

Arvind Sahai Vs. State of U.P. and Another

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Court : Allahabad

Decided On : Aug-25-1998

Reported in : 1999(1)AWC546; [1999(81)FLR80]

Judge : Brijesh Kumar and;R.P. Nigam, JJ.

Acts : [Constitution of India](#) - Article 16

Appeal No. : Writ Petition Nos. 1184 (S/B) and 1258 (S/B) of 1997

Appellant : Arvind Sahai

Respondent : State of U.P. and Another

Advocate for Def. : C.S.C.

Advocate for Pet/Ap. : L.P. Misra, Adv.

Judgement :

Brijesh Kumar, J.

1. Since the abovenoted two writ petitions relate to the same petitioner and the same subject-matter, i.e.. consequential benefits on account of holding the promotion post for a long period, hence, we have heard the petitions together which are disposed of by this order.

2. We have heard learned counsel for the petitioner and the learned State counsel.

3. The brief facts are that the petitioner was appointed as Assistant Director. State Museum, Lucknow in the year. 1962 and was confirmed on the said post on 1.4.1971. In the year. 1985, a post of Programme Executive was sanctioned by the Government in the Directorate of Culture. Petitioner was appointed on the said post on ad hoc basis by means of the order dated 26.8.1985. a copy of which has been filed as Annexure-2 to the writ petition. This order shows that the petitioner was appointed on a newly created post of Programme Executive in the pay-scale of Rs. 850-40-1.050-EB-50-1,300-60-1.420-EB-60-1.720. The appointment was made on ad hoc basis till February, 1986 or till the regularly selected candidate by the U. P. Public Service Commission is appointed. whichever be earlier. The Government, it appears, laid down qualifications as well as mode and manner to fill up the post subject, to the approval of the Commission ; a copy of the said letter issued to the U. P. Public Service Commission dated May 17, 1986 has been filed as Annexure-1 to the writ petition. After indicating the qualifications, it provides that the recruitment shall be made by promotion or by deputation and in case of non-availability of candidate by direct recruitment. The Commission, it appears, approved the proposed qualifications and mode of recruitment which would be evident from Annexure-4, a letter dated October 25, 1989 sent by the U. P. Public Service Commission to the State Government. The subject was regarding laying down the qualifications and the eligibility for the post of Programme Executive. It is said that the proposal was given due consideration and the post may be filled up by promotion. The letter also stated that the candidates included in the enclosed list from serial Nos. 1 to 6 be considered for promotion. It will be relevant to mention that the name of the petitioner finds its place at serial No. 1. The Commission, in the end, also mentioned that the Commission be also informed of the steps taken in that regard. Petitioner, however, was continued on ad hoc basis under several orders of the State Government which have been filed as Annexure-3 to the writ petition. There is no specific order after June, 1989 by which promotion of the petitioner was extended for a period of one year i.e.. upto June, 1990, The fact, however, remains that the petitioner in fact was continued to work on the post of Programme Executive till his retirement when he was reverted by the impugned order dated 29.10,1997 to the post of Assistant Director. Petitioner, by means of another letter dated 29.10.1997. was retired from service w.e.f. 31-

10.1997. It is again to be noted that 29.10.1997 was the last working day for the petitioner as Programme Executive as the following two days were holidays on account of Deepavali, as indicated by the learned counsel for the petitioner. So, the fact that remains is that for all the practical purposes the petitioner was made to work on higher post of Programme Executive during the whole working period till his retirement.

4. In the meanwhile, in the year, 1990 petitioner filed a Writ Petition No. 4103 of 1990 with the prayer that before making recruitment on the post of Programme Executive, the opposite parties may consider his claim for regularisation on the post of Programme Executive. Petitioner's representation in that regard was also pending with the Government which, it appears, was not considered despite the order passed in that effect during pendency of the Writ Petition No. 4103 of 1990. Petition was, however, finally disposed of providing as follows :

'To this extent, we find the claim of the petitioner justified that in case he is entitled to be regularised on the promotion post, he should be considered under the relevant rules for regularisation before any selection for promotion is held. Learned counsel for the parties agree that the petition may be finally disposed of at this stage in the above terms. It is, therefore, provided that before opposite parties hold any selection for promotion to the post of Programme Executive, they will first consider and dispose of the representations of the petitioner, copies of which have been annexed as Annexures-17 and 18 to the writ petition. The writ petition stands finally disposed of in the manner, indicated above.'

