Uoi Vs Phool Dev Singh

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Court : Delhi

Decided On : Aug-18-2010

Judge : Mr. Pradeep Nandrajog ; Mr. Mool Chand Garg. J J.

Appeal No. : W.P.(C) 12479/2009

Appellant : Uoi

Respondent : Phool Dev Singh

Advocate for Def. : Mr.S.S.Tiwari, Adv.

Advocate for Pet/Ap. : Ms.Manpreet Kaur, Mr.H.K.Gangwani, Advs.

Judgement :
1. Whether the Reporters of local papers may be allowed to see the judgment?

2. To be referred to Reporter or not?

3. Whether the judgment should be reported in the Digest?

ORDER

1. On 17.06.1982, the respondent was employed by Central Public Works Department (hereinafter referred to as "CPWD") as a khalasi on a daily wage basis.

2. In the year 1983, various persons who were employed by CPWD on a daily wage basis and were working in the said capacity since several years filed writ petition(s) under Article 32 of Constitution of India before the Supreme Court praying that they should be paid same wages as were paid to permanent/regular employees doing identical work.

3. Applying the doctrine of "equal pay for equal work", vide decision reported as Surinder Singh v Engineer-in-Chief, C.P.W.D. (1986) 1 SCC 639 the Supreme Court allowed the writ petition(s). The relevant observations made by the Court are as under:-

" .The Central Government like all organs of the State is committed to the Directive Principles of State Policy and Article 39 enshrines the principle of equal pay for equal work. In Randhir Singh v. Union of India this Court has occasion to explain the observations in Kishori Mohan Lal Bakshi v. Union of India and to point out how the principle of equal pay for equal work is not an abstract doctrine and how it is a vital and vigorous doctrine accepted throughout the world, particularly by all socialist countries. For the benefit of those that do not seem to be aware of it, we may point out that the decision in Randhir Singh case has been followed in any number of cases by this Court and has been affirmed by a Constitution Bench of this Court in D.S. Nakara v. Union of India. The Central Government, the State Governments and likewise, all public sector undertakings are expected to function like model and enlightened employers and arguments such as those which were advanced before us that the principle of equal pay for equal work is an abstract doctrine which cannot be enforced in a court of law should ill come from the mouths of the State and State Undertakings. We allow both the writ petitions and direct the respondents, as in the Nehru Yuvak Kendras case to pay to the petitioners and all other daily rated employees, to pay the same salary and allowances as are paid to regular and permanent employees with effect from the date when they were respectively employed. The respondents will pay to each of the petitioners a sum of Rs 1000 towards their costs. We also record our regret that many employees are kept in service on a temporary daily wage basis without their services being regularised. We hope that the government will take appropriate action to regularise the services of all those who have been in

continuous employment for more than six months." (Emphasis Supplied)

4. In view of the afore-noted observations and directions of the Supreme Court, pertaining to regularization of services of daily wage employees working in CPWD, Ministry of Urban Development, Union of India, regularized the services of the respondent on 04.02.1993.

5. Taking into account that the respondent had completed twelve years of service in CPWD from the date of regularization of his services i.e. 04.02.1993, the petitioner was granted the benefit of 1st Assured Career Progression on 09.03.2005.

6. On 21.03.2006, the respondent made a representation to CPWD stating therein that he should be given increments in his salary and the benefit of Assured Career Progression Scheme on the basis of date of his initial entry in CPWD i.e. 17.06.1982 and not on the basis of the date of regularization of his services i.e. 04.02.1993, which representation was rejected vide office order No.10(20) ED 5/2006-07/1609 dated 17.06.2006.

7. Aggrieved by the order dated 17.06.2006 passed by CPWD, the respondent filed an application under Section 19, Administrative Tribunal Act, 1985 before Central Administrative Tribunal (hereinafter referred to as "CAT"), Principal Bench, New Delhi inter-alia praying that:- (i) office order dated 17.06.2006 be quashed;

(ii) his pay be fixed on the basis of date of his initial entry in CPWD i.e. 17.06.1982 and

(iii) benefit of Assured Career Progression Scheme be granted to him on the basis of date of his initial entry in CPWD i.e. 17.06.1982.

