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ALLAHABAD HIGH COURT (LUCKNOW BENCH)

SHITLA PRASAD — Appellant

Vs.

STATE OF U.P.AND OTHERS — Respondent

(Before : S.N.Shukla, J)

Writ Petition No.5134 (S/S) of 2000

Decided on : 23-12-2005

A. Service Law Regularization Daily wage employees Claim for regularization as Pump Attendants in Nagar Palika Government Order dated 8.1.1992 provides for regularization of daily wage employees appointed before 11.10.1989 with three years' service (240 days/year) Petitioners, working continuously, are entitled to minimum pay scale of regular employees per interim court order Counter affidavit by Nagar Palika claims regularization posts are unsanctioned and petitioners lack technical qualifications for Pump Operator post State Government is responsible for increasing employee strength and regularizing services on unsanctioned or ad hoc posts Petitioners assert qualification by long service and claim equal pay for equal work Uttar Pradesh Regularization of Ad hoc Appointments (On post out side the purview of the Public Service Commission) Rules, 1979, and subsequent notifications support regularization after three years' continuous service. (Paras 3, 4, 5, 6, 7)

B. Service Law Appointment Challenge to appointment of Respondents 5 & 6 as Clerks Petitioner (a daily wage Pump Attendant) claims appointment preference against vacant clerk posts for Scheduled Caste quota based on Government Order dated 26.6.1992 and 31.8.1998, which prioritizes daily wage employees employed before 11.10.1989 for vacancies arising from death or retirement Nagar Palika argues petitioner, a Group D daily wager, is not on feeder post and is ineligible for clerk promotion Petitioners challenge

Respondents 5 & 6's appointments as being made arbitrarily, without procedure, on ministerial dictate, and in violation of Government Orders and reservation rules Interim court order stayed Respondents 5 & 6's appointments Locus standi of petitioner upheld against challenge, citing right to equal opportunity in employment and previous judgments supporting consideration of eligible daily wagers for higher posts. (Paras 8, 9, 10, 11, 12, 13)

C. Service Law Illegal Appointments Quashing of appointments Appointments of Respondents 5 and 6 as Clerks made solely on Minister's direction without following prescribed procedure or rules are illegal and arbitrary Such appointments violate constitutional requirements of Articles 14 and 16, which mandate fairness and equality in public employment Quashing of these appointments is justified as they constitute a backdoor entry, detrimental to service efficiency, and breed nepotism and corruption. (Paras 11, 12, 15, 16, 20, 21, 22)

D. Service Law Regularization Directives for consideration Before any direct recruitment to Group D posts, petitioners are to be considered for regularization within sanctioned strength according to rules State Government/Nagar Palika Parishad is directed to expeditiously consider petitioners' regularization under relevant rules against sanctioned posts If rules permit, before making direct appointments to vacant Class III posts, the petitioner in Writ Petition No. 5134 (S/S) of 2000 shall be considered based on eligibility and law. (Para 23)

E. Service Law Regularization Judicial precedent and principles Reliance on Praveen Kumar v. State of U.P. & others (2003) for directions on processing regularization of daily wage employees, creation of posts, and utilizing existing posts for regularization before direct recruitment Reliance on State of Haryana and others v. Pyare Singh and others (1992) asserting effort to regularize work-charged and casual labour, with presumption of regular need if continued for long spells Supreme Court observations in Dr. M.A. Haque & others v. Union of India & others (1993) and State of H.P. v. Suresh Kumar Verma & another (1996) emphasize strict adherence to recruitment rules, avoiding backdoor entries, and requiring recruitment according to rules. (Paras 13, 14, 15, 16)

F. Service Law Regularization Non-claimable as a matter of right Regularization cannot be claimed as a matter of right and an illegal appointment cannot be legalized through regularization, only irregularities can

be regularized, not illegalities Daily wagers, in absence of statutory provision, are not entitled to regularization Constitutional scheme rejects backdoor appointments and requires state actions to conform to Articles 14 and 16. (Paras 17, 18)

JUDGMENT

S.N. Shukla, J.—Heard Sri Ramesh Pandey, learned counsel for the petitioner and Sri A.K. Bajpai, learned counsel for the respondents No.3 and 4 as well as learned Standing Counsel representing the respondents No.1 and 2 and Mr. R. Roy for the respondents No.5 and 6.

2. There are three writ petitions filed by the petitioner and all are related to each other involving the same question. Hence, I feel it proper to dispose of all the petitions by following common order.

