

Court No. - 6

Case :- WRIT - A No. - 11384 of 2022

Petitioner :- Mohd. Ashique

Respondent :- State Of U.P. And 3 Others

Counsel for Petitioner :- Jamil Ahamad Azmi, Mariyam Azmi

Counsel for Respondent :- C.S.C.

Hon'ble Ajay Bhanot, J.

1. Heard Shri Jamil Ahamad Azmi, learned counsel assisted by Shri Mohd. Umar Farrukh, learned counsel for the petitioner and the learned Standing Counsel for the State-respondents.

2. The petitioner was appointed as a Sweeper on 24.09.1983. By the impugned order dated 09.05.2022 the claim of the petitioner for regularization has been rejected on the footing that he was minor on the date of his appointment.

3. These facts are established from a perusal of the pleadings inter se the parties and materials in the record. The petitioner was appointed as a Sweeper on 24.09.1983. The petitioner worked continuously on the aforesaid post for more than 39 years. The petitioner was working against a substantive post. The job was perennial in nature. The record of service of the petitioner is unblemished. But for the fact of his minority at the time of appointment, the petitioner was entitled to be regularized in service.

4. The question now arises as to whether the aforesaid infirmity in the appointment of the petitioner is sufficient reason to decline his claim for regularization after rendering almost four decades of service. To examine the correctness of the impugned order invalidating the case of the petitioner for regularization, the distinction between an irregular appointment and illegal appointment has to be considered.

5. Irregularities in appointments can be cured while illegalities vitiate the action. Distinguishing cases of irregular appointment from illegal appointments in the context of regularization of employees a Constitution Bench of the Supreme Court most recently in **Vinod Kumar and Others vs. Union of India and Others** reported at (2024) 9 SCC 327 held as under:-

"7. The judgement in the case Uma Devi (supra) also distinguished between "irregular" and "illegal" appointments underscoring the importance of considering certain appointments even if were not made strictly in accordance with the prescribed Rules and Procedure, cannot be said to have been made illegally if they had followed the procedures of regular appointments such as conduct of written examinations or interviews as in the present case."

6. **Vinod Kumar (Supra)** while invoking the ratio of **Secretary, State of Karnataka vs. Uma Devi** reported at (2006) 4 SCC 1 stated:-

"5. Having heard the arguments of both the sides, this Court believes that the essence of employment and the rights thereof cannot be merely determined by the initial terms of appointment when the actual course of employment has evolved significantly over time. The continuous service of the appellants in the capacities of regular employees, performing duties

indistinguishable from those in permanent posts, and their selection through a process that mirrors that of regular recruitment, constitute a substantive departure from the temporary and scheme-specific nature of their initial engagement. Moreover, the appellants' promotion process was conducted and overseen by a Departmental Promotional Committee and their sustained service for more than 25 years without any indication of the temporary nature of their roles being reaffirmed or the duration of such temporary engagement being specified, merits a reconsideration of their employment status.

6. The application of the judgment in *Uma Devi (supra)* by the High Court does not fit squarely with the facts at hand, given the specific circumstances under which the appellants were employed and have continued their service. The reliance on procedural formalities at the outset cannot be used to perpetually deny substantive rights that have accrued over a considerable period through continuous service. Their promotion was based on a specific notification for vacancies and a subsequent circular, followed by a selection process involving written tests and interviews, which distinguishes their case from the appointments through back door entry as discussed in the case of *Uma Devi (supra)*.

7. The judgement in the case *Uma Devi (supra)* also distinguished between "irregular" and "illegal" appointments underscoring the importance of considering certain appointments even if were not made strictly in accordance with the prescribed Rules and Procedure, cannot be said to have been made illegally if they had followed the procedures of regular appointments such as conduct of written examinations or interviews as in the present case."

7. A similar issue as regards fall out of irregularities in initial appointments on the claim for regularization arose before the learned Single Judge of this Court in **Surendra Kumar Srivastav vs. State of U.P. and another (Writ-A No.- 20259 of 2019)** and other companion writ petitions. Ashwani Kumar Mishra, J predicated the discussion by delineating concept of irregular appointments in light of the judgment of the Supreme Court in **Narendra Kumar Tiwari and others vs. The State of Jharkhand and**

others reported at **(2018) 8 SCC 238** which held as under:-

"8. The fact that the State of Jharkhand continued with the irregular appointments for almost a decade after the decision in Umadevi (3) is a clear indication that it believes that it was all right to continue with irregular appointments, and whenever required, terminate the services of the irregularly appointed employees on the ground that they were irregularly appointed. This is nothing but a form of exploitation of the employees by not giving them the benefits of regularisation and by placing the sword of Damocles over their head. This is precisely what Umadevi (3) and Kesari sought to avoid. "

8. Thereafter Mishra, J embarked on a prescient and eloquent discussion on the concept of regularization of employees by propounding thus:-