8. Vide judgment dated 18.09.2008, it was held by CAT that the respondent is not entitled to get the benefit of Assured Career Progression Scheme on the basis of his initial entry in CPWD for the reason sub-paras 3.1 and 3.2 of para 3 of the said scheme, implemented vide Office Memorandum dated 09.08.1999, issued by Department of Personnel and Training specifically provides that said scheme shall not apply to "temporary status" employees. But as regards salary to be paid in a

regular scale of pay with effect from the date the respondent jointed service as a daily wager relief was granted which has the effect of placing the respondent in the applicable pay scale with effect from 17.6.1982 and giving him the benefit of yearly increment the arrears have to be paid.

9. Aggrieved by the impugned judgment dated 18.09.2008 insofar it directed that the respondent is entitled to get increments in his salary on the basis of date of his initial entry in CPWD, Ministry of Urban Development and Poverty Alleviation, Union of India has filed the present petition challenging said direction.

10. During the hearing of the petition, learned counsel for the petitioner submitted that the direction issued by CAT in the impugned judgment, to grant increments in the salary of the respondent on the basis of date of his initial entry in CPWD is contrary to the dictum of law laid down by Supreme Court in the decision reported as Secretary, State of Karnataka v Umadevi (3) (2006) 4 SCC 1.

11. Since the main plank of the submission advanced by the learned counsel for the petitioner is based upon the decision of Supreme Court in Umadevis case (supra), we first proceed to examine the said decision.

12. In Umadevis case (supra), the issue of regularization of daily wage employees who had been working in the said capacity since several years was the core issue before Supreme Court. Incidental to the said issue, the legality of the direction issued by the High Court to the effect that the employees engaged on daily wages be paid wages equal to the salary and allowances that are being paid to the regular employees, with effect from the dates of their engagement on daily wages was also examined by the Court. In view of the fact that there was difference of opinion amongst various Benches of the Supreme Court regarding regularization of the services of the daily wage employees, the issue was referred to the Constitution Bench which decided Umadevi.

13. With regard to legality of the engagement of workers on daily wages by the government, the Constitution Bench observed as under:-

"3. A sovereign Government, considering the economic situation in the country and the work to be got done, is not precluded from making temporary appointments or engaging workers on daily wages ..

12. In spite of this scheme, there may be occasions when the sovereign State or its instrumentalities will have to employ persons, in posts which are temporary, on daily wages, as additional hands or taking them in without following the required procedure, to discharge the duties in respect of the posts that are sanctioned and that are required to be filled in terms of the relevant procedure established by the Constitution or for work in temporary posts or projects that are not needed permanently. This right of the Union or of the State Government cannot but be recognised and there is nothing in the Constitution which prohibits such engaging of persons temporarily or on daily wages, to meet the needs of the situation. But the fact that such engagements are resorted to, cannot be used to defeat the very scheme of public employment. Nor can a court say that the Union or the State Governments do not have the right to engage persons in various capacities for a duration or until the work in a particular project is completed "

14. With regard to regularization of services of daily wage employees, the Constitution Bench observed as under:-

"3 ..But, a regular process of recruitment or appointment has to be resorted to, when regular vacancies in posts, at a particular point of time, are to be filled up and the filling up of those vacancies cannot be done in a haphazard manner or based on patronage or other considerations. Regular appointment must be the rule.

6. The power of a State as an employer is more limited than that of a private employer inasmuch as it is subjected to constitutional limitations and cannot be exercised arbitrarily (see Basu's Shorter Constitution of India). Article 309 of the Constitution gives the Government the power to frame rules for the purpose of laying down the conditions of service and recruitment of persons to be appointed to public services and posts in connection with the affairs of the Union or any of the States. That article contemplates the drawing up of a procedure and rules to regulate the recruitment and regulate the service conditions of appointees

appointed to public posts. It is well acknowledged that because of this, the entire process of recruitment for services is controlled by detailed procedures which specify the necessary qualifications, the mode of appointment, etc. If rules have been made under Article 309 of the Constitution, then the Government can make appointments only in accordance with the rules. The State is meant to be a model employer. The Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959 was enacted to ensure equal opportunity for employment seekers. Though this Act may not oblige an employer to employ only those persons who have been sponsored by employment exchanges, it places an obligation on the employer to notify the vacancies that may arise in the various departments and for filling up of those vacancies, based on a procedure. Normally, statutory rules are framed under the authority of law governing employment. It is recognised that no government order, notification or circular can be substituted for the statutory rules framed under the authority of law. This is because, following any other course could be disastrous inasmuch as it will deprive the security of tenure and the right of equality conferred on civil servants under the constitutional scheme. It may even amount to negating the accepted service jurisprudence. Therefore, when statutory rules are framed under Article 309 of the Constitution which are exhaustive, the only fair means to adopt is to make appointments based on the rules so framed.

