

HIGH COURT OF JAMMU AND KASHMIR AT JAMMU

SWP No. 525/2005
CMP No.583/2005
c/w
SWP No.232/2004
CMP No.194/2006

Date of decision:25.03.2010

Naresh Kumar	vs.	State of J&K & ors.
Naresh Kumar	vs.	State of J&K & ors.

Coram :-
Mr. Justice J. P. Singh, Judge.

Appearing Counsel:

For Petitioner(s)	:	Mr. S.S.Lehar, Sr. Advocate with Mr. Meharban Singh, Advocate.
For Respondent(s)	:	M/S S.Hakim Dy.A.G & S.K.Anand, Advocate.

i)	Whether approved for reporting in Press/Journal/Media	: Yes/No
ii)	Whether to be reported in Digest/Journal	: Yes/No

The dispute between Naresh Kumar-petitioner and Sudesh Kumar-respondent, leading to the filing of these two Writ Petitions pertains to the post of Foreman in the State Health Transport Organization of the Health and Medical Education Department of the State Government.

Facts necessary for determination of the dispute may be stated thus:

The petitioner, a Pump Mechanic in the State Malariologist Office, was ordered to be adjusted as Foreman in the pay scale of 600-925, in his own pay and grade against the vacancy caused due to the retirement of Hardit Singh-Foreman, until necessary formalities as provided under rules in respect of filling up of the post were completed vide Director Health Services Jammu and Kashmir's Communication No.DHS/EST/NG-16/1949-51 dated 09.07.1986. It was indicated that the petitioner would not claim any superior lien at the time of selection to the post by the competent Authority.

The Director's order was not, however, implemented leading to petitioner's approaching this Court by his Writ Petition SWP No. 745/1986 when an interim order was issued against the respondents to permit the petitioner to join as Foreman. This Writ Petition was later dismissed in default of petitioner's appearance. Its restoration, however, did not mature. The dismissal of the petitioner's Writ Petition appears to have gone un-noticed by the State-respondents,

who did not disturb the petitioner's continuance as Foreman despite dismissal of his Writ Petition.

The petitioner filed another Writ Petition SWP No.708/1995, which was disposed of *inter alia* providing as follows:-

"In the circumstances, it will be innocuous to dispose of this Writ Petition by directing the official respondents to consider the case of the petitioner for regularization of his promotion on the post of Foreman in the State Health Transport Organization, in accordance with rules, within three months, from the date of receipt of this order and to pass appropriate orders thereon.

29.10.1996

Sd/-
Hon'ble Judge"

The Writ Court's order was questioned by the State Government in Appeal by LPA(SW) No.34/1997 which was disposed of on 18.08.1999 with the following observations/clarifications:-

"A perusal of the above para would indicate that the State has been left free to consider the case and pass such order as may be deemed proper. If the respondent/writ petitioner is not eligible or there is any impediment in the matter of his regularization then that would be a factor that should be taken note of by the State Government. The right of the state has not been hampered in any manner by any observations made by the Court in the Writ Petition. The right of consideration means right to be considered as per the rules and also taking into consideration the concept of equality as envisaged in Articles 14 and 16 of the Constitution of India. As the State has been left free to deal with the matter, it is not necessary to interfere with the order passed by the learned single judge. This appeal is found to be without any merit and is dismissed subject to the right of the State to consider the case of the respondent/writ petitioner in the manner indicated by the learned Single Judge..."

The petitioner's case was accordingly considered in the light of the directions aforementioned; but finding no merit in it, the claim

was rejected vide Government order No.261-HME of 2001 dated 11.04.2001.

