

(2012) 02 CAL CK 0036
In the Calcutta High Court
Case No : Writ Petition No. 10550 (W) of 2010

Uttam Majumdar

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 27-02-2012

Acts Referred:

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

Citation : (2012) 2 CALLT 60 : (2012) 5 CHN 231

Hon'ble Judges : Harish Tandon, J

Bench : Single Bench

Advocate : Subrata Mukherjee and Mr. Ganesh Banerjee, for the Appellant; Dipak Ghosh, Kamallesh Bhattacharya and Mr. R. De for the respondent nos. 2-7, for the Respondent

Final Decision : Dismissed

Judgement

Harish Tandon, J.—The petitioner being a casual mazdoor has prayed for a writ of mandamus directing the respondent authorities to make him permanent employee upon regularization of his service. The petitioner claimed to be appointed as casual mazdoor in Damodar Valley Corporation on 28.4.1989 for the purpose of line patrolling but he has been directed to work in the different departments in different capacity as per the instruction of the concerned officer issued from time to time. It is further contended that he discharged his duty diligently and to the fullest satisfaction of his employer and have also averted major disaster by extinguishing fire which erupted in one of the sub-station at Gomo on 25.7.2000. For such bravious attempt the petitioner received appreciation from the high officials of said corporation. Although several representations were made for permanent absorbtion as well as sincere discharge of the duties, but the respondent authorities did not regularised the service of the petitioner. It is further contended that despite recommendations for the regularization of his service by the different officials of the Damodar Valley Corporation as well as a Member of Parliament but the authorities rejected

the aforesaid recommendations on the ground that the same would violate the statutory rules provided for the recruitment and appointment. However a case of discrimination is made by the petitioner by stating that three of the employees who were casual workers were absorbed permanently without following the rules.

2. In affidavit-in-opposition the respondent nos. 2-7 contended that the services of the petitioner was availed till the year 2003 and thereafter the petitioner is not working either as a casual labourer or daily wager in the Damodar Valley Corporation. It is further contended that after the judgement delivered by the Supreme Court in case of Secretary, State of Karnataka and Others Vs. Umadevi and Others, the petitioner cannot claim regularization of his service as a contract/casual labourer and the person named by the petitioner to have been employed were absorbed prior to the said decision of the apex court.

3. Mr. Subrata Mukherjee, learned advocate appearing for the petitioner submits that the state should act as a model employer and should not keep a person in temporary or ad hoc status for a long time and if the employee is allowed to continue for a longer period of time it should be presumed that there warrants need for a regular post and should direct the regularization of the service and placed reliance upon a judgment of the Supreme Court in case of State of Haryana and others Vs. Piara Singh and others etc. etc., . He audaciously argues that the state cannot make a discrimination amongst the equals by placing reliance upon the judgement rendered by the Constitutional Bench of the Supreme Court in case of Indira Sawhney Vs. Union of India and Others, and in case of J.B. Chopra and Others Vs. Union of India (UOI) and Others, . By contending that the petitioner cannot be said to be illegal appointees but may be termed as an irregular appointee and is serving continuously for more than 10 years and there is no impediment in granting the regularization of the service of the petitioner by the corporation, he placed reliance upon the judgment of the apex court in case of State of Karnataka and Others Vs. M.L. Kesari and Others, He lastly submits that the petitioner is all along diligent in discharging his duty which would be evident from the event when the fire broke out in one of the sub-station and because of the courageous effort of the petitioner there was no loss of property as well as life.