11. In addition to the equality clause represented by Article 14 of the Constitution, Article 16 has specifically provided for equality of opportunity in matters of public employment. Buttressing these fundamental rights, Article 309 provides that subject to the provisions of the Constitution, Acts of the legislature may regulate the recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of a State. In view of the interpretation placed on Article 12 of the Constitution by this Court, obviously, these principles also govern the instrumentalities that come within the purview of Article 12 of the Constitution. With a view to make the procedure for selection fair, the Constitution by Article 315 has also created a Public Service Commission for the Union and the Public Service Commissions for the States. Article 320 deals with the functions of the Public Service Commissions and mandates consultation with the Commission on all matters relating to methods of recruitment to civil services and for civil posts and other related matters. As a part of the affirmative

action recognised by Article 16 of the Constitution, Article 335 provides for special consideration in the matter of claims of the members of the Scheduled Castes and Scheduled Tribes for employment. The States have made Acts, rules or regulations for implementing the above constitutional guarantees and any recruitment to the service in the State or in the Union is governed by such Acts, rules and regulations. The Constitution does not envisage any employment outside this constitutional scheme and without following the requirements set down therein.

12. But the fact that such engagements are resorted to, cannot be used to defeat the very scheme of public employment. Nor can a court say that the Union or the State Governments do not have the right to engage persons in various capacities for a duration or until the work in a particular project is completed. Once this right of the Government is recognised and the mandate of the constitutional requirement for public employment is respected, there cannot be much difficulty in coming to the conclusion that it is ordinarily not proper for the Courts whether acting under Article 226 of the Constitution or under Article 32 of the Constitution, to direct absorption in permanent employment of those who have been engaged without following a due process of selection as envisaged by the constitutional scheme.

16. In B.N. Nagarajan v. State of Karnataka this Court clearly held that the words "regular" or "regularisation" do not connote permanence and cannot be construed so as to convey an idea of the nature of tenure of appointments. They are terms calculated to condone any procedural irregularities and are meant to cure only such defects as are attributable to methodology followed in making the appointments. This Court emphasised that when rules framed under Article 309 of the Constitution are in force, no regularisation is permissible in exercise of the executive powers of the Government under Article 162 of the Constitution in contravention of the rules. These decisions and the principles recognised therein have not been dissented to by this Court and on principle, we see no reason not to accept the proposition as enunciated in the above decisions. We have, therefore, to keep this distinction in mind and proceed on the basis that only something 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 regularised and that it alone can be regularised and granting permanence of employment is a totally different concept and cannot be equated with regularisation.

17. We have already indicated the constitutional scheme of public employment in this country, and the executive, or for that matter the court, in appropriate cases, would have only the right to regularise an appointment made after following the due procedure, even though a non-fundamental element of that process or procedure has not been followed. This right of the executive and that of the court would not extend to the executive or the court being in a position to direct that an appointment made in clear violation of the constitutional scheme, and the statutory rules made in that behalf, can be treated as permanent or can be directed to be treated as permanent.

26. With respect, why should the State be allowed to depart from the normal rule and indulge in temporary employment in permanent posts? This Court, in our view, is bound to insist on the State making regular and proper recruitments and is bound not to encourage or shut its eyes to the persistent transgression of the rules of regular recruitment. The direction to make permanentthe distinction between regularisation and making permanent, was not emphasised herecan only encourage the State, the model employer, to flout its own rules and would confer undue benefits on a few at the cost of many waiting to compete. With respect, the direction made in para 50 (of SCC) of Piara Singh is to some extent inconsistent with the conclusion in para 45 (of SCC) therein. With great respect, it appears to us that the last of the directions clearly runs counter to the constitutional scheme of employment recognised 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.