3. The writ petition No.4820 (S/S) of 1996 has been filed to issue a writ of mandamus to absorb and regularize the petitioner on the post of Pump Attendant in Jal Kal Vibagh, Nagar Palika, Sultanpur and to pay the similar pay scale and allowance as are admissible to the regular and permanent Pump Attendants.

4. Through this writ petition they have claimed the regularization on the basis of a Government Order dated 8.1.1992 (Annexure No.2 to the writ petition) which speaks that those daily wages employees who were appointed before the date 11.10.1989 and have completed three years' services, 240 days in each and every year the proceedings for their regularization are going on and those who have not completed 3 years service by that date, shall also be absorbed in future vacancies and they shall not be terminated from the service. Claiming the benefit of the aforesaid Government Order they have filed the seniority list issued by the Executive Officer, Nagar Palika, Sultanpur (Annexure No.1 to the writ petition) which specified the department, their names, post and the dates of engagement.

5. After perusing the aforesaid seniority list, it is evident that some of them were engaged prior to the out of date i.e. 11.10.1989 fixed by the Government Order dated 8th January, 1992 and some of them were engaged later on in the subsequent year. However, since they are continuously working as such, by way of interim order passed on 9th August 1996 by this Court, it was directed that the petitioner shall be paid minimum of the pay scale as payable to the regular employees and admittedly, they are getting minimum of the pay scale on the post of Pump Attendant. A Government Order dated 21st October, 1989 is also on record as Annexure No. 4 to the writ petition, which speaks that on 19th October, 1989 Government had taken decision to provide regular pay scale who have completed three years continuous service, 240 days in each and every year, till 19th October, 1989 and for the said purposes the proposals were sought from all the local bodies through all District Magistrate of the U.P. The District Magistrate, Sultanpur, through Annexure No.5 to the writ petition, also provided the proposal to the Government vide letter dated 15th July,

1994 annexing therewith a list (Annexure No.6) containing their names.

6. A shortcounter affidavit has been filed on behalf of the opposite parties No.3 and 4. Through their counter affidavit, they have submitted that none of the post, against which the petitioners are claiming their regularization, are sanctioned nor they belong to the technical services nor any of them is technically qualified to be absorbed in service against the post of Pump Operators. They have submitted that post of Pump Operator is purely technical in nature. They have also submitted that the opposite parties referred the case of the petitioners and as well as many other similarly situated daily wages employees of Nagar Palika Parishad working with it and its auxiliary unit to the State Government for issuance of suitable orders for regularization and it is solely outlook and the wisdom of the State Government to increase the sufficient strength of the employees and further to regularize the services of the employees working against unsanctioned post and against ad hoc arrangement made by the Nagar Palika Parishad in the public interest.

7. Through the rejoinder affidavit, the petitioner has controverted the facts stated in the shortcounter affidavit and have submitted that they possess requisite qualification prescribed in view of their long continuous service on account of which they have right to be considered for regularization in service. They have submitted that the State Government has framed the Uttar Pradesh Regularization of Ad hoc Appointments (On post out side the purview of the Public Service Commission) Rules, 1979, in which three years continuous service has been made precedent for regularization. Keeping in view of the aforesaid Rules, the State Government has issue notifications regarding regularization in several departments. They have also claimed that they are entitled to equal pay for equal work as they are discharging the similar duties like regularly appointed employees of the department and the respondents are under legal obligation to pay salary to the petitioners.

8. Writ petition No.4135 (S/S) of 2000 has been filed to issue a writ of mandamus to consider the petitioner for appointment on the vacant post of clerk against the quota of Scheduled Caste Category under the terms of Government Order dated 26.6.1992 and 31.8.1998 of the Director of Local Bodies, Government of Uttar Pradesh, Lucknow.

9. When two posts of clerk have fallen vacant due to retirement of Mohd. Mustaq and Bhatrat Singh in the Nagar Palika Parishad, the petitioner Sri Shitla Prasad filed the present writ petition No.4135 (S/S) of 2005 claiming for appointment against the said post with the averments that he possessed the eligibility criteria for appointment on the post of clerk in accordance with the provisions of Gvoernment Order dated 26.6.1992. the aforesaid Government Order dated 26.6.1992 provides that against the vacancy arising out of death or retirement, the daily wages employees of the local bodies who have been working since before 11.10.1989 would be appointed and in terms of the aforesaid Government Order he has submitted that he is entitled to be given preference and weightage in case of appointment.

