
(2002) 01 DEL CK 0071
In the Delhi High Court
Case No : CW 3149 of 2001

Union of India

APPELLANT

Vs

J.S. Arora and Others

RESPONDENT

Date of Decision : 30-01-2002

Acts Referred:

Citation : (2002) 8 AD 439 : (2002) 97 DLT 230

Hon'ble Judges : S.B. Sinha, C.J.;A.K. Sikri, J

Bench : Division Bench

Advocate : Maneesha Dhir, for the Appellant; S.S. Tiwari, for the Respondent

Judgement

S.B. Sinha, C.J.—This writ petition is directed against a judgment and order dated 17th November 2000 passed by the Central Administrative Tribunal in Original Application No. 938/978 whereby and hereunder the original application filed by the respondents herein was allowed. The basic fact of the matter is not in dispute.

2. The respondents Mrs. Visalakshi Sivanandan, Shri Pramod Kumar and Shri J.S. Arora were appointed as daily wage typists for there months on 26th November 1985, 20th August 1986 and 6th November 1986 respectively. Later they were appointed as ad hoc LDCs - Smt. Visalakshi Sivanandan w.e.f. 7th March 1986 and Shri Pramod Kumar and J.S. Arora with effect form 2nd March 1987. On 06.12.1986, Smt. K.S. Visalakshi passed typing test conducted by the ISTM and on 28.02.1987 Shri J.S. Arora and Shri Pramod Kumar also passed typing test conducted by the ISTM. It is said that while the first post of LDC fell vacant on 27.9.1988 with promotion of Shri G.K. Sharma as regular UDC from the said date, the 2nd and 3rdvacancies were caused upon the promotion of Shri A.K. Sharma and Mrs. Binita Nandwani as UDCs on regular basis w.e.f. 6.5.1992. 2d and 3rdvacancies to be filled by general candidates arose on 16.5.1992. It is also said that 4th and 5th vacancies arose on 12.08.1993 to be filled up by ST and General candidates respectively. Against the firs vacancy Shri Chander Prakash was appointed on 12.08.1993 as he was an SC candidate on the basis of the

recommendation of a DPC meeting held on 12.08.1993. Against the 3rd vacancy Shri J.S. Arora was appointed w.e.f. 12.08.1993 on the basis of typewriting test conducted by ISTM on 28.2.1987 and after assessment of ACRs. The 4th vacancy was carried over as this was reserved for ST and no eligible candidate from ST category was available at that time. Shri Pramod Kumar was appointed as LDC against the 5th vacancy on 12.08.1993 on the basis of typewriting test conducted by ISTM on 28.02.1987 and after assessment of ACRs. O.A. No. 938/98 and O.A. No. 322/98 were filed by Shri J.S. Arora & Pramod Kumar and Mrs. Vishalakshi for seeking revision in their seniority from the date of the initial appointment on daily wage basis which has been rejected by the Petitioner vide letter dated 24.1.1997. On 27.11.2000, CAT allowed OA Nos. 938/98 & 322/98 and directed the petitioner to count the services rendered by the Respondents w.e.f. the date on which the Respondents were appointed on ad hoc basis. Aggrieved by the above order, the petitioner has filed this writ petition.

3. Learned counsel appearing on behalf of the petitioner would submit that as the concerned respondents were appointed on daily wage basis, their seniority could not have been counted from the dates of their appointment but from the respective dates on which their services had been regularized. The learned counsel would contend that having regard to the fact that at the relevant point of time, there did not exist any sanctioned post which, so far as respondents are concerned, came into being subsequently, the learned Tribunal must be held to have erred both in law as also on fact in passing the impugned judgment. In support of the said contention, strong reliance has been placed on "The Direct Recruit Class-II Engineering Officers" Association and others Vs. State of Maharashtra and others, and State of W.B. and Others Vs. Aghore Nath Dey and Others, .

4. The learned counsel appearing on behalf of the respondents, on the other hand, would submit that four vacancies have been existing since 1985 which fact had not been denied or disputed by the petitioner herein. According to the learned counsel, having regard to the fact that they had entered into service upon compliance of the recruitment rules, the period during which they were in service on daily wage basis, although later on they were recruited on ad hoc basis, their seniority would be counted there from. strong reliance in this connection has been placed on Rudra Kumar Sain and Others Vs. Union of India and Others, . The learned counsel would contend that although the respondents have been appointed purportedly on daily wages for the purpose of ascertaining the nature of their appointments, the entire service records are required to be considered.

5. Before advertng to the rival contentions raised by the learned counsel for the parties, the nature of the appointment of the respondents may be noticed. One of the samples where the offer of appointment was made to Mrs. K.S. Visalakshi is in the following terms:

"No. 1/27/85-DCH/Admn.I

Government of India

Ministry of Commerce

Department of Textiles

Office of the Development Commissioner for Handlooms

New Delhi, the 26th November, 1985

OFFICE ORDER

In partial modification to this officer Office Order of even number dt. 8th November, 1985, Kum. K.S. Visalakshi, F-128, Mohammed Pur, R.K. Puram, New Delhi-66 is appointed as Clerk/typist on daily wage basis with effect from the free-noon of the 26th November, 1985 in place of Kum. Poonam Rani given at S. No. 2 of the Office Order referred to above. The other terms and conditions of the said Office Order remain the same.

