

(2009) 12 SHI CK 0046
In the High Court Of Himachal Pradesh

Vijay Singh

APPELLANT

Vs

State of H.P. and Others

RESPONDENT

Date of Decision : 11-12-2009

Acts Referred:

Constitution of India, 1950 — Article 311

Citation : (2009) 12 SHI CK 0046

Hon'ble Judges : Kuldeep Singh, J

Bench : Single Bench

Judgement

Kuldeep Singh, J.—The grievance of the petitioner is that on 19.7.1994 he was engaged as daily wage driver in the department. He had completed ten years of service. The name of the petitioner was registered in the Employment Exchange, the department was in need of regular driver. The petitioner was directed by the department to appear for interview for the post of regular driver on 20.1.2004 and the name of the petitioner was sponsored through Employment Exchange. The petitioner appeared before the competent authority and consequent upon the recommendations, he was offered the appointment of driver on regular basis vide office order dated 31.5.2004. The petitioner had joined his duties as regular driver. The work and conduct of the petitioner was satisfactory and nothing adverse was ever communicated to him.

2. The petitioner was given show cause notice dated 22.2.2006 Annexure A-3. It was observed in the show cause that appointment of petitioner as driver was examined at government level and it was found that appointment of the petitioner was made in violation of instructions for filling up the vacancies on regular basis through direct recruitment, therefore, the show cause notice was given to the petitioner to terminate his services as regular driver and revert him to his original post of daily waged driver. The petitioner submitted an application dated 28.2.2006 Annexure A-4 to supply him the instructions, which were stated to be violated while making his appointment on regular basis and also requested for extension of time for filing the reply. The instructions dated 8.7.1998

Annexure A-6 were supplied to the petitioner and thereupon the petitioner submitted his reply dated 8.3.2006 Annexure A-7. The respondent No. 3 vide communication dated 22.3.2006 Annexure A-8 rejected the request of petitioner submitted by him in the form of reply dated 8.3.2006 to the show cause notice. Thereupon vide notice dated 22.3.2006 Annexure A-9 was issued to the petitioner and the petitioner was informed that his services shall stand terminated with effect from the date of expiry of a period of one month from the date on which the said notice is served on, or as the case may be tendered to him. The petitioner has assailed Annexure A-8 dated 22.3.2006 and notice dated 22.3.2006 Annexure A-9 and prayed their quashing. It has further been prayed that petitioner may be held to be in continuous service with the respondent/ department with all consequential benefits.

3. The petition has been contested by the respondents. In the reply it has been submitted by way of preliminary submission that S.K. Singhal, the then Superintending Engineer had committed illegality in appointing the petitioner as a regular driver. The said Superintending Engineer had violated the rules in order to favour the petitioner. In the year 1997, the government had sanctioned a special project, namely Project Management Unit and had sanctioned a few posts to execute the project within a specified period. It was clearly stipulated that posts created were temporary and would only be filled up amongst the existing strength within the department and no recruitment against these posts was to be made. In addition to that department of Finance had banned the direct recruitment in order to effect economy without the prior approval of Finance Department vide notification dated 28.7.1998. The then Superintending Engineer, Project Management was not competent to advertise the post in view of aforesaid instructions. The then Superintending Engineer in connivance with the petitioner appointed him driver on regular basis. The project has been completed, therefore, the appointment of petitioner as regular driver being illegal and against the rules is not sustainable. The illegality was noticed by the higher authorities when one Kamal Raj claimed his regularization/ appointment by filing OA No. 2044 of 2004. The appointment of the petitioner as driver on regular basis is illegal, therefore, it was to be rectified and set-aside, as such the notice was issued to the petitioner as to why his services be not terminated, even though under Sub-rule (1) of Rule 5 of Temporary Service Rules, no notice was required to be given.

4. On merits, it has been admitted that petitioner has worked with the department as daily wage driver w.e.f. 19.7.1994. However, it has been submitted that appointment of petitioner as regular driver is wrong and illegal. The respondents have ultimately prayed for dismissal of the petition.

5. I have heard the learned Counsel for the parties. It has been submitted on behalf of the petitioner that petitioner was appointed as driver on regular basis who has right to hold the post till his services are terminated in accordance with law. The foundation of termination order of the petitioner is stigmatic and penal

in nature and has not been passed in consonance with Article 311 of Constitution of India. The instructions on the basis of which purported action has been taken are not applicable in the present case and the services of the petitioner have been terminated by invoking the provision of wrong instructions. The impugned order and rejection of representation demonstrate non-application of mind, while rejecting the representation of the petitioner no reasons have been assigned nor the rejection has been elaborated by a speaking order. The respondents have not conducted any inquiry before terminating the services of the petitioner. The show cause was given to the petitioner for reverting him to the post of daily wage driver but ultimately his services have been terminated without reverting him back to the post of driver on daily wage basis.