4. Mr. Dipak Kumar Ghosh, learned Advocate appearing for the respondent nos. 2-7 submits that the petitioner worked for a period of three years till the year 2003 and thereafter corporation did not avail his service. He further submits that the allegation against a discrimination made in the writ petition does not stand on the truth as these appointments were much prior to the appointment of the petitioner. It is strenuously argues that after the judgment rendered by the apex court in case of Umadevi (3) there is no scope for providing regularization of the service of the contract labourer/casual labourer/daily wager. To contend that the service of the casual labourers cannot be regularized after the expiration of the term of their contract as there is no relationship between master and servant, he placed reliance" upon a judgement of the Supreme Court in case of Bilas Sarker

& Ors. v. Union of India reported in JT (1998)9 SC 509, U.P. Power Corporation Ltd. and Another Vs. Bijli Mazdoor Sangh and Others, By placing reliance upon five-judges Bench decision of the Supreme Court delivered in case of Secretary, State of Karnataka and Others Vs. Umadevi and Others, he contends that the engagement or appointment of a daily wager or casual labourer comes to an end on discontinuance and the temporary employee could not claim to be a permanent one on the expiry of his term. He succinctly argues that the selection is made only in accordance with the Rules or in absence thereof in terms of the executive instructions issued by the government and placed reliance upon the judgment of the Supreme Court in case of State of Uttaranchal & Anr. v. Dinesh Kumar Sharma reported in (2007) 1 SCC 683, Management, The Assistant Salt Commissioner Vs. Secretary, Central Salt Mazdoor Union, Ghaziabad Development Authority and Another Vs. Ashok Kumar and Another, . Lastly he contends that the apex court in case of State of Rajasthan and Others Vs. Daya Lal and Others, has laid down that the directions for regularization, absorption or permanent continuance should not be granted by the high court in exercise of power under Article 226 of the Constitution unless the employee claiming regularization has been appointed in accordance with the relevant recruitment rules in an open competitive process, against the sanctioned vacant post. Mere continuance of service by the casual labourer does not seek regularization or parity in salary with the regular employees of the government on the principle of equal pay for equal work.

5. Having considered the respective submissions, the point involved in the instant writ petition has been settled by the five-judges Bench decision of the supreme Court in case of Umadevi (3) wherein it is held that the temporary employee/casual labourer/daily rater cannot claim for absorption and/or regularization merely on the strength of such continuance if the initial appointment is not made by following a due process of selection in terms of the relevant rules. While laying down the aforesaid principle of law it is observed that any decision which runs contrary to the principle settled therein shall not be treated as a precedents in following words :

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.

6. However certain exceptions are carved out by the Supreme Court in case of Umadevi (3) that a casual labourer/daily rater who being the irregular appointees and not the Illegal appointees may be considered for regularization if they have continuously worked for 10 years or more without intervention of the order of the court or of a Tribunal and to ameliorate such situation the state governments and/or their instrumentalities should take steps as one time measure in following words :

44. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in S.V. Narayanappa

(supra), R.N. Nanjundappa (supra), and B.N. Nagarajan (supra), and referred to in paragraph 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of courts or of tribunals. The question of regularization of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases above referred to and in the light of this judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularize as a one time measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date. We also clarify that regularization, if any already made, but not subjudice, need not be reopened based on this judgment, but there should be no further by-passing of the constitutional requirement and regularizing or making permanent, those not duly appointed as per the constitutional scheme.

7. In subsequent judgment delivered in case of Secretary, Central salt Mazdoor Union (supra) the Division Bench while applying the law laid down in case of Umadevi (3) held that the regularization does not mean permanency and any appointment made dehors the rule shall be held to be illegal, such appointees cannot claim shelter under Article 14 and 16 of the constitution.

8. Admittedly the petitioner could not prove that his appointment was against a sanctioned vacant post but without following the procedure. What has been claimed in the writ petition is that his bravious act of saving life and property of the corporation and its employees by extinguishing the fire which broke out in one of the sub-station, the authority should regularise his service which would be evident from the mandamus claimed in the writ petition which runs thus:

(a) To issue a writ of Mandamus directing the respondents and each one of them, their men, agents, servants and sub-ordinates to show cause as to why the service of petitioner as "Casual Majdoor" shall not be made permanent, even as a special case, for his contribution towards Damodar Valley Corporation by which he saved machineries valuing crores of rupees from being damaged and destroyed.

