

IN THE HIGH COURT OF DELHI AT NEW DELHI

% Date of decision : January 17th, 2008

+ **W.P.(C).No.3720/2006**

KRISHAN KUMAR SODHI PETITIONER
Through: Mr.S.R.Singh, Sr.Advocate with
Mr.Gulab Chandra, Advocate.

Versus

THE FOOD CORPORATION OF INDIA RESPONDENTS
& ANR
Through: Mr.Virender Kumar Sharma, Advocate.

+ **W.P.(C).No.14198/2004**

MS.NIRMALA DEVI PETITIONER
Through: Mr.S.R.Singh, Sr.Advocate with
Mr.Gulab Chandra, Advocate.

Versus

THE FOOD CORPORATION OF INDIA RESPONDENTS
& ANR
Through: Ms.Pinky Anand, Advocate.

CORAM:
HON'BLE MR. JUSTICE ANIL KUMAR

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| 1. Whether reporters of Local papers may be allowed to see the judgment? | YES |
| 2. To be referred to the reporter or not ? | NO |
| 3. Whether the judgment should be reported in the Digest? | NO |

ANIL KUMAR, J. (Oral)

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1. The petitioners, Krishan Kumar and Nirmala Devi, seek direction to the respondents, Food Corporation of India, to re-fix

their seniority giving benefit of past service during the period they rendered services with the Food Corporation of India as daily wage typists with consequential benefits of promotion etc.

2. The petitioner, Krishan Kumar Sodhi, was employed with the Food Corporation of India as typist on daily wage basis with effect from 30th December, 1971. Petitioner joined at District Office, Food Corporation of India, Hapur, U.P.

3. The services of Krishan Kumar Sodhi were regularized on 29th August, 1972 and he was given status of regular typist and joined his duties with effect from 29th August, 1972 at District Office, F.C.I. Saharanpur (U.P). While giving the status of regular typist the seniority for the period from 30th December, 1971 to 28th August, 1972 was not given to Krishan Kumar Sodhi despite the fact that there was continuity of service without any break as typist till Krishan Kumar Sodhi was regularized.

4. The said petitioner, Krishan Kumar Sodhi, was promoted to Assistant Grade II in 1977 and to the post of Assistant Grade I with effect from 4.10.2000 and is continuing so. Despite the various letters and representations written by him the seniority has not been given to him for the period he worked as daily wager. Mr.

Krishan Kumar Sodhi relied on Regulation 15 of the Food Corporation of India Staff Regulations, 1971 which is as under:-

“15. Probation:-

1) Every person regularly appointed to any post in the Corporation under Sub-Clause (a) of Clause(1) of Regulation 7 shall be required to be on probation for a period of one year from the date of appointment. Provided further that there will be no probation for a person promoted from one grade to another grade within the same category except where the promotion involves a change in the category of post in the same cadre e.g if an Asstt.Grade III is promoted as Asstt.Grade II there will be no probation whereas if a Messenger (Category IV official) is promoted as Asstt.Grade III (Category III) or an Asstt.Grade-I (Category III) is promoted as Asstt.Manager (Category II) normal probation period shall be applicable. Similarly if an Asstt.Manager (Category II) is promoted as Deputy Manager (Category I) there will be normal period of probation and for persons promoted from Deputy Manager onwards, there will not be any probation.

(2) The appointing authority may in his discretion extend the period of probation by a further period not exceeding one year.

(3) During the period of probation an employee directly recruited shall be liable to be discharged from service without assigning any reason by giving him a notice of 30 days or pay and allowances in lieu thereof.

An employee promoted from a lower post to a higher post shall be liable to be reverted to the lower post without notice and without assigning any reason.

(4) An employee who has satisfactorily completed his probation in any post shall thereafter be confirmed.

(5) Where an employee has rendered continuous temporary service or continuous service on deputation in any post immediately preceding his regular appointment to such post, the period of service so

rendered temporarily or on deputation may be counted against the period of probation if the appointing authority so directs.”

5. The petitioner also relied on the fact that respondents have given seniority to five typists working on daily wage basis in U.P region whose services were even terminated at one stage and who were taken back in their services and were regularized by S.R.M. Lucknow with effect from 1.8.1983. Reliance was also placed on an office memorandum No.5(20)/86-94/E-III/NZ dated 11.12.1996 issued from Zonal Office (North) by which Sh.S.K.Bassi, Assistant Grade II, without any interference of Court or otherwise had been given seniority with effect from 17th February, 1972, the date Sh. Bassi was appointed as typist on daily wage basis and was regularized on 27th February, 1976.

6. A series of representations were given by the petitioner which remained un-replied. Ultimately by office communication No.5(16)/98-E-III/VS/CS/132 dated 3rd May, 2000, the petitioner was intimated by the respondents that zonal office is not competent to decide and fix the seniority of daily wagers.