The petitioner again approached this Court questioning the aforementioned order by his Writ Petition SWP No.776/2001, which was disposed of vide order of April 12, 2002 providing as follows:-

“ No doubt when a person continues on particular post in pursuance of court direction that would not confer any extra benefit on him. But in present case there was no Court direction for the almost four years i.e. after dismissal of petitioner's Writ Petition on 18.9.1991 till the filing of the fresh writ petition which came to be disposed of i.e. Writ Petition(S) 708/1995. For this period there was no Court direction notwithstanding petitioner was permitted to continue as Foreman. It was this aspect of the matter which was required to be considered. Respondent-State is accordingly directed to reconsider the issue in the light of decision given in Writ Petition No.708/1995. Consideration is to question as to whether services of the petitioner are to be regularized or not and not the question as to whether he is to be promoted to that post. Let decision be taken at the earliest preferably within a period of three months from the date copy of the order passed by this Court is made available by the petitioner to the respondents. Till then status-quo shall be maintained. Disposed of as such.”

He filed yet another Writ Petition SWP No.1013/03 which was disposed of on 06.11.2003 with the following directions:-

“In view of the stand taken by the respondents, this petition is disposed of with the direction to consider the claim of the petitioner for regularization in accordance with law and pass appropriate orders within a period of three months. It is further directed that respondents shall pass a speaking order in respect of claim of the petitioner and same shall be conveyed to the petitioner.”

The petitioner's case was accordingly re-considered but finding him ineligible for regularization, the Director Health Services, Jammu directed his

repatriation to the Malaria Organization against his own post of Pump Mechanic. The charge of the post held by the petitioner was assigned to respondent-Sudesh Kumar Fitter, the senior most person in State Health Transport Organization with better merit.

The petitioner has questioned the Director's order of January 24, 2004 by his SWP No.232/2004.

During the pendency of petitioner's aforementioned Writ Petition, the Director Health Services, Jammu, acting on the recommendations of the Divisional Departmental Promotion Committee, ordered the promotion of Sudesh Kumar-respondent working as Fitter in SHTO, Jammu, as Foreman in the pay scale of Rs.5700-10100 w.e.f. 24.01.2004 on regular temporary basis, subject however, to the final outcome of the Writ Petition, if any pending in the Court and without prejudice to the superior claim of anyone else.

It was in these circumstances that the petitioner filed his Second Writ Petition No.525/2005

questioning the aforementioned order of Director Health Services, Jammu.

I have heard learned counsel for the parties and considered their submissions in the light of the documents on records.

Perusal of various orders passed in earlier round of litigations by this Court reveals that the petitioner had not been found entitled to promotion against the post of Foreman in the State Health Transport Organization and all that the Court wanted the State-respondents to consider was his entitlement or otherwise to regularization against the post on which he had been working for all these years.

Learned counsel for the parties were not at variance that the Jammu and Kashmir Health and Medical (Subordinate) Services Recruitment Rules, 1992, governed the filling up of the post of Foreman.

According to the rules, the post is required to be filled up 100% by promotion from Class-V Category (A) having five years experience in that category. Category V comprises of Driver/Driver-cum-Mechanic

possessing middle pass with Hill Driving License and experience as Mechanic.

No direct recruitment to the post is contemplated by the rules.

There being no direct recruitment to the post of Foreman and the petitioner who neither belongs to Class V Category (A) post nor possesses requisite qualification of having Driving License which may entitle him to consideration for promotion, would have thus no claim to the post of Foreman additionally because of his belonging to an Organization other than the State Health Transport Organization, where the post had become available.

Continuance of the petitioner, though for long, on the post where he was adjusted in his own pay and grade until necessary formalities in respect of filling up of the post under rules were completed, would not, in my opinion, clothe him with any additional right to seek regularization against the post which in terms of the rules framed under Section 124

of the Constitution of Jammu and Kashmir, prescribe specific mode for its filling up.

Regularization in Service Jurisprudence is contemplated only in respect of irregular appointments/adjustments, for one or the other reasons and not in case of appointments/adjustments which are *per se* illegal and against the rules governing the field.