9. Even the recommendations made from time to time to an higher authority was founded on the ground of such courageous act of the petitioner; there is no whisper relating to the appointment of the petitioner as casual worker against any sanctioned vacant post so as to bring within an exception carved out in case of Umadevi (3). From the letter of refusal as annexed to the writ petition it is evident that the same is done on the premise that there is a Rule for appointment on the vacant post which cannot be by-passed. It has been held by the Supreme Court in case of Nagendra Chandra (supra), Ashok Kumar (supra)

and Dinesh Kumar Sharma (supra) that the statutory authorities are obliged to make recruitment in terms of a statutory rules and upon due compliance of the equality clause enshrined in Article 14 and 16 of the Constitution.

10. It is a specific stand of the contesting respondents that service of the petitioner is discontinued in the year 2003. The petitioner neither could prove or at least satisfy with any cogent documentary evidence that he is still working with the corporation. There is no doubt that if a casual worker/labourer is discontinued he cannot claim regularization of his service as there ceases a relationship between a master and a servant. The above principle can be fortified from a judgment of the apex court in case of Bilas Sarkar (supra) in these words :

We have heard Shri Raj Kumar Gupta the learned counsel for the appellants and Shri P.P. Malhotra, learned Senior Counsel appearing for the respondents. By the impugned judgment, the Tribunal has held that the appellants work sometimes as independent persons for the Railway administration for which they are paid remuneration at a rate mutually agreed upon as per the terms of the contract and that they could not be regarded as casual employment engaged by the Railway administration. Since there was no relationship of master and servant between them and the Railway administration, they could not be regularized as railway employees or as casual labourers or substitutes. Having considered the record we do not find any infirmity in the said judgment of the Tribunal. The appeal, therefore, fails and is accordingly dismissed, no costs.

11. The same principle is reiterated by a subsequent Bench decision of the Supreme Court in case of Bijli Mazdoor Sangh (supra) in following words:

6. The plea of learned counsel for the respondent that at the time the High Court decided the matter, decision in Uma Devi's case (supra) was not rendered is really of no consequence. There cannot be a case for regularization without there being employee-employer relationship. As noted above the concept of regularization is clearly linked with Article 14 of the Constitution. However, if in a case the fact situation is covered by what is stated in para 45 of the Uma Devi's case (supra), the Industrial Adjudicator can modify the relief, but that does not dilute the observations made by this Court in Uma Devi's case (supra) about the regularization.

12. The principle relating to regularization of the service of the casual labourers/ daily raters has been laid down by the Supreme Court in case of Daya Lal (supra) in the following manner :

8. We may at the outset refer to the following well settled principles relating to regularization and parity in pay, relevant in the context of these appeals:

(i) High Court, in exercising power under Article 226 of the Constitution will not issue directions for regularization, absorption or permanent continuance, unless the employees claiming regularization had been appointed in pursuance of a regular recruitment in accordance with relevant rules in an open competitive

process, against sanctioned vacant posts. The equality clause contained in Articles 14 and 16 should be scrupulously followed and courts should not issue a direction for regularization of services of an employee which would be violative of constitutional scheme. While some thing that is irregular for want of compliance with one of the elements in the process of selection which does not go to the root of the process, can be regularized, back door entries, appointments contrary to the constitutional scheme and/or appointment of ineligible candidates cannot be regularized.

(ii) Mere continuation of service by an temporary or ad hoc or daily-wage employee, under cover of some interim orders of the court would not confer upon him any right to be absorbed into service, as such service would be "litigious employment". Even temporary, ad hoc or daily-wage service for a long number of years, let alone service for one or two years, will not entitle such employee to claim regularization, if he is not working against a sanctioned post. Sympathy and sentiment cannot be grounds for passing any order of regularization in the absence of a legal right.