7. The petitioner, Krishan Kumar Sodhi, also placed reliance on the matter of V.Sekhar who was appointed on daily wage basis

between the period 26th June, 1970 to 15th April, 1971 and whose writ petition being W.P(C) No.5256/1998, V.Sekhar Vs. FCI was decided on 17th February, 2000 in his favor and his seniority was re-fixed from 26th June, 1970 when he joined as daily wager. The petitioner's contention is that his case is not different from the cases of Sh.S.K.Bassi and V.Sekhar and he has been illegally discriminated without any rationale and justification and only on the basis of whims of the officials of the respondents.

8. Petitioner, Krishan Kumar Sodhi, categorically contended that U.P. region of Food Corporation of India has already given seniority to all their employees who worked on daily wage basis for years together at the intervention of Labor Court and they have been placed accordingly in Zonal seniority. The petitioner also made a grievance that the officials of the respondents are acting on their whims and fancies in granting seniority taking into consideration the work done by the employees on daily wage basis. Krishan Kumar Sodhi gave more representations after seniority was given to some on 8th July, 2005, 25th September, 2000 and 28th April, 2003 and thereafter filed the present petition.

9. The other petitioner, Smt. Nirmala Devi, contended that she was appointed as a typist on daily wage basis on 17th June, 1972

at Head Quarters, New Delhi pursuant to letter dated 13th June, 1972 and her services were regularized on 26th February, 1976. During this period she worked continuously as daily wage typist. She was promoted to Assistant Grade II on 14th August, 1987 and promoted to Assistant Grade I in October, 2002. The petitioner, Smt. Nirmala Devi also relied on the cases of Sh.S.K.Bassi and V.Sekhar in whose matters, the period during which they had worked as daily wagers was taken into consideration while fixing their seniority.

10. The petitioner, Smt. Nirmala Devi also contended that despite various representations given by her from time to time, by office order No.5(16)/98-E-III/VS/CS/132 dated 3rd May, 2000 she was given an evasive reply that zonal office is not competent to decide and fix the seniority of daily wagers and she was advised to approach the concerned appointing authority. The said petitioner, thereafter, made more representations, however, her seniority has not been fixed taking into consideration the period during which she worked as daily wager.

11. The writ petitions are contested by the respondents. In the case of Krishan Kumar Sodhi it was contended that there is no provision under Regulation 16 of the Food Corporation of India

(Staff) Regulation, 1971 for grant of seniority to the persons for the period he worked on daily wage basis. It was also contended that for grant of seniority the competent authority is SRM/GM and since the appointing authority of typist is General Manager, U.P. Lucknow the zonal seniority list based on requirement of panels of different regions is issued at zonal level.

12. Regarding the seniority given to the five typists for the period they worked as daily wagers, the reply of the respondents was that it was given on the recommendation of appointing authority. Though the writ petition has been filed against the Food Corporation of India and reply has also been filed on its behalf, however, pleas of the petitioner has been replied only on behalf of zonal office. How the case of the petitioner is different from the five other typist who had been recommended by the office letter which was relied on by the petitioner, no cogent reply has been given. Regarding the case of Sh.S.K.Bassi it was contended that his case was decided by the Head Quarters being appointing authority under Regulation 15(5) of the Food Corporation of India (Staff) Regulation, 1971. All the appointing authorities are under the Food Corporation of India but no reply has been given as to why in the case of the petitioners, the seniority cannot be given.

13. In the counter affidavit filed by Lachman Sahijwani, DGM (P) in the case of Mr. Krishan Kumar Sodhi it was pleaded by him that the power to grant seniority to the persons for the period he worked on daily wage basis is with the appointing authority to whom the petitioner has already made representations. Regarding the case of Sh.V. Sekhar it was contended that his case was also decided by Head Quarters under Regulation 15(5) being his appointing authority. In para 13 of the said counter affidavit it was categorically contended that whosoever got the seniority was given by the appointing authority as per Regulation 15(5). Para 13 & 14 of the counter affidavit in CWP No.3720/2006 are as under:-

“13. That para no.13 of the writ petition is wrong and denied. It is submitted that whosoever got the seniority was given by the appointing authority as per Regulation 15(5) mentioned supra. It is submitted that once the service of daily wagger were terminated and later on taken back and regularized by General Manager (UP) being the appointing authority w.e.f.1.8.1983 as sequel to settlement before ALC (C) Kanpur UP, he is not entitled to seniority. All other contents of para under reply are wrong and denied.

14. That para no.14 of the writ petition is wrong and denied. It is submitted that there is no provision under Regulation 16 of the FCI (Staff) Regulation, 1971, for grant of seniority to the person for the period he worked on daily wages basis. His case can only be considered by General Manager (UP) Lucknow as per Regulation 15(5) mentioned supra. All other contents of para under reply are wrong and denied.”