Sd/-

(G. Somasekhar)

Assistant Director(Admn.)"

6. It is not in dispute that while the afore-mentioned appointment was made only on the basis of interview, the typing test were taken later on, where after Departmental Promotion Committee considered the cases of the respondents who were appointed in the post of lower division clerk on regular scale of pay w.e.f. 12thAugust 1993.

7. It appear from the records the that concerned respondents were appointed pursuant to the requisition made on or about 22nd August 1985 which is in the following terms:

"Office of the Development

Commissioner For Handlooms

The Advisory Committee set up under the Handloom Reservation Act has had its first meeting on 13th and 14thAugust 1985. The Committee is required to submit its recommendations to Government latest by the end of this year.

During the next 2 to 3 months, there will be correspondence and typing work for this Committee. As such, it is requested that 3 clerks/Typists on daily wage basis may kindly be engaged for a period of 3 months for doing this work.

(N.N. VASUDEV)

Addl. Development Commissioner

(Handlooms)"

8. It is, Therefore, evident that the concerned respondent shad not been appointed in terms of the recruitment rules or upon compliance of mandates contained in Article 14 and 16 of the Constitution of India inasmuch as there is nothing on record to show that nay advertisement had been made inviting application from all eligible candidates for the afore-mentioned posts nor is there anything to show that at the relevant point of time, there existed sanctioned posts. We may, however, notice that there exits a doubt as to whether the appointments were required to be made in terms of Resolution dated 4thNovember 1975 or in terms of Rule 182 of the Recruitment Rules. The Recruitment Rules were notified in the Gazette on 25thMay 1981 from a perusal whereof, it appears that for the purpose of recruitment to the post of General Central Service Group "C" Non-Gazetted Ministerial, the mode of recruitment was:

"90% by direct recruitment, 10% of the vacancies in the Office of Development Commissioner for Handlooms shall be reserved for being filled up by Group "D" employees subject to the following conditions namely: (a) Selection would be made through a Departmental Examination confined to such Group "D" employees who fulfil the requirements of minimum educational qualifications namely metriculation or its equivalent and have passed type-writing in English with a minimum speed of 30 words per minute; (b) the maximum age for the said examination would be 45 years (50 years for Scheduled Castes and Scheduled Tribe candidates); (c) At least 5 years service in Group "D" would be essential (d) The maximum number of recruits by this methods would be limited to 10% vacancies in the cadre of Lower Division Clerk occurring in a year. Unfilled vacancies would not be carried forward."

9. However, method of recruitment, age limit, qualification etc. in terms of the said rules, are as under:

"Method of recruitment, age limit and qualifications etc. :- (1) Every Officer who was holding immediately before the commencement of these rules, any post in the Officer of the Development Commissioner for Handlooms specified in column 1 of the said schedule, shall be deemed to have been appointed to such post or the post so redesignated, as the case may be, under thee rules and the "regular continuous service of such officer in the respective grades prior to such commencement shall be taken into account for the purpose of calculating qualifying service for conformation against, or promotion to, any of the posts specified in column 11 of he said schedule.

(2) Without prejudice to the appointment made in accordance with Sub-rule (2), appointment to other posts and future vacancies in any post shall be made in accordance with the method of recruitment, age limit, qualifications and other matters relating to the said posts as specified in columns 5 to 13 of the said Schedule."

10. However, the said Recruitment Rules did not contain any provision as to the constitution of the Selection Committee. It appears that even prior to the framing of the said rules, there existed a Resolution of the petitioner dated 4th November 1975 providing for constitution of a Subordinate Service Commission and its function was to make recruitment, inter alia, in the posts of lower division clerks in other departments and attached offices of the Government of India. It appears that a further Resolution was also made on 1st June 1999 whereby and hereunder also the Commission was to hold competitive examinations for recruitment to attached and subordinate services. The latter Resolution evidently has no application in the instant case.

11. There cannot, Therefore, by any doubt whatsoever, that the concerned respondents had not been appointed in terms of the Recruitment Rules.

12. It is now trite that when a particular status is conferred upon the concerned employees, the said status cannot be changed except in accordance with the Recruitment Rules.

13. In *The Direct Recruit Class II Engineering Officers' Association and Ors. v. State of Maharashtra and Ors.* (supra), it has categorically been held that where appointment has been made without following the recruitment rules, the seniority would be counted from the date of regularization. the afore-mentioned proposition has been re-iterated by the Apex Court in *Dr M.A. Haque and Others Vs. Union of India (UOI) and Others*, and *State of West Bengal and Ors. v. Aghore Nath Dey and Ors.* (supra). Yet again, in *V. Sreenivasa Reddy and others Vs. Govt. of Andhra Pradesh and others*, , the apex court, relying upon its earlier decision in *B.N. Nagarajan and Others Vs. State of Karnataka and Others*, and *R.N. Nanjundappa Vs. T. Thimmiah and Another*, , has categorically held that the period during which an employee was on ad hoc service, the date of his initial employment could not be considered for his seniority.