(iii) Even where a scheme is formulated for regularization with a cut off date (that is a scheme providing that persons who had put in a specified number of years of service and continuing in employment as on the cut off date) it is not possible to others who were appointed subsequent to the cut off date to claim or contend that the scheme should be applied to them by extending the cut off date or seek a direction for framing of fresh schemes providing for successive cut off dates.

(iv) Part-time employees are not entitled to seek regularization as they are not working against any sanctioned posts. There cannot be a direction for absorption, regularization or permanent continuance of part time temporary employees.

(v) Part time temporary employees in government run institutions cannot claim parity in salary with regular employees of the government on the principle of equal pay for equal work. Nor can employees in private employment, even if serving full time, seek parity in salary with government employees. The right to claim a particular salary against the State must arise under a contract or under a statute."

13. Recently, the Supreme Court in case of State of U.P. and Others Vs. Rekha Rani, considered the matter relating to regularization where the appointees were discontinued after a certain period and it has been held :

11. A regular appointment can only be made after selection by the U.P. Public Service Commission. Also, admittedly, the respondent was only a temporary employee and had not worked after 16.4.1991.

12. It has been held in a recent decision of this court in State of Rajasthan and Others Vs. Daya Lal and Others, following the Constitution Bench decision of this court in Secretary, State of Karnataka and Others Vs. Umadevi and Others, that

the High Court in exercise of its power under Article 226 cannot regularize an employee. Merely because some others had been regularized does not give any right to the respondent. An illegality cannot be perpetuated.

13. Also, it is well-settled that a temporary employee has no right to the post vide State of Uttar Pradesh and Another Vs. Kaushal Kishore Shukla, The respondent's service was not terminated as a measure of punishment. Hence no opportunity of hearing was necessary for terminating her service. The direction for her reinstatement is not sustainable as she was only a temporary employee and hence had no right to the post.

14. In the judgment rendered in case of M L Kesri (supra), the apex court was considering a matter of an irregular appointees against the sanctioned vacant post and passed direction upon the authorities to undertake exercise of one-time regularization if they come within the purview of the eventualities as enshrined in Umadevi (3). The judgment cited by the petitioner in case of Piara Singh (supra) was considered in the five-judged Bench decision rendered in case of Umadevi (3) and it is held :

With respect, the direction made in paragraph 50 of Piara Singh (supra) are to some extent inconsistent with the conclusion in paragraph 45 therein. With great respect, it appears to us that the last of the directions clearly runs counter to the constitution scheme of employment recognize in the earlier part of the decision. Really, it cannot be said that this decision has laid down the law that all ad hoc, temporary or casual employees engaged without following the regular recruitment procedure should be made permanent.

15. The another judgment cited by the petitioner in case of Indra Sawhney (supra) to the principle that neither the Parliament nor the legislature could transgress the basic feature of the Constitution namely the principle of equality as enshrined in Article 14 and 16 of the Constitution, there is no dispute to the proposition that the equality is one of the basic features enumerated in the preamble to the Constitution which cannot be transgressed either by the Parliament and/or by legislatures. It is also undisputed that there must be equality amongst the equals but not equality amongst the unequal.

16. As indicated above, the larger Bench of the Supreme court in case of Umadevi (3) clearly laid down that the temporary or casual workers cannot claim a regularization as illegal appointees. It is further held in case of Ashoke Kumar (supra) and Central Salt Mazdoor Union (supra) that any recruitment dehors the recruitment rules as well as constitutional scheme is void.

17. Therefore, the petitioner cannot claim regularization of his service in view of the law enunciated by the Apex Court in case of Uma Devi (3). Additionally, this court factually found that the service of the writ petitioner is discontinued since the year 2003 and was not employed as casual labourer at the time of initiation of this writ petition.

18. Therefore, the relief claim in this writ petition cannot be granted to the petitioner.

19. Thus, the writ petition is dismissed. However, there shall be no order as to costs.

Urgent Photostat certified copy of this judgment if applied for, be given to the parties on priority basis.