6. The learned Additional Advocate General has submitted that the then Superintending Engineer in connivance with the petitioner flouted the rules and illegally appointed the petitioner as driver on regular basis in violation of instructions. There was no sanctioned post of regular driver nor permission from the Finance Department was obtained for the appointment of the petitioner as driver on regular basis. The illegality committed by the then Superintending Engineer came to the notice of authorities when another driver had filed Original Application in the erstwhile Tribunal for regularization. The appointment of petitioner as driver on regular basis was dehors the instructions and availability of post of regular driver, therefore, it was required to be rectified and the department has rectified the illegality by terminating the services of the petitioner as a regular driver. He has submitted that there is no merit in the petition.

7. The department has taken a specific stand that a special project named Project Management Unit (PMU) was sanctioned on 3.12.1997 with a few posts and the project was to be executed within a specified period. It was made clear that posts created are temporary and will only be filled up amongst the existing strength within the department and no recruitment against these posts was to be made. The posts created in the project were not to be filled in by direct recruitment. In addition the department of Finance had banned the recruitment in order to effect economy without the prior approval of the Finance Department vide notification dated 28.7.1998. S.K. Singhal the then Superintending Engineer had appointed the petitioner on regular basis in violation of notification dated 3.12.1997 and instructions dated 28.7.1998. The notification dated 3.12.1997 provides one post of driver in the PMU. It has further been provided in the notification dated 3.12.1997 that all the posts will be internalized within the existing cadres in the IPH Department as far as possible and the resultant vacancies in the department will be kept in abeyance. The creation of PMU will be co-terminus with the project and after the expiry of project, the PMU will cease to exist and all the incumbents will be absorbed in their respective cadres within the pre-project sanctioned strength of the IPH Department. It is thus clear that posts in PMU were to be filled from the existing cadres of IPH Department and after the completion of project, the incumbents will be absorbed in their

respective cadres within the pre-project sanctioned strength in IPH Department.

8. The notification dated 3.12.1997 and instructions dated 28.7.1998 make it clear that petitioner could not have been appointed driver on regular basis as there was no sanctioned post of regular driver nor permission from the Finance Department was taken before appointing the petitioner as regular driver. The petitioner was appointed in violation of notification dated 3.12.1997 and instructions dated 28.7.1998, therefore, no right accrued in favour of the petitioner to continue driver on regular basis with the department. The department has every right to rectify the mistake. The department when realized that illegal appoint of petitioner has been made then show cause was issued to him and only thereafter services of the petitioner as regular driver were ordered to be terminated vide Annexure A-9 after rejecting his representation Annexure A-8.

9. There is no substance in the submission of learned Counsel for the petitioner that the order of termination of services of petitioner as regular driver vide Annexure A-9 is stigmatic and order of termination could not have been passed without holding proper inquiry as contemplated under CCS (CCA) Rules, 1965. The foundation of appointment of petitioner as regular driver is illegal. The temporary appointment of the petitioner was illegal but the department has still followed the procedure prescribed under Central Civil Services (Temporary Service) Rules, 1965 before terminating the services of the petitioner.

10. The learned Counsel for the petitioner has submitted that show cause Annexure A-3 dated 22.2.2006 provides that government has decided to terminate the services of petitioner as regular driver and revert him to his original post of daily wage driver, but in termination notice Annexure A-9 dated 22.3.2006 the services of the petitioner have been terminated without any reference that petitioner will remain as driver in the department on daily wage basis. The termination notice Ex. A-9 is beyond the scope of show cause notice dated 22.2.2006 Annexure A-3. It has been submitted that as per respondents, the petitioner had joined as daily wage driver on 19.7.1994, therefore, even if the petitioner is considered to be a daily wage driver in that case also he is entitled to regularization inasmuch as the petitioner has completed more than requisite service which is necessary as per the policy of the government for regularizing a daily wagger driver.

11. There is substance in the aforesaid submission of the learned Counsel for the petitioner. It is not the case of the respondents that there was break in service of the petitioner at any time since 19.7.1994 onwards. It has also not been contended on behalf of the State that there is no policy of State for regularization of daily wage driver after certain length of service. In these circumstances, the respondents are directed to consider the case of the petitioner for regularization as driver as per policy of the government within a period of two months and in case the petitioner is found eligible for regularization, then respondents shall take a decision to this effect within the same period for regularization of

petitioner as driver. The petitioner shall continue with the respondents as daily wage driver till a decision is taken by the respondents for his regularization. The petitioner shall be entitled to salary of regular driver till today and thereafter wages of daily wage driver till he continues as such. The other claim of the petitioner is rejected. The status quo order dated 19.4.2006 stands vacated.