5. It is submitted that after the above order was passed, the Increments which were being paid to the petitioner on the post of Programme Executive, were stopped. It is also submitted that no steps were taken to fill up the post by holding selection even though the petitioner was to be considered first in view of the letter of the Public Service Commission. Annexure-4 to the writ petition. Petitioner was due to retire on 31.10.1997 and on the last working day on 29.10.1997, an order was passed reverting the petitioner to his substantive post of Assistant Director and by another order, as indicated above, retiring him on 31.10.1997. The above two orders dated 29.10.1997 have been Impugned in (he Writ Petition No. 1258

(S/B) of 1997 and by means of other writ petition the reliefs sought are that he be allowed increments of the post of Programme Executive for the period 31.5.1990 to 31.10.1997, till his retirement and selection grade be granted in the pay-scale of Rs. 3,000-4,500. Yet another prayer was made that he may be treated as regular Programme Executive as well as he be paid all service benefits including post retiral benefits of the said post.

6. We have gone through the counter-affidavit which has been filed on behalf of the opposite parties. It has been stated that the petitioner was reverted and the order dated 29.10.1997 in that connection was passed in the light of the order passed by this Court, dated 25.5.1990. It is indicated that a decision was taken and the petitioner was thereafter reverted. It is also averred in para 6 of the counter-affidavit that the post of Programme Executive is to be filled up by direct recruitment, therefore, petitioner cannot claim that there was no necessity to face the Public Service Commission again for promotion. In para 4 of the counter-affidavit, the stand which has been taken is that appointment of the petitioner was not extended with effect from 31.5.1990 onwards, hence, the annual increments in the pay-scale have not been granted.

7. The pleas which have been taken by the opposite parties in the counter-affidavit, as indicated above, do not seem to be tenable on the face of it. Annexure-4 to the writ petition by which U. P. Public Service Commission accepted the proposal of filling up of the post of Programme Executive through promotion has not been denied, yet it is averred in para 6 that the post is to be filled up by direct recruitment. The other averments that the increments were not made admissible to the petitioner since his appointment as Programme Executive was not extended w.e.f. 31.5.1990. It also does not hold water since admittedly he was allowed to continue till the end of period of service on the higher post of Programme Executive. Therefore, the opposite parties felt necessity to revert the petitioner from the post of Programme Executive to the post of Assistant Director. The stand taken is wholly self contradictory. So far as taking the decision to revert the petitioner in the light of the order passed by this Court dated 25.5.1990 is concerned, the same is also not tenable. There was no direction or observation saying that the petitioner be reverted. All that was provided by the said Judgment,

as quoted above, was that in case petitioner was entitled to be regularised on the promoted post under the rules, in that event his case be considered before-holding any selection for the post. The order was passed in May, 1990. Reversion order has been passed in October, 1997. It is difficult to understand as to why effort has been made to connect the order of reversion passed by the opposite parties with the order passed by this Court in Writ Petition No. 4103 of 1990 (S/B).

8. The facts which emerge out from the record are that the petitioner worked throughout on the higher post of Programme Executive for more than 12 years. The proposal of the State Government to fill up the post by promotion and in that connection names of the officers of the Department as authorised by the Commission petitioner being at serial No. 1. were to be considered for the same. The State Government took no steps, at least, nothing has been indicated about regular selection for the post of Programme Executive. Petitioner was continued even after May, 1990. on the post of Programme Executive and was also paid salary of the said post though increments were stopped after 1990 for which we find no basis. Once the petitioner was allowed to continue on the higher post and was reverted by means of order dated 29.10.1997, there was no reason to stop the payment of increments which were being paid in the preceding years.

9. There is some force in the submission made on behalf of the State that since Rules do not permit regularisation on the promotion post within the purview of Commission, hence, petitioner cannot claim to be treated as regularised on the post of Programme Executive. The promotion post, it is submitted, can be filled up only through regular selection. The inaction seems to be on the part of the State, in not sending the requisition or requesting the Commission to hold the selection for the promotion for a period of eight years after the Commission had accepted recruitment by promotion on the post also.