33. By and large what emerges is that regular recruitment should be insisted upon, only in a contingency can an ad hoc appointment be made in a permanent vacancy, but the same should soon be followed by a regular recruitment and that appointments to non-available posts should not be taken note of for regularisation.

The cases directing regularisation have mainly proceeded on the basis that having permitted the employee to work for some period, he should be absorbed, without really laying down any law to that effect, after discussing the constitutional scheme for public employment.

39. There have been decisions which have taken the cue from Dharwad case and given directions for regularisation, absorption or making permanent, employees engaged or appointed without following the due process or the rules for appointment. The philosophy behind this approach is seen set out in the recent decision in Workmen v. Bhurkunda Colliery of Central Coalfields Ltd. though the legality or validity of such an approach has not been independently examined. But on a survey of authorities, the predominant view is seen to be that such appointments did not confer any right on the appointees and that the Court cannot direct their absorption or regularisation or re-engagement or making them permanent.

43. Thus, it is clear that adherence to the rule of equality in public employment is a basic feature of our Constitution and since the rule of law is the core of our Constitution, a court would certainly be disabled from passing an order upholding a violation of Article 14 or in ordering the overlooking of the need to comply with the requirements of Article 14 read with Article 16 of the Constitution. Therefore, consistent with the scheme for public employment, this Court while laying down the law, has necessarily to hold that unless the appointment is in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointee. If it is a contractual appointment, the appointment comes to an end at the end of the contract, if it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued. Similarly, a temporary employee could not claim to be made permanent on the expiry of his term of appointment. It has also to be clarified that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. It is not open to the court

to prevent regular recruitment at the instance of temporary employees whose period of employment has come to an end or of ad hoc employees who by the very nature of their appointment, do not acquire any right. The High Courts acting under Article 226 of the Constitution, should not ordinarily issue directions for absorption, regularisation, or permanent continuance unless the recruitment itself was made regularly and in terms of the constitutional scheme. Merely because an employee had continued under cover of an order of the court, which we have described as "litigious employment" in the earlier part of the judgment, he would not be entitled to any right to be absorbed or made permanent in the service. In fact, in such cases, the High Court may not be justified in issuing interim directions, since, after all, if ultimately the employee approaching it is found entitled to relief, it may be possible for it to mould the relief in such a manner that ultimately no prejudice will be caused to him, whereas an interim direction to continue his employment would hold up the regular procedure for selection or impose on the State the burden of paying an employee who is really not required. The courts must be careful in ensuring that they do not interfere unduly with the economic arrangement of its affairs by the State or its instrumentalities or lend themselves the instruments to facilitate the bypassing of the constitutional and statutory mandates."

15. With regard to equality between daily wage employees and regular employees, the Constitution Bench observed as under:-

"48. It was then contended that the rights of the employees thus appointed, under Articles 14 and 16 of the Constitution, are violated. It is stated that the State has treated the employees unfairly by employing them on less than minimum wages and extracting work from them for a pretty long period in comparison with those directly recruited who are getting more wages or salaries for doing similar work. The employees before us were engaged on daily wages in the department concerned on a wage that was made known to them. There is no case that the wage agreed upon was not being paid. Those who are working on daily wages formed a class by themselves, they cannot claim that they are discriminated as against those who have been regularly recruited on the basis of the relevant rules. No right can be founded on an employment on daily wages to claim that such

employee should be treated on a par with a regularly recruited candidate, and made permanent in employment, even assuming that the principle could be invoked for claiming equal wages for equal work. There is no fundamental right in those who have been employed on daily wages or temporarily or on contractual basis, to claim that they have a right to be absorbed in service. As has been held by this Court, they cannot be said to be holders of a post, since, a regular appointment could be made only by making appointments consistent with the requirements of Articles 14 and 16 of the Constitution. The right to be treated equally with the other employees employed on daily wages, cannot be extended to a claim for equal treatment with those who were regularly employed. That would be treating unequals as equals. It cannot also be relied on to claim a right to be absorbed in service even though they have never been selected in terms of the relevant recruitment rules. The arguments based on Articles 14 and 16 of the Constitution are therefore overruled."

