenging the order dated 21.04.2009 passed by Engineer in Chief, Irrigation Department, State of Uttar Pradesh.

9. Sri. Ramesh Pandey, learned counsel for petitioners while challenging the impugned order submits that in pursuance to the advertisement issued in the year 1993 for appointment on the post of Tube-Well Operator under Executive Engineer, Nal Kup Khand-II, the petitioners submitted their candidature thereafter on the basis of written examination and interview, a select list was declared on 09.09.1994 in which names of the petitioners find place, however, due to the reasons which are not within the control of the petitioners they were not appointed on the post in question. Lastly, in the year 2005-2006, the appointment order have been issued and they were appointed on the post in question in view the direction issued by the Engineer in chief by an order dated 17.03.2005, issued in compliance of the order passed by this Court in Writ Petition No. 3144 (SS) of 1995 (Vinal Kumar Upadhyay v. State of U.P. and others) and Writ Petition No. 1453 (SS) of 1998 (Surya Prakash Tiwari v. State of U.P. and others). So, in these circumstances, they are deemed to be appointed on 09.09.1994 when the select list was issued, thus, they fulfill all the requisite criteria and condition prescribed for regularization of their services as per Rules 1996 as amended in the year 2008 on the post of Tube Well Operator. However, in most illegal and arbitrary manner, contrary to law, by an order dated 21.04.2009, the O.P. No. 2/Engineer in Chief, Irrigation Department, State of U.P. has denied the right of the petitioners for regularization of services, so the same is liable to be set aside and the writ petition be allowed. In support of his argument, he placed reliance on the judgment given by this Court in the case of Indra Kumar Singh and another v. State of U.P. and others, 2008 (26) LCD 280.

10. Sri. A.N. Trivedi, learned Additional Chief Standing Counsel submits that the State Government had issued notification dated 16.12.1996 and Tubewell Operator Rules were framed known as "Uttar Pradesh Irrigation Department

Regularization of Part-Time Tube-Well Operators on the post of Tube-Well Operators Rules, 1996" which provided that all those part time Tube-Well Operators who are engaged on or before 20.10.1986 are working on the date of promulgation of rules, shall be considered for regularization.

11. Eventually the State of U.P. amended the cut off date as prescribed under rule 4 of the Regularization Rules 1996 by means of Uttar Pradesh Irrigation Department (Amendment) Rules, 2008 and the cut off date mentioned in rule 4 of 1996 Rules was replaced by 30.06.1998. The said amendment Rules 2008 were notified on 05.05.2008.

12. Both the aforesaid rules clearly provide that all such Part Time Tube-Well Operators appointed before the cut off date and continuing as such on the date of promulgation of said rules, shall be eligible for regularization.

13. The admitted position in the aforesaid case is that:

(i) The petitioners were sent for training by means of order dated 25.05.2006 (Annexure No. 5) and after successful completion of training they were to be placed in the pay scale of Rs. 3050-4950/- from the date of their joining.

(ii) The petitioners have completed their training and were consequently appointed in 2006 and thus it is apparent that none of the petitioners were either appointed nor have worked as Part Time Tube-Well Operators on or before the cut off date i.e. 30.06.1998.

14. So, the order dated 21.04.2009 (Annexure No. 11) passed by O.P. No. 2, rejecting the claim of the petitioners for regularization is perfectly valid rather in accordance with law as laid down by Hon"ble the Supreme Court in the case of Secretary, State of Karnataka and Others Vs. Umadevi and Others, , for the said purpose be placed reliance in paragraph Nos. 43 and 45 of the said judgment, quoted hereinbelow:

Para No. 43 - Normally, what is sought for by such temporary employees when they approach the court, is the issue of a writ of mandamus directing the employer, the State or its instrumentalities, to absorb them in permanent service or to allow them to continue. In this context, the question arises whether a mandamus could be issued in favour of such persons. At this juncture, it will be proper to refer to the decision of the Constitution Bench of this Court in Rai Shivendra Bahadur Vs. The Governing Body of the Nalanda College, . That case arose out of a refusal to promote the writ petitioner therein as the Principal of a college. This Court held that in order that a mandamus may issue to compel the authorities to do something, it must be shown that the statute imposes a legal duty on the authority and the aggrieved party had a legal right under the statute or rule to enforce it. This classical position continues and a mandamus could not be issued in favour of the employees directing the Government to make them permanent since the employees cannot show that they have an enforceable legal right to be permanently absorbed or that the State has a legal duty to make

them permanent.

