

Anil Kumar Kaushik Vs. New Okhla Industrial Development Authority and anr.

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SooperKanoon Citation : sooperkanoon.com/485949

Court : Allahabad

Decided On : Oct-21-1997

Reported in : (1998)1UPLBEC407

Judge : S.P. Srivastava, J.

Acts : Service Law

Appeal No. : Civil Misc. Writ Petition No. 8153 of 1995

Appellant : Anil Kumar Kaushik

Respondent : New Okhla Industrial Development Authority and anr.

Advocate for Def. : U.S. Awasthi, Adv.

Advocate for Pet/Ap. : W.H. Khan and ;Akhleshwar Singh, Adv.

Judgement :

S.P. Srivastava, J.

1. Feeling aggrieved by the inaction of the respondent authority in the matter relating to the determination of the claim of the petitioner regarding the regularisation of his services and his absorption against the vacant post of Junior

Assistant/Typist, he has approached this Court seeking redress praying for a direction requiring the respondent appointing authority to regularise his services.

2. The parties have exchanged their affidavits. The learned Counsel for the parties have jointly requested that this writ petition be disposed of finally at this stage.

3. Considering the facts and circumstances brought on record I find that the present case is fit one for being disposed of finally at this stage under the second proviso to Rule 2(i) of Chapter 22 of the Rules of the Court.

4. I have heard Shri W.H. Khan learned Counsel for the petitioner and Shri U.S. Awasthi learned Counsel representing the respondents and have carefully perused the record.

5. On 23.5.97 learned Counsel representing the respondent had stated that the service regulations providing the service conditions regulating the recruitment procedure for filling up of the post of Junior Assistant/Typist had not been notified as yet. In view of the aforesaid statement it is apparent that no statutory service Rules exist regulating the procedure for the recruitment for filling up of the post of Junior Assistant/Typist or regulating the service conditions of such employees.

6. The petitioner asserts that he had been appointed as Hindi Typist and was continues as such intermittently with artificial breaks for over six years. Along with the writ petition he has filed the true copies of the various appointment letters issued from time to time by the respondent authority indicating that the petitioner had initially been engaged as Hindi Typist in purely temporary capacity on a contract basis making it clear that his service was liable to termination without any notice and he was entitled as wages a consolidated amount of Rs. 600/- per month. This appointment, to begin with was for a fixed period of six months. Fresh appointments with same terms and conditions for a period of six months were repeatedly given to him with breaks ranging between one day to the maximum of 20 days. From the year 1990, however, instead of consolidated salary of Rs. 600/- per month, appointment orders provided payment of salary at the rate of Rs. 24/- per day and a period of engagement of 89 days instead of six months. In the year 1991 the rate of payment was enhanced from Rs. 24/- to Rs. 30 per day.

Thereafter, in the year 1994 it was enhanced from Rs. 30/- to Rs. 38/- per day.

7. The petitioner submitted a representation on 25.11.1994 addressed to the Chairman of the respondent No. 1 claiming that he knows Hindi Shorthand also and several Hindi Typists who had been engaged in the organisation subsequent to the engagement of the petitioner had been regularised but his claim for regularisation was not being considered. It was also indicated that he had become over age awaiting the regularisation of his service and it was prayed that his services may be regularised as Junior Assistant/Typist. When the aforesaid representation went without any response he again submitted another representation on 1.3.1995 seeking regularisation. When no action was taken he filed the present writ petition on 28.3.95.

8. The petitioner has asserted in paragraph No. 12 of the writ petition that the services of Ram Prakash and Gopal Chilwal who had been engaged subsequent to the engagement of the petitioner had been regularised. It has also been asserted that the respondent authority had made fresh appointments of various Assistant/Typists on adhoc/daily wages basis after removing the petitioner. This, it is claimed, was done in an arbitrary manner as substituting one adhoc by another could not be justified specially when there had never been any complaint against the work and conduct of the petitioner.

9. The petitioner has also asserted that for the years 1992, 1993 and 1994 he was also provided the bonus which is admissible to an employee on full time basis. On the strength of the orders granting bonus to the petitioner referred to hereinafter it is claimed that even according to the respondent authority the breaks in service of the petitioner were taken to be merely artificial breaks which did not affect his continuous engagement.