16. With regard to application of doctrine of "equal pay for equal work" in case of regularization of services of daily wage employees, the Constitution Bench observed as under:-

" 44. The concept of "equal pay for equal work" is different from the concept of conferring permanency on those who have been appointed on ad hoc basis, temporary basis, or based on no process of selection as envisaged by the rules. This Court has in various decisions applied the principle of equal pay for equal work and has laid down the parameters for the application of that principle. The decisions are rested on the concept of equality enshrined in our Constitution in the light of the directive principles in that behalf. But the acceptance of that principle cannot lead to a position where the court could direct that appointments made without following the due procedure established by law, be deemed permanent or issue directions to treat them as permanent. Doing so, would be negation of the principle of equality of opportunity. The power to make an order as is necessary for doing complete justice in any cause or matter pending before this Court, would not normally be used for giving the go- by to the procedure established by law in the matter of public employment. Take the situation arising in the cases before us from the State of Karnataka. Therein, after Dharwad decision1 the Government

had issued repeated directions and mandatory orders that no temporary or ad hoc employment or engagement be given. Some of the authorities and departments had ignored those directions or defied those directions and had continued to give employment, specifically interdicted by the orders issued by the executive. Some of the appointing officers have even been punished for their defiance. It would not be just or proper to pass an order in exercise of jurisdiction under Article 226 or 32 of the Constitution or in exercise of power under Article 142 of the Constitution permitting those persons engaged, to be absorbed or to be made permanent, based on their appointments or engagements. Complete justice would be justice according to law and though it would be open to this Court to mould the relief, this Court would not grant a relief which would amount to perpetuating an illegality."

17. With respect to the direction issued by the High Court the employees engaged on daily wages be paid wages equal to the salary and allowances that are being paid to the regular employees of their cadre, with effect from the dates of their engagement on daily wages, the Constitution Bench observed as under:-

"55. In cases relating to service in the Commercial Taxes Department, the High Court has directed that those engaged on daily wages, be paid wages equal to the salary and allowances that are being paid to the regular employees of their cadre in government service, with effect from the dates from which they were respectively appointed. The objection taken was to the direction for payment from the dates of engagement. We find that the High Court had clearly gone wrong in directing that these employees be paid salary equal to the salary and allowances that are being paid to the regular employees of their cadre in government service, with effect from the dates from which they were respectively engaged or appointed. It was not open to the High Court to impose such an obligation on the State when the very question before the High Court in the case was whether these employees were entitled to have equal pay for equal work so called and were entitled to any other benefit. They had also been engaged in the teeth of directions not to do so. We are, therefore, of the view that, at best, the Division Bench of the High Court should have directed that wages equal to the salary that is being paid to regular employees be paid to these daily-wage employees with effect from the date of its judgment. Hence, that part of the direction of the Division Bench is

modified and it is directed that these daily-wage earners be paid wages equal to the salary at the lowest grade of employees of their cadre in the Commercial Taxes Department in government service, from the date of the judgment of the Division Bench of the High Court." (Emphasis Supplied)

18. In a nutshell, the legal position which emerges from Umadevis case (supra) can be delineated as under: -

(i) the government is not precluded from engaging workers on daily wages;

(ii) appointment to public posts can only be made in terms of statutory rules framed under Article 309 of Constitution of India;

(iii) an employee engaged on daily wage basis cannot claim to be made a permanent employee;

(iv) the courts cannot direct regularization of services of workers engaged on daily wage basis;

(v) the doctrine of equal pay for equal work has no application in case of regularization of services of workers engaged on daily wage basis and

(vi) in cases where services of workers engaged on daily wage basis gets regularized, such workers cannot claim parity with regular employees with regard to payment of salary and other allowances for the period prior to regularization of their services. Suffice would it be to state that in para 55 of its decision, the Constitution Bench clearly held that under no circumstances can it be directed that wages in the regular scale of pay be paid to daily wage employees whose services are subsequently regularized.

19. Thus, in view of the dictum of law laid down by Supreme Court in Umadevis case (supra), the direction issued by the CAT in the impugned judgment that the petitioner is entitled to get increments in salary from the date of his initial entry in CPWD is clearly erroneous. In that view of the matter, impugned judgment insofar it directs that the petitioner is entitled to get increments in his salary on the basis of date of his initial entry in CPWD is set aside.

20. The writ petition is accordingly allowed. Impugned order and judgment dated 08.09.2008 passed by the Central Administrative Tribunal is set aside and OA No.1387/2007 filed by the respondents is dismissed.

21. No costs.