Regularization against a post borne on the cadre of a service, de hors the rules framed under the Constitution, is therefore impermissible, is a position well settled in law. Profitable in this context would be to refer to few paragraphs of the judgment delivered by Hon'ble Supreme Court of India in *Secretary, State of Karnataka and ors. versus Uma Devi and Ors.*, reported as AIR 2006 SC, 1806, where dealing with a similar question, it was held as follows:-

"14. Even at the threshold, it is necessary to keep in mind the distinction between regularization and conferment of permanence in service jurisprudence. In *State of Mysore v. S.V.Narayanappa* [1967 (1) SCR 128], this Court stated that it was a mis-conception to consider that regularization meant permanence. IN *R.N.Nanjundappa v. T.Thimmiah & Anr.* [(1972) 2 SCR 799], this Court dealt with an argument that regularization would mean conferring the quality of permanence on the appointment. This Court stated:-
"Counsel on behalf of the respondent contended that regularization would mean conferring the quality of permanence on the appointment, whereas counsel on behalf of the State contended that regularization did not mean permanence but that it was a case of regularization of

the rules under Article 309. Both the contentions are fallacious. If the appointment itself is in infraction of the rules or if it is in violation of the provisions of the Constitution, illegally cannot be regularized. Ratification or regularization 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. Regularization cannot be said to be a mode of recruitment. To accede to such a proposition would be to introduce new head of appointment in defiance of rules or it may have the effect of setting at naught the rules."

In *B.N.Nagarajan & Ors. v. State of Karnataka & Ors.* [(1979)] held that the words "regular" or "regularization" 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 emphasized that when rules framed under Article 309 of the Constitution of India are in force, no regularization 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 recognized 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 regularized and that it alone can be regularized and granting permanence of employment is a totally different concept and cannot be equated with regularization.

15. We have already indicated the constitutional scheme of public employment in this Court, and the executive, or for that matter the Court, in appropriate cases, would have only the right to regularize 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.

16. Without keeping the above distinction in mind and without discussion of the law on the question or the effect of the directions on the constitutional scheme of appointment, this Court in *Daily Rated Casual Labour v. Union of India & Ors.* (1988 (1) SCR 598) directed the Government to frame a scheme for absorption of daily rated casual labourers continuously working in the Posts and Telegraphs Department for more than one year. This Court seems to have been swayed by the idea that India is a socialist republic and that implied the existence of certain important obligations which the State had to discharge. While it might be one thing to say that the daily rated workers, doing the identical work, had to be paid the wages that were being paid to those who are regularly appointed and are doing the same work, it would be quite a different thing to say that a socialist republic and its Executive, is bound to give permanence to all those who are employed as casual labourers or temporary hands and that too without a process of selection or without following the mandate of the Constitution and the laws made thereunder concerning public employment. The same approach was made in *Bhagwati Prasad v. Delhi State Mineral Development Corporation* (1989 Suppl (2) SCR 5130) where this Court directed regularization of daily rated workers in phases and in accordance with seniority."

The order passed by Director Health Services, Jammu on the premise that putting the petitioner over the head of Superior staff having Superior status and rank in SHTO as Foreman by skipping over three-four steps promotion was not justified additionally because both the organizations had their own seniority and promotion prospects and an employee borne on one organization under law was disabled for consideration for promotion/regularization in other department/organization, cannot thus, in view of the above legal position be faulted as the petitioner having no right to the post of Foreman in SHTO is disentitled to maintain his Writ Petitions seeking directions against the respondents questioning their orders and the arrangement devised for adjustment/promotion against the post of Foreman. Petitioner's repatriation to his parent organization does not violate any fundamental, legal or statutory right of the petitioner justifying exercise of extra ordinary writ jurisdiction.

Both the petitioner's Writ Petition are thus found to be misconceived and without merit. These are, accordingly, dismissed.

(J. P. Singh)
Judge

JAMMU:
25.03.2010
Pawan Chopra