10. A short counter affidavit has been filed on behalf of respondent No.3 and 4 in which it

has been submitted that the petitioner is working on Group D post of Pump Attendant as a daily wager and is getting minimum of the pay scale of the post by virtue of interim orders dated 9th August, 1996 in writ petition No.4820 (S/S) of 1996. It has been further submitted that neither he is working on the feeder post for promotion to the post of clerk nor he is eligible otherwise so as to consider for the promotion to the post of clerk and accordingly the claim of the petitioner has been denied by the opposite party No.3 and 4.

11. Through the writ petition No.5134 (S/S) of 2000, the petitioner has assailed the appointment orders of respondents No.5 and 6 which are annexed as Annexure No.4 and 5 to the writ petition, on the grounds that the appointments of the respondents No.5 and 6 have been made on the dictate of Hon'ble Minister without following any procedure prescribed under the law and in clear violation of the Government Order dated 26.6.1992 as well as without following the provisions of U.P. Public Service (reserved for Scheduled Castes, Scheduled Tribes and other Backward Classes, 1994). The petitioner has submitted that he has already filed a writ petition No.4135 (S/S) of 2000 to consider for appointment on the vacant post of clerk against the quota of Scheduled Caste Category upon which the learned counsel for the State was directed to seek instructions. He has also submitted that in the earlier writ petition he has clearly mentioned that two posts of clerk are lying vacant in the office of the Nagar Palika Parishad substantively and keeping in view his continuous working since last more than 16 years and eligibility, he claimed his appointment against the said post. The petitioner has submitted that the appointment of the respondents No.5 and 6 have been made in pursuance of direction of Hon'ble Minister in illegal and arbitrary manner. This Court by way of interim order dated 8th September, 2000, stayed the operation of the orders dated 26.6.2000 (Annexure No.4) and 30.8.2000 (Annexure No.5) pertaining to the appointments of respondents No.5 and 6 with the direction that their appointments shall remain in abeyance till the next date of listing. After perusing the order sheet, it is apparent that the aforesaid interim order is continued till date.

12. A counter affidavit has been filed on behalf of the respondents No.3 and 4 wherein it has been submitted that the petitioner was appointed as daily wager and he is working as such and in any way the petitioner is not entitled for appointment against the post of clerk. Further it has been submitted that the respondents No.5 and 6 had served in the Nagar Palika under contractor who had taken assignment from the Nagar Palika for different nature of work. They approach the Hon'ble Minister of the department who recommended their cases for sympathetic consideration. However, appointment was made on the basis of merits and the Chairman of the Nagar Palika was fully empowered to make appointment on the substantive vacancy in exercise of powers conferred on him under Section 74 of the Municipalities Act, 1916. Considering the averments of the counter affidavit, I find that the respondent No.6 has submitted in his counter affidavit that the petitioner does not fulfill the condition mentioned in the Government Order dated 26.6.1992 and as such neither he is eligible nor entitled for appointment on the post of clerk under the said Government Order. It has further been submitted that they have also not completed three years continuous service prior to 11.10.1989.

13. During the course of arguments, the respondents No.3 and 4 raised objection against the maintainability of the writ petition filed by the petitioner on the ground that he has no locus standi to challenge the appointment of the respondents No.5 and 6 as by way of the appointment of the respondents No.5 and 6, they have not been deprived of their right as they are working as Pump Attendant on daily wage basis post. In reply to this, the learned counsel for the petitioner has placed reliance on judgment of this Court in Surendra Prasad Tewari v. U.P. Rajya Krishi Utpadan Mandi Parishad and others, passed in writ petition No.6475 (S/B) of 1992 in which it has been held that the temporary appointee has no right to the post and only a permanent appointee has a right to the permanent post and permanent appointment should only be made under Article 16 of the Constitution of India, which requires equal liberty for getting such appointments. The learned counsel for the petitioner has also placed reliance upon a judgment of the Supreme Court Ramesh & others v. Unit Electricity Board and others, (1998) 4 SCC 319 and submitted that due to, appointments of the respondents No.5 and 6, they have been deprived of their rights otherwise, in the light of the Government Order referred in above, they had become eligible to consider for appointment or Class III Post as they possess the qualification for appointment on such post. I find force in the submissions of the learned counsel for the petitioner, hence the objection raised by the learned counsel for the respondents No.3 and 4 are rejected. In support of his contention the petitioner for their regularization, the learned counsel for the petitioner has placed reliance on a judgment of this Court in Praveen Kumar v. State of U.P. & others, reported in 2003 (4) ESC (All) page 2100 in which this Court after considering several aspects as well as the judgments rendered by the Apex Court on this point, has issued the following directions:

23. (1) The Nagar Palika Parishads/Nagar Nigam are directed to process relevant details and send the list of all such daily wage employees who were engaged on or prior to June 29, 1991 and are still continuing along with requisite papers for creation of posts to the State Government within a period of two months and the State Government in its turn shall pass appropriate orders for creation of posts within a period of six weeks from the date of receipt of the papers. In the case of those Nagar Nigams/Nagar Palika Parishads which have already submitted such lists for creation of post, the State Government shall pass appropriate speaking orders in this regard within a period of six weeks from today.