14. The decision of the apex court in *Rudra Kumar Sain and Ors. v. Union of India and Ors.* (supra) whereupon reliance has been placed by the learned counsel for the respondent cannot be said to have any application whatsoever in this case. The said decision of the apex court was rendered having regard to the relevant rules. In any event, as noticed herein before, in the instant case, the appointments had been made for a limited period and the services of the Respondents had been regularized only when they passed the typing tests.

15. Furthermore, from the records it appears that even in 1993, when the services of the petitioner were regularized, special dispensation of the relevant rules had been obtained.

16. The right of an employee to be regularized in service has been considered recently by this Bench in *Prem Kumar and Ors. v. Union of India*, CWP 3056/96 wherein it was observed as under:

"Recently a Division Bench of the Andhra Pradesh High Court, of which one of us

was a Member, in Superintending Engineer, HCC-I, CPWD, Hyd. Vs. Tekmalla Raja Sekhar and Others, notice various decision of different High Courts and held as under:

14. In Sohan and Another Vs. State of Haryana and Another, a Division Bench of this Court has clearly held that regularization is not a mode of appointment and in absence of any statutory rules the Part-time employees, ad hoc employees and NMRs did not derive any legal right whatsoever to continue in service and no such direction can be issued inasmuch as for the purpose of obtaining a writ of or in the nature of mandamus the petitioner must establish existence of a legal right in himself and a corresponding legal duty in the respondents.

15. It was further held in no uncertain terms that the Court cannot direct creation of more posts.

16. Recently in State of West Bengal v. Krishna Kumar Majumdar, it was held:

.....An appointment on regular post must be made in terms of the Recruitment Rules having regard to the principles adumbrated under Articles 14 and 16 of the Constitution of India. In the instant case, as indicated hereinbefore, neither any appointment has been made by the writ petitioner that such appointment has been made in accordance with the Recruitment Rules or in consonance with the principle laid down under Articles 14 and 16 of the Constitution of India. Such appointment, Therefore, cannot be encouraged. Furthermore, a finding of fact has been arrived at by the competent authority that the writ petitioner were appointed on contractual basis and that too for a period of 2 years at one point of time.

17. Even in State of Haryana v. Piara Singh the apex Court has clearly held that when an employee is appointed on ad hoc basis the same itself is a pointer to the effect that no regular post is available. the said principle should be applied also in relation to NMR. It has been held in the said case thus:

Ordinarily speaking, the creation and abolition of post is the prerogative of the Executive. It is the Executive again that lays down the conditions of service subject, of course, to a law made by the appropriate Legislature. This power to prescribe the conditions of service can be exercised either by making Rules under the proviso to Article 309 of the Constitution or (in the absence of such Rules) by issuing Rules/instructions in exercise of its executive power. The Court comes into the picture only to ensure observance of fundamental rights, statutory provisions, Rules and other instructions, if any, governing the conditions of service. The main concern of the Court in such matters is to ensure the Rule of law and to see that the executive act fairly and gives a fair deal to its employees consistent with the requirements of Articles 14 and 16.

18. We may notice that it has clearly been held that even the definition of worker under the Factories Act can only be read for the said purposes only. It is for the appropriate Government to decide whether employment of contract labour

should be prohibited or only regulated. The Court or the Tribunal has no say therein. [See *Sujan Benerjee v. Union of India*, *Ranjit Kumar Chanda v. State of West Bengal*] In *Union of India v. Shri Rajinder Singh* it has been held:

An employee must be appointed upon compliance of the provisions of the Recruitment Rules. When a particular status is conferred upon an employee, the same cannot be changed unless there exists any statutory provision therefore.

A regular appointment can only be made in terms of the Recruitment Rules and subject to the candidate's possessing the requisite qualification and also subject to existence of any sanctioned post.

An employee is born in the cadre only when he is appointed upon fulfilling the requirement. Therefore in a sanctioned post.

19. Referring to *W.B. Essential Commodities Supply Corporation v. MD Sarif, Director of Public Instructions W.B. v. Krishna Prasad Ghosh and Anr.*, and *Swapan Kumar Benerjee v. Union of India*, it has been held in *Union of India v. Registrar*

The question as to whether the petitioners had fulfilled the essential conditions for regularization or not, is essentially a question of fact. In law, nobody is entitled to claim regularization unless there exists any statutory provision in this regard. Only because a person has worked for more than 240 days, the same by itself would not be a ground for direction to regularize the service of the concerned employee."

17. As the learned Tribunal did not consider this case from this angle, we are of the opinion that the impugned judgment cannot be sustained. It is set aside accordingly. But in the facts and circumstances of the case, there shall be no orders as to costs.