14. In the case of Nirmala Devi the counter affidavit was filed by

Sh.R.P.Goel working as Joint Manager, Finance Accounts in the Food Corporation of India, Regional Office, Rajendra Place, New Delhi. He contended that the petition is bad on account of delay of more than 28 years. Regarding the employment of the petitioner on daily wage basis since 1972 it was contended that the records have been destroyed and, therefore, the case of the petitioner cannot be considered. Relying on Regulation 15(5) it was contended in the case of Smt. Nirmala Devi that the period she worked on daily wage basis cannot be counted for fixing her seniority as under the said regulation only temporary service on deputation is to be counted.

15. I have perused both the writ petitions, counter affidavits filed in them and the rejoinder affidavit and heard the counsel. The learned counsel for the respondents Mr.Virendra Kumar Sharma has argued that appointing authority has not been impleaded as a party and the discretion is with the appointing authority to take into consideration the period an employee has worked on daily wages, to grant seniority considering the said period.

16. The petitioners have filed the writ petition against the Food Corporation of India which is a statutory body. Once the Food Corporation of India has been sued, the respondents cannot contend that the Food Corporation of India does not represent the

concerned appointing authorities. No reply has been given in the counter affidavits filed on behalf of the Food Corporation of India as to why the appointing authorities have not granted seniority to the petitioners for the period they worked as daily wagers and how the cases of the petitioners are different from other persons whose period for which they worked as daily wagers has been computed to grant seniority. The plea of the petitioners has remained un-rebutted.

17. The different appointing authorities of the Food Corporation of India cannot grant seniority to the daily wagers on the basis of their alleged discretion which is not circumscribed by a uniform criterion. Granting seniority to some of the daily wagers and denying the seniority to others in these facts and circumstances suffers from the vice of arbitrariness.

18. The plea of the petitioners that Sh.S.K.Bassi and Sh.V.Sekhar also worked as daily wagers and while fixing their seniority the work done by them as daily wagers has been considered has not been denied in the counter affidavits filed on behalf of respondents. What is stated in the counter affidavits filed in the two writ petitions is that the seniority has been fixed by the Head Quarters and/or appointing authority. The writ petitions

have not only been filed against Zonal Manager (North) in case of Krishan Kumar Sodhi and the Executive Director (P) in case of Nirmala Devi but has also been filed against the Food Corporation of India. The plea raised on behalf of the respondents is based on the premise that not only the Food Corporation of India is a statutory authority, but its officials are also distinct and different statutory authorities such as Executive Director (P) and the Zonal Manager (North). Since the writ petition has been filed against the Food Corporation of India, all the authorities referred in the counter affidavits come under the Food Corporation of India and it was for the respondent, Food Corporation of India to explain how some of the daily wagers have been given the benefit of service for fixing seniority for the period of employment as daily wager and why the same benefit has not been extended to the petitioners.

19. The respondents are also unable to explain as to how the seniority have been granted to some of the employees such as Sh.S.K.Bassi, Sh.V.Sekhar and five other typists and not to the petitioners in these two writ petitions. The plea taken that the discretion is with the appointing authority is no justification to the discrimination and arbitrary acts indulged by the appointing authorities of the Food Corporation of India.

20. The learned counsel for the respondents Corporation, Mr. Sharma, who had contended that the Regulation 15(5) contemplates grant of seniority to only those employees who had been granted 'Temporary Status' has also contended that the appointing authority has the discretion which has been exercised in case of others and he is unable to explain as to on what grounds the same discretion could not be exercised in case of petitioners. The case of the respondent is not that under Regulation 15(5) the period for which an employee has worked on daily wages cannot at all be taken into consideration but that it is to be considered and decided by the appointing authority only.

21. In the circumstances, the apparent case of the respondents is that though the period during which an employee has worked on daily wage basis can be considered for grant of seniority but it is to be done by the appointing authorities and it can be granted at their discretion. Why that discretion has not been exercised has not been pleaded or explained. The learned counsel for the respondents are also unable to explain how the appointing authorities of Food Corporation of India can exercise their discretion in such an arbitrary manner. For the exercise of discretion there should have been some relevant consideration. In the facts and circumstances it seems, the respondent's have unfettered discretion. The whole

concept of unfettered discretion is inappropriate to a public authority, which possesses powers solely in order that it may use them for the public good. Refusing to grant benefit of the period during which the employees have worked on daily wages to some and granting to others infuses arbitrariness in their action which requires correction in exercise of jurisdiction by this Court under Article 226 of the Constitution of India. From the arguments of the counsel for the respondents it appears that the Appointing authority of respondent has unfettered discretion which cannot be permitted in the facts and circumstances. In *Kumari Srilekha Vidyarthi & ors Vs State of U.P and ors*, (1991) 1 SCC 212, the Supreme Court relying on Wade's Administrative Law 6th edition on pages 237 had held as under:

25 . In Wade: *Administrative Law* (6th edn.) after indicating that 'the powers of public authorities are essentially different from those of private persons', it has been succinctly stated at pp. 400-01 as under:

"... The whole conception of unfettered discretion is inappropriate to a public authority, which possesses powers solely in order that it may use them for the public good.