Para No. 45--It is also clarified that those decisions which run counter to the principle settled in this decision, or in which directions running counter to what we have held herein, will stand denuded of their status as precedents.

15. In view of the abovesaid facts, it is requested by learned Additional Chief Standing Counsel that the present writ petition filed by the petitioners lacks merit, liable to be dismissed.

16. I have heard learned counsel for parties and gone through the record.

17. Admitted facts of the case are that on 07.12.1993, an advertisement was issued/published for selection/appointment on the post of Assistant Tube-Well Operator. In the said advertisement, it was provided that after qualifying written examination the incumbent would be sent for one month training without pay and after completion of successful training and passing the consequential test, the final appointment order would be issued.

18. In pursuance to the same, the petitioners submitted their candidature thereafter, appeared in written and interview test in which they passed successfully and on 09.09.1994, a select list was issued for appointment on the post in which the names of the petitioners find place.

19. However, due to litigation which had taken place in the matter in question, as stated in the year 2005-2006, the petitioners were appointed on the post in question. Thereafter, they submitted their grievance for regularization of their services in view of the Uttar Pradesh Irrigation Department Regularization of Part Time Tube-Well Operators on the post of Tube-Well Operators Rules 1996, which has been amended in the year 1998 by means of known as Uttar Pradesh Irrigation Department (Amendment) Rules 1998 by which Rule 4 of 1996 as amended reads as under:

(1) Any person who:

(i) was appointed on the post of Part-Time Tube-Well Operator before June 30, 1998 and is continuing in service, as such, on the date of the commencement of the Uttar Pradesh Irrigation Department Regularisation of Part-Time Tube-Well Operators on the post of Tube-Well Operators (First Amendment Rules, 2008).

20. From the reading of Rule 4 of the Regularization Rules, 1996 as amended for the purpose of Regularization on the post in question, the following two conditions must be satisfied:

(a) A person should be appointed on the post of Part-Time Tube-Well Operator before 30 June, 1998.

(b) He is continuing in service, as such on the date of the commencement of Uttar Pradesh Irrigation Department Regularization of Part-Time Tube-Well Operators on the post of Tube-Well Operators first amendment Rules, 1998.

21. It is settled position of law that recruitment/selection, by way of advertisement or any other mode, as prescribed by the Rule is essential process which lead to a eventually appointment in service that is to say, the selection/ recruitment process and precedes appointment. (Sic)

22. Notifying the vacancies inviting applications, their scrutiny, finalisation of list of such eligible candidates, thereafter preliminary test, written and oral tests and interview are the part of selection process for appointment on post and after completing the said exercise, the selection for appointment compete when appointment order is issued.

23. Further, the appointment to a post or office postulates (a) decision by the competent authority to appoint a particular person: (b) incorporation of the said decision in an order of appointment: and (c) communication of the order of appointment to the person who is being appointed. All the three requirements must be fulfilled for an appointment to be effective.

24. Appointment is effected by the employer through a contract of employment. As in every contract, so in a contract of public employment an offer of appointment to the candidate sought to be employed and his acceptance of the offer forms the basis of appointment. Appointment is made to a vacancy and in a post. It is, therefore, made by a positive and deliberate act of engagement creating a relationship between employer and employee. Appointment is the starting point of a career in public employment. It confers a status and ensure all the rights that are attached to public service, including confirmation, seniority, promotion, and so on tenure. (See. Basant Lal Malhotra Vs. State of Punjab and Others,).

25. Hon"ble the Supreme Court in the case of Prafulla Kumar Swain Vs. Prakash Chandra Misra and Others, held that appointment means an actual act of posting a person to a particular office and anything short of it cannot be construed as appointment.