(2) The appointing authority after receipt of orders from the State Government for creation of posts, shall consider the matter of regularization under the provisions of Regularisation Rules in relation to Class IV daily wage employees already working in the service for the period indicated above within a period not later than six weeks thereafter in accordance with the presented procedure and having due regard to the Government Order dated 10.7.2003.

(3) The Nagar Palika Parishads/Nagar Nigam shall initiate action for regularization on the posts already created and existing taking into reckoning the reservation policy and no appointment shall be made upon any of the posts advertised by the Nagar Nigam/Nagar

Palika Parishad as backlog vacancies for SC/ST/OBC under the directions of the State Government and appointment pursuant to such directions shall remain in abeyance till such time, all the posts created and existing are utilized in regularization of daily wage employees working in respective Nagar Nigam/Nagar Palika Parshads.

(4) All the daily wage employees in Class IV category who have completed 10 years of service as on June 29, 2001 are entitled to get minimum of the pay scales of the regularly appointed employees.

14. The learned counsel for the petitioner has also placed reliance on a judgment of State of Haryana and others v. Pyare Singh and others, (AIR 1992 SC 2130) and has submitted that on the basis of their long spell of working, the petitioner is entitled for regularization. After perusing the said judgment, I find that the Hon'ble Supreme Court has said for regularization of the workcharged employees and casual labour as under:

So far as the workcharged employees and casual labour are concerned, the effort must be to regularize them as far as possible and as early as possible subject to their fulfilling the qualifications, if any, prescribed for the post and subject also to availability of work. If a casual labourer is continued for a fairly long spell say two or three years a presumption may arise that there is regular need for his services. In such a situation, it becomes obligatory for the concerned authority to examine the feasibility of his regularization. While doing so, the authorities ought to adopt a positive approach coupled with an empathy for the person. As has been repeatedly stressed by this Court, security of tenure is necessary for an employee to give his best to the job.

15. I have also gone through some other judgments rendered by the Supreme Court. In Dr. M.A. Haque & others v. Union of India & others, (1993) 2 SCC 213. The Hon'ble Supreme Court has observed in para 9 as under;

Para 9: We cannot lose sight of the fact that the recruitment rules made under Article 309 of the Constitution have to be followed strictly and not in breach. If a disregard of the rules and the bypassing of the Public Service Commissions are permitted, it will open a backdoor for illegal recruitment without limit. In fact this Court has, of late, been witnessing a constant violation of the recruitment rules and a scant respect for the constitutional provisions requiring recruitment to the services through the Public Service Commission. It appears that since this Court has in some cases permitted regularization of the irregularly recruited employees, some Governments and authorities have been increasingly resorting to irregular recruitments. The result has been that the recruitment rules and the Public Service Commissions have been kept in cold storage and candidates dictated by various considerations are being recruited as a matter of course.

16. In the case of State of H.P. v. Suresh Kumar Verma & another, (1996) 7 SCC 562, the Supreme Court has held that: the vacancies are required to be filled up in accordance with the Rules and all the candidates who would otherwise be eligible are entitled to apply for

when recruitment is made and seek consideration of their claims on merit according to the Rules for direct recruitment along with all the eligible candidates. The appointment on daily wages cannot be a conduit pipe for regular appointments which would be a backdoor entry, detrimental to the efficiency of service and would breed seeds of nepotism and corruption. It is equally settled law that even for Class IV employee recruitment according to Rules is a precondition.

17. In case of *State of U.P. & others v. Ajay Kumar*, (1997) 4 SCC 88, in para 3 of which it has been observed that it is now settled 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. Dailywage 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. Under these circumstances, the Division Bench was clearly in error in directing the appellant to regularize the service of the respondent to the post as and when the vacancy arises and to continue him until then. The direction in the backdrop of the above facts is, obviously, illegal.