10. In the counter affidavit filed by the respondent the claim of the petitioner has been contested asserting that it was incorrect to say that the petitioner had worked for more than six years in continuation but he had worked on contractual basis and the appointment had been granted to him for specific periods depending upon the requirement of the work. So far as Ram Prakash and Gopal Chilwal are concerned the fact that their services had been regularised is not disputed but what has been

indicated is that they had been working on adhoc basis. The respondent authority does not dispute that the aforesaid persons had been junior to the petitioner and their services had been regularised. From the stand of the respondent authority taken in the counter affidavit it is apparent that the petitioner was not being treated at par with the aforesaid persons on the ground that while the petitioner had been engaged on contract basis the aforesaid persons had been engaged on adhoc basis. It is further pointed out by the respondent authority that Jagbir Singh S/o Shri Yad Ram and Jagbir Singh S/o Shri Om Prakash as well as Sunder Singh had also been appointed through interview in the special drive for the recruitment of S.C. and S.T. candidates and the cases of G.S. Chilwal and Jagbir Singh and Sunder Singh were totally different from the case of the petitioner.

11. From the ratio of the decision of the Apex Court in the case of R.N. Nanjundappa v. T. Thimmaiah and Anr., reported in A.I.R. 1972 S.C. 1768, it is apparent that regularisation cannot be said to be a form of appointment. The Apex Court had observed that ratification or regularisation is possible of an act which is within the power and province of the authority but there has been some non-compliance with procedure or manner which does not go to the root of the appointment. It was further clarified that regularisation cannot be said to be a mode of recruitment and to accede to such a proposition would be to introduce a new head of appointment in-defiance of Rules and it may have the effect of setting at naught the Rules. However, in its decision in the case of J & K Public Service Commission etc. v. Dr. Narindra Mohan and Ors. etc., reported in J.T. 1993 (6) S.C. 593, it was clarified that existence of statutory Rules is not a condition precedent to appoint an eligible and fit person to a post emphasising that it is settled law that once statutory Rules have been made, the appointment shall be only in accordance with the Rules and the executive power could be exercised only to fill in the gaps but the instructions cannot and should not supplant the law, but would only supplement the law. It was further emphasised that efforts should always be made to replace such adhoc employees or temporary employees by regularly selected employees, as early as possible and appointment of the regularly selected candidate cannot be withheld or kept in-abeyance for the sake of such an adhoc employee making it clear that adhoc or temporary employee should not be replaced by another adhoc or temporary employee and he must be

replaced only by regularly selected employee.

12. A Division Bench of this Court in its decision in the case of Subedar Singh and Ors. v. The District Judge, Mirzapur and Anr., Civil Misc. Writ Petition No. 17907 of 1996, decided on 24.2.97, had observed that whenever the employees are appointed on adhoc basis to meet an emergent situation every effort should be made to replace them by the employees appointed on regular basis in accordance with the relevant Rules as expeditiously as possible emphasising, however, that where no Rules are operative it is open to the employees to show that they have been dealt with arbitrarily and their weak position has been exploited by keeping them on adhoc basis for long spell of time. The Division Bench, however, emphasised that it is a question of fact whether in the given situation they were treated arbitrarily.

13. An adhoc appointment is made due to exigencies of particular situation without considering the respective merits of all those who are eligible. It is a stop gap arrangement and is fortititious and does not confer any right to continue even on a temporary post. In fact the expression 'adhoc' is capable of being understood in two different ways. There is un-certainty as to the continuity of the appointment and also refers to a 'stop-gap-arrangement' without considering all the persons eligible for appointment.

14. In its decision in the case of S.K. Verma and Ors. v. State of Punjab and Ors., reported in A.I.R 1979 Punjab and Harayana 149, rendered by a Full Bench, the Punjab and Haryana High Court had pointed out that the term 'adhoc employee' is conveniently used for a wholly temporary engaged either for a particular period or either a particular purpose and one whose service could be terminated with the maximum of ease. It was further pointed out that no distinction could reasonably be drawn betwixt a temporary employee whose services are terminable without notice or other wise and an employee characterised as adhoc and an employee on similar terms indicating further that in the gamut of service law an adhoc employee virtually stands at the lowest rung. As against the permanent, quasi permanent and temporary employee the adhoc one appears at the lowest level implying that he has been engaged casually or for stop gap arrangement for a short duration or

fleeting purpose.

15. In the aforesaid view of the matter the petitioner as well as the other employees who are claimed to have been engaged on adhoc basis obviously fell in the category of appointees employed casually, for a short duration or fleeting purposes.