26. In the case of Ganendra Prasad v. Executive Engineer and others, (Civil Misc. Writ Petition No. 34729 of 2007); this Court by judgment and order dated 02.07.2010 held as under:--

According to the petitioner he appeared in the examination and interview for selection on the post of Part time/Assistant Tub-well Operator on 12.5.1994 whereupon vide order dated 27.5.1994 he was declared selected. On his aforesaid selection he was sent for training which he completed successfully. However, he was not permitted to join the services in view of the judgment and order of the Lucknow Bench of the Allahabad High Court dated 18.5.1994 passed in writ petition No. 3538 of 1992 Suresh Chandra Tiwari and others v. State of U.P.; interim order in SLP No. 16219 of 1994 of the State of U.P. arising therefrom; and the directions of the authorities dated 4.10.1994 not to appoint any part-time/Assistant Tube-well operators till the disposal of the Special Leave Petition.

After the dismissal of the SLP on 22.3.1995, the petitioner represented for issuing appointment letter but when no action was taken, he preferred writ petition No. 7003 of 1996 seeking direction for his appointment. The said writ petition was disposed of on 22.3.1996 with the direction to the authorities concerned to decide the representation of the petitioner in that regard within a time bound period. The above order was modified on 10.7.1996 and it was also provided that in deciding the representation the authorities shall also keep in mind the decision of the Supreme Court dated 22.3.1995 dismissing the Special Leave Petition. The petitioner as such again represented to the authorities and ultimately after going through the process of initiation of contempt proceedings, final order was passed on 24.9.1997 by the respondent No. 2 rejecting the petitioner's claim. When the said order was brought to the notice of the contempt Court in contempt petition No. 1503 of 1997, the Court vide order 20.4.2001 held that the aforesaid order dated 24.9.1997 can not be treated as an order passed in compliance of the order of the High Court. In such a situation, the petitioner again submitted a fresh representation for giving him appointment which was rejected vide order dated 3/4.10.2002. However, the said order was set aside by the High Court in writ petition No. 50610 of 2002 of the petitioner on 10.4.2007 and the matter was remitted to the authorities concerned to reconsider the same. It is thereafter that on the fresh representation of the petitioner, one of the impugned orders dated 27.6.2007 rejecting the claim/representation of the petitioner has been passed. A fresh order was passed by the respondent No. 1 on 29.11.2008 refusing the claim of the petitioner and other similarly situated persons for appointment as Part time/Assistant Tube-well Operator in pursuance to the selection of the year 1994 on the ground that the aforesaid posts have been declared to be a dying cadre.

27. In the said matter, it has been further held as under:

To conclude the claim of the petitioner for appointment as prayed for cannot be accepted in short for the following reasons:

- (1) Petitioner was never finally selected for appointment as he had not undergone and qualified the practical examination as provided under Rule 14 of the Rules;
- (2) There are no cadre posts of part time/Assistant Tube-well Operators under the Rules and the posts of Part time/Assistant Tube-well Operators temporarily created were declared dead and have not been revived;
- (3) The petitioner has not been discriminated as he was never allowed to function in pursuance to his alleged selection and even otherwise any irregular or illegal appointment, would not permit the petitioner to take shelter of Article 14 of the Constitution and to seek appointment on the basis of parity with the alleged wrong appointment:
- (4) Selection alone, if any, does not give any right for appointment; and

(5) There is no justification for giving appointment to the petitioner at such a long distance of time on the basis of selection of the year 1992.

In view of the aforesaid circumstances, I am of the considered opinion that the respondent No. 1 has committed no error of law in rejecting the petitioner's claim for appointment of Part time/Assistant Tube-well Operator on the basis of alleged selection of the year 1994.

28. In the instant case, although, the petitioners were selected for appointment on the post in question and their names find place in the select list published on 09.09.1994 but the order for appointment on the post in question has been issued in the year 2005-2006 after completing all the necessary formalities, so their actual date of appointment in the Department is the date on which they were appointed on the post in question (i.e. in the year 2005-2006) and not 09.09.1994, when the select list was published. Hence, the petitioners were not appointed on the post of part time Tube-Well Operators before 30, June, 1998, as per the rule 4 of Regularization Rules 1996. Thus, there is no illegality or infirmity in the impugned order dated 21.04.2004 passed by Engineer in Chief and the petitioner cannot claim any benefit from the letter/order dated 17.03.2005 or on the basis of the argument advanced on their behalf in view of the judgment passed by this Court in the case of Indra Kumar Singh (supra). So, the same is not applicable in the facts and circumstance of the present case. In the result, writ petition lacks merit and is dismissed as the same is not applicable in the facts and circumstances of the present case.