There is nothing paradoxical in the imposition of such legal limits. It would indeed be paradoxical if they were not imposed. Nor is this principle an oddity of British or American law: it is equally prominent in French law. Nor is it a special restriction which fetters only local

authorities: it applies no less to ministers of the Crown. *Nor is it confined to the sphere of administration: it operates wherever discretion is given for some public purpose*, for example where a judge has a discretion to order jury trial. It is only where powers are given for the personal benefit of the person empowered that the discretion is absolute. Plainly this can have no application in public law.

For the same reasons there should in principle be no such thing as unreviewable administrative discretion, which should be just as much a contradiction in terms as unfettered discretion. The question which has to be asked is what is the scope of judicial review, and in a few special cases the scope for the review of discretionary decisions may be minimal. It remains axiomatic that all discretion is capable of abuse, and that legal limits to every power are to be found somewhere.”
(emphasis supplied)

22. In the facts and circumstances the unfettered discretion exercised by the appointing authority of the respondents denying the benefit of the period during which they worked as daily wagers cannot be permitted in the facts and circumstances of the present cases. If the seniority has been granted taking into consideration the period during which the employees have worked on daily wages to some of the employees as has been detailed by the petitioner in these two writ petitions, the same cannot be denied to the petitioners in the facts and circumstances. This is not the case of the respondents that seniority for the period during which the employees have worked on daily wages cannot be granted at all in accordance with rules but that it is the discretion of the appointing

authority of food Corporation of India. Consequently the action of the respondents in denying to the petitioners the seniority for the period during which they worked as daily wager cannot be sustained in the facts and circumstances. The petitioners, in these two writ petitions, therefore for fixing of their seniority shall be entitled for the period during which they worked as daily wager.

23. The learned counsel for the respondents Ms. Pinky Anand has also raised a plea that the petition of Smt.Nirmal Devi suffers from delay and laches. However, considering all the pleas in their entirety it is apparent that there is not such a delay that the said petitioner should be deprived of the relief claimed by her. The various representation of the petitioners were not considered for considerable period and thereafter were replied taking a vague plea that the matter of seniority for the period during which she worked as daily wager has to be considered by the appointing authority or the Head Quarter and the representation should be made to them. This reply was given in 2000. Thereafter the representations have been made which have not been replied. Though the seniority has been granted to some of the employees for the period they worked on daily wage basis also but the petitioners have been denied the same relief without any justifiable and legal cause or reason except that it is the unfettered discretion of the appointing Authority. In

the case of Smt. Nirmala Devi this ground has been raised on behalf of the respondents, however, in the case of other petitioner Shri Krishan Kumar Sodhi, this plea has not been taken. In the circumstances, it will not be appropriate to dismiss one petition on the ground of delay and laches and allow another petition. In any case considering the entirety of pleas and contentions and the fact that the seniority of others daily wagers has also been considered till recently, it also cannot be inferred that the petition suffers from delay and laches.

24. In the case of Smt. Nirmala Devi, another plea of the respondents is that they do not have the record of the said petitioner about her working as daily wager. The said petitioner has produced the copy of her appointment letter appointing her on daily wage basis. The plea of the respondents that they do not have the record cannot be accepted. To counter the plea of the said petitioner, it was for the respondents to locate the record. The respondents cannot be allowed to take shelter under the plea that the record is very old. The respondents have failed to aver and show that the efforts were made by the respondents in consonance with the rules of the Food Corporation of India about keeping the record and that the record had been destroyed being old. The petitioner has discharged her onus by producing the copy of the

letter by which she was appointed as typist on daily wage basis. It was for the respondents to rebut the same by tracing the record and producing the same. This is not the case of the respondents that there are rules for the destruction of the record and the record of the petitioner, Smt. Nirmala Devi has been destroyed. Since destruction of the record is not the plea of the respondents, they cannot deny the copy of the appointing letter produced by said petitioner on the ground that the record is very old and not traceable. So even on this plea the petitioner Smt. Nirmala Devi cannot be denied the relief sought by her.

25. Therefore in the facts and circumstances the rule is made absolute and the writ petitions are allowed. The respondents are directed to fix the seniority of the petitioners taking into consideration their appointment as daily wager, i.e for petitioner, Smt. Nirmala Devi from 17.6.1772 and for Shri Krishan Kumar Sodhi from 30.12.1971. Considering the facts and circumstances, the parties are however, left to bear their own costs.

January 17th, 2008
‘k’

ANIL KUMAR J.