16. It seems to me that for the entitlement of regularisation benefits, the quantum of money paid as salary or wages or the manner of its payment whether on daily wage basis or monthly basis or weekly basis is of no consequence and persons employed on daily wage basis/contract basis or work charged basis have to be treated as falling within the ambit of the expression 'adhoc appointee'. I respectfully agree with the observations made in the decision of the Full Bench of Punjab and Haryana High Court in the matter relating to the implications arising under the expression 'adhoc appointee'. It further seems to me that when an employee whether he be engaged on daily wage basis or on contract basis is continued for a fairly long spell of time a presumption may arise that there is regular need for his service. In such a circumstance it becomes obligatory on the employer to take steps for regularisation of service of such an employee continued for a fairly long spell of time after following at least the minimum procedure for determining the efficiency and suitability of the person for his absorption as against the available post. In the absence of a post, however, the question of regularisation can never arise.

17. In the aforesaid view of the matter since the respondent authority continued the engagement of the petitioner for the post of Hindi Typist for a fairly long spell of time, it will not be unreasonable to presume that the requirement of such an employee was of a permanent nature. It, however, seems to me that during the subsistence or continuance of the requirement if the employer takes recourse to such artificial breaks or interruptions in service as involved in the present case, it cannot be taken to be a fair play inaction and really amounts to misuse by the employers of the power and such breaks or interruptions which are ostensibly given a colour of fresh engagement or fresh appointment being in colourable exercise of power cannot be taken to be a break in service or affect the continuity

of service as there is no fault on the part of the employee specially when the requirement for the post continues to subsist.

18. The fact that the posts were available to accommodate the petitioner in the present case, cannot be doubted as according to the own showing of the respondent authority, several persons who had been engaged subsequent to the petitioner on purely adhoc basis had been regularised and absorbed against the available posts. I am clearly of the opinion that the action of the respondent authority in treating the petitioner to be not at par with the appointees junior to him on adhoc basis was manifestly erroneous and based on a total misconception specially when on the own showing of the respondent authority, no statutory Rule exists providing for an adhoc appointment or prescribing any procedure for recruitment to the post against which the regularisation is sought by the petitioner.

19. Learned Counsel for the respondent has strenuously urged that a daily wager like the petitioner was not entitled to regularisation. He has placed strong reliance upon the decision of the Apex Court in the case of State of U.P. and Ors. v. Ajay Kumar, reported in 1997 (4) S.C.C. 88. In the aforesaid decision the Apex Court had observed that it is now settle legal position that there should exist a post and either administrative instructions or statutory Rules must be in operation to appoint a person to the post. It was further indicated that daily-wage appointment will obviously be in relation to contingent establishment in which there cannot exist any post and it continues so long as the work exists.

20. The ratio of the aforesaid decision, in my opinion, cannot come to the rescue of the respondent authority in the facts and circumstances of the present case as brought on record. As has already been noticed hereinabove the engagement of the petitioner was not in relation to a contingent establishment. The petitioner had been engaged as Hindi Typist in the New Okhala Industrial Development Authority, Noida and continued as such for a long spell of time for about six years. As has already been noticed hereinabove the persons engaged subsequent to the petitioner had been regularised clearly indicates that posts were in fact available against which the petitioner could be absorbed. The petitioner besides knowing Hindi Typing also knows Hindi Shorthand. In his representation the petitioner had

specifically brought to the notice of the respondent authority that a Hindi Typist had been appointed who knew Hindi Shorthand as well. That being the position it cannot be said that the post for accommodating the petitioner as a Hindi Typist/Stenographer was not available wherein he could be accommodated. In the aforesaid view of the matter the ratio of the decision in the case of State of U.P. and Ors. v. Ajay Kumar (supra), is not at all attracted to the facts and circumstances of the present case.

21. Considering the facts and circumstances brought on record sufficient ground has been made out for interference by this Court.

22. In the result this writ petition succeeds in part. The respondent authority is directed to consider the claim of the petitioner for regularisation against the post of Hindi Typist/Stenographer, after having satisfied about his efficiency and suitability for the appointment as against the post for which purpose his past record of service shall be taken into account and the petitioner will also be entitled for the relaxation of the age limit taking into account the period of his past service.

23. It is further directed that in case the available post against which the petitioner's claim for regularisation ought to have been considered stands filled up, a supernumerary post shall be made available for him till the availability of the post on regular basis without, however, disturbing the appointment already made ignoring the petitioner's claim.

24. The respondent authority shall ensure that appropriate orders disposing of the petitioner's representation are issued considering his claim for regularisation of his service in the light of observations made hereinabove within a period not later than three months from the date of production of a certified copy of this order before the respondent authority.

25. There shall, however, be no orders as to costs.