18. In the case of *Mahendra L. Jain & others v. Indore Development Authority & others*, (2005) 1 SCC 639, in para 19 of which it has been observed that the question, therefore, which arises for consideration is as to whether they could lay a valid claim for regularization of their services. The answer thereto must be rendered in the negative. Regularisation cannot be claimed as a matter of right. An illegal appointment cannot be legalized by taking recourse to regularization. What can be regularized is an irregularity and not an illegality. The constitutional scheme which the country has adopted does not contemplate any backdoor appointment. A State before offering public service to a person must comply with the constitutional requirements of Articles 14 and 16 of the Constitution. All actions of the State must conform to the constitutional requirements. A dailywager in the absence of a statutory provision in this behalf would not be entitled to regularization. (See: *State of U.P. v. Ajay Kumar* and *Jawaharlal Nehru Krishi Viswa Vidyalaya v. Bal Krishna Soni*).

19. The learned counsel for the petitioner has placed reliance before me on the Rules namely U.P. Regularisation of Ad hoc appointments (on posts out side the purview of the Public Service Commission) (Third Amendment), Rules 2001 and relying upon the said Rules he submitted that the petitioner is entitled for regularization in service in the light of the said Rules as he holds all the eligibility provided in the said Rules. The said Rules speak that the persons who were appointed prior to the date of 29th June, 1999 against GroupD post on daily wage basis and has been continuously working till the date of enforcement of this Rules, shall be considered for regularization on the basis of their suitability etc. This Rule has come into force on 21st December 2001. The learned counsel for the respondents No.3 and 4 disputes the submission of the learned counsel for the petitioner on the ground that the petitioner has been continuously working under the strength of the interim order passed by this Court.

20. After perusing the interim order passed in writ petition No.4820 (S/S) of 1996, I find that on 9th August 1996 this Court issued direction to the effect that the petitioners shall be paid minimum pay scale as payable to the regular employees. Thus the submissions of the learned counsel for the respondents No.3 and 4 are not found correct. After perusing the record, it is very much obvious that there was Government Order dated 9th January 1992 (Annexure No.2 to the writ petition No.4820 (S/S) of 1996) providing the provisions for regularization of the daily wages who were appointed prior to 11th October, 1989. Subsequently, another Government Order was also issued on 26 June 1992 to make appointments only from the candidates who are governed under the terms of the Government Order dated 11th October, 1989 (Annexure No.1 to the writ petition No.4135 (S/S) of 2000). Moreover, on 31st August, 1999 Director of the local bodies also issued circular (Annexure No.2 to the writ petition No.5134 (S/S) of 2000) to take action in pursuance of the order of the State Government given in Government Order dated 26th June 1992. It has not been brought to my notice that before prevailing Regularization Rules 2001 any other Rule was prevailing for regularization of daily wages. After perusing the Government orders as well as the Rules framed for the same purpose it is obvious that the State Government has already good sense to regularize the services of the daily wages and for that purpose it has issued Government Orders and framed the rule as well. After perusing the records of the writ petition No.5134 (S/S) of 2000, in which the appointments of respondents No.5 and 6 are under challenge and the counter affidavit filed therein as well as the relevant provisions provided for selection on Class III Post in the Municipalities Act, 1916, I find that the appointments of respondents No.5 and 6 have been made without following the procedure and purely at the behest of the Minister of the Department. As is evident from the writ petition No.5134 (S/S) of 2000, the respondent No.5 submitted an application to the Hon'ble Minister of Urban Development Department, Government of U.P. who himself directed the Executive Officer of the Nagar Palika Parishad as under:

E.O. Swikriti Pad Per Niyukti Ker Lein.

21. Annexure No.4 letter of the Adhyaksh date 26.8.2000 also supports the same. Likewise from the Annexure No.5, it is established that the appointment of the respondent No.6 was made in clear violation of law. However, this Court through interim order dated 8th September, 2000 stayed the operation of the appointment orders issued in favour of respondents No.5 and 6 and further issued direction that their appointments shall remain in abeyance till the next date of listing, which is still operating as is evident from the order sheet of the writ petition.

22. In view of the law laid down by the Supreme Court as referred to herein above, the appointments of the respondents No.5 and 6 are wholly vitiated in law and those are hereby quashed.

23. In view of the facts and circumstances referred to hereinabove all the three writ petitions are allowed with the direction that before making any direct recruitment on the

post of Group D post, the petitioners shall be considered for regularization for Group D post within its sanctioned strength in accordance with Rules and further a writ of mandamus is issued to the State Government/Nagar Palika Parishad, Sultanpur to proceed expeditiously and consider the petitioners' regularization under the relevant rules against the sanctioned post and if the Rules permit so, before making the appointment directly on vacant Class III post, the petitioner of writ petition No.5134 (S/S) of 2000 shall be considered for giving appointment on the said post subject to his eligibility in accordance with law.

(Petition allowed)