Learned counsel for the petitioner submits that petitioner cannot be denied the benefits of the post of Programme Executive in view of his long working on the post for more than 12 years. It is submitted that for the inactions of the opposite parties, petitioner cannot be made to suffer nor it is sweet-will or choice of the opposite parties to not to hold the selection or get it held through Commission till

the petitioner retires. It is submitted that the order by which petitioner was appointed on ad hoc basis clearly provided that he would continue till 28.2.1986 or till the regularly selected candidate by the U. P. Public Service Commission is appointed, whichever be earlier. It is submitted that there was continuity of the post and holding of the same by the petitioner in connection with the benefits which the petitioner appears to be entitled to, reliance has been placed on a decision in Baleshwar Das and others v. State of U. P. and others. (1081) 1 SCR 449. Reliance has been placed more particularly on observations made at page No. 469 to the effect as follows :

'If a public servant serves for a decade with distinction in a post known to be not a casual vacancy but a regular post, experimentally or otherwise kept as temporarily under the time-honoured classification, can it be that his long officiation turns to ashes like a Dead Sea fruit because of a label and his counterpart equal in all functional respects but with ten years less of service steals a march over him because his recruitment is to a permanent vacancy? We cannot anathematize officiation unless there are reasonable differentiations and limitations.'

It is true that there seems to be a bit difference on facts but stress of the petitioner is on the consequences of long officiation of a post irrespective of the label with the post or the office may be tagged with. Another decision which has been relied, is N. S. K. Nayer and others v. Union of India and others, (1992) 2 UPLBEC 1348. It has been observed, referring to the rules involved in the case that they provided a source of appointment to meet an administrative exigency of short tenure. It could never be the intention of the framers of Rule, to permit the appointments under the Rules to go on for 10 to 15 years and in that view of the matter it was held that denying them the right of regularisation and consequential benefits of the said grade was violative of Article 16 of the [Constitution of India](#). Yet another decision relied upon is Secretary-cum-Chief Engineer, Chandigarh v. Har Om Sharma and others. (1998) 5 SCC 87. In this decision also, matter related to appointment on the promotion post with the condition that the incumbent cannot claim his promotion as of right nor would claim any benefit pertaining to that post. It has been held that this kind of arrangement would be contrary to law and also against public policy. It is also observed that the petitioner was one of the amongst

those who were only persons to be considered amongst non-diploma holders available for promotion to the post of Junior Engineer and was likely to be considered for promotion as his own right.

In the present case also we find that according to the letter of the Public Service Commission petitioner's name was at serial No. 1 to be considered for promotion. Looking to the long period during which petitioner was made to work on higher post and the fact that he was one who was to be considered first for promotion, it would be arbitrary on the part of the opposite parties denying the petitioner his claim and benefits to which a person would be entitled to working on the regular basis.

10. The question of continuance of an ad hoc appointee on the higher post till regularly selected candidate is available, was considered by the Hon'ble Supreme Court in the case in Dr. Mrs. Swnati P. Shere v. Union of India and others, (1989) 17 LCD 417. It was held that normally the employee would be entitled to continue till the select candidate was available.

11. In the light of the facts and law indicated above, there is no escape from the conclusion that the order of reversion passed on the eve of the retirement of the petitioner is arbitrary. Petitioner was allowed to work till the last working day as Programme Executive. It is indicated that next two following days were holidays and the petitioner was to retire on 31.10.1997. Apparently, there was no other purpose to revert the petitioner to the post of Assistant Director except with a view to deprive him of the benefits of his long service of 12 years as Programme Executive. The order, thus, suffers with malice in law since it was for the purposes other than relevant to reversion of the petitioner.

12. In the result, both the writ petitions are allowed. The order of reversion dated 29.10.1997. contained in Annexure-7 to the writ petition is set aside. Petitioner though be not treated as regularised but would be entitled for all the benefits accrued to him while working on the post of Programme Executive. He shall also be entitled for the increments with effect from the date they were stopped in the year. 1990 till the time of retirement. The opposite parties shall also consider grant of selection grade to the petitioner on the post of Programme Executive in

accordance with the Rules with effect from the date it would accrue to the petitioner. This decision shall be taken by the opposite parties within one month from the date of service of certified copy of this order. He shall also be entitled for all the other consequential benefits on account of his long service rendered as Programme Executive. There would be no order as to costs.

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