“ 9. So far as the first ground taken to non-suit the petitioner is concerned, it is not in issue that the petitioner was engaged in the Corporation as daily wage/ contract employee and has continued in the employment of the Corporation for nearly 30 years. The plea that he has not been engaged in accordance with rules and therefore he has not been found entitled to be regularised is noticed only to be rejected. The applicable service rules, where under regular/ substantive appointment is to be offered, do not contemplate making of appointment on daily wage or contract basis. The policy framed by the State Government to regularise the services of such employees, who have continued for decades together proceeds upon the due acknowledgment of fact that persons have been engaged on daily wage basis or on contract basis, without adhering to the applicable rules which regulates substantive employment in the Corporation itself. The non-observance of service rules while initially engaging persons on daily wage basis, and it being a ground to deny regularisation, shows complete lack of understanding on part of the Corporation to the very purpose for which the regularisation rules have been framed. The object of regularising services of employees engaged on daily wage basis is entirely distinct. In most cases of regularisation the initial engagement of employee is not in

accordance with the applicable service rules which regulates substantive employment. The mere fact that the rules of recruitment have not been followed at the time of offering contractual or daily wage employment, does not render the employment illegal but it merely remains an irregularity capable of being regularised by framing rules." (emphasis supplied)

9. The concept of regularization presupposes some initial irregularities in appointments. By virtue of regularization the aforesaid infirmities which do not go to the root of the appointment are cured. After regularization the employee is treated as a regularly appointed Government servant. Upon being regularized employee is entitled to the status and benefit of other regularly appointed employees working on the same post.

10. Prior to invalidating the case for regularization and the aforesaid distinctions between illegal appointment and irregular appointments have to be borne in mind. The infirmities or initial deficiencies in the appointments have to be examined in the context of the post to which the employee was holding, the nature of the duties attached to the aforesaid post, the minimum eligibility qualifications for appointment to the said post. The employer shall also factor in the length of service rendered by such employee as well as record of service. Forgery in documentation/testimonials submitted by the employee at the time of appointment are also liable to be considered.

11. Prior to passing the impugned order the authority neglected to examine the above said factors which were

germane to the controversy. In the instant case, the petitioner was continuously working as Sweeper for almost four decades. Educational qualification required for appointment to the post of a Sweeper are of a minimal nature and are not in issue. The respondents have nowhere stated that the petitioner was found guilty of any misconduct or dereliction of duties during the long course of his career.

12. The respondents have taken a mere technical ground to deny the substantive rights of the petitioner. This Court has set its face against the State Government resorting to such technical pleas to deny substantive rights of employees who are at the bottom of the governmental hierarchy. This Court in **Special Appeal No. 220 of 2021 (State of U.P. and 4 others vs. Smt. Anita Devi)** examined the legality of such approach of the State in regard to a part time Sweeper who had worked for 28 years and held thus:-

"It was expected by the State to act as a model employer instead of taking technical and frivolous objections against a petty employee and accordingly we find this appeal to be nothing but luxury in the hands of the officer who has taken decision otherwise judgment should have been complied. "

In fact in the instant case it will not be an exaggeration to hold that if the impugned order is allowed to subsist it will lead to unlawful exploitation of labour.

13. The petitioner is entitled for regularization in light of the cases in point discussed earlier but for the aforesaid

infirmity of the petitioner being a minor at the time of his initial appointment on 24.09.183, it is undisputed that the petitioner was entitled for regularization as per regularization rules applicable to the petitioner.

14. In ordinary course of things the matter ought to have been remitted to the competent authority for fresh adjudication in light of this judgement. However, considering the fact that the petitioner is a sweeper belonging to a marginalized class of the society, such a course will not be consistent with the ends of justice. Remand of the matter may even entail a fresh round of litigation which will exhaust the petitioner financially and batter him emotionally. The facts of the case as seen above are largely undisputed. The position of law is well settled. Hence, the Court is consciously restrained itself from remitting the matter and is adjudicating the matter in final terms.

15. The discussion has the benefit of authorities in point. In matters where the facts are not disputed, the position of law is uncontested and repeated bouts of the litigation are in prospect, the Courts have dissuaded themselves from remanding the matter to the authorities and bringing about litigative repose by passing appropriate directions as per law. This Court in **Vinay Kumar Upadhyay vs. State of U.P. and others reported at 2019 (3) AWC 2972 All** when confronted with similar facts held as under:-

"46. In the instant case the matter would have been remitted to the authorities for considering the case of grant of seniority and consequential pay benefits. But in the light of the facts found in the preceding paragraphs, it is evident that the petitioner has reached the stage of litigative exhaustion. The petitioner has been running from pillar to post, from Court to the authorities and back. This cycle was repeated a number of times, for more than a decade.

47. Considering the facts narrated in the preceding paragraphs, this Court proposes to mandamus the authorities. Remanding the matter to such authorities for fresh adjudication, is not in the interest of justice. It is time for a litigative rest.

48. This view stands fortified by the law laid down by the Hon'ble Supreme Court in *Comptroller and Auditor General of India, Gian Prakash, New Delhi Vs K.S. Jagannathan* reported at 1986 (2) SCC 679, wherein Hon'ble Supreme Court held thus:-

"22. There is thus no doubt that the High Courts in India exercising their jurisdiction under Article 226 have the power to issue a writ of mandamus or a writ in the nature of mandamus or to pass orders and give necessary directions where the Government or a public authority has failed to exercise or has wrongly exercised the discretion conferred upon it by a statute or a rule or a policy decision of the Government or has exercised such discretion mala fide or on irrelevant considerations or by ignoring the relevant considerations and materials or in such a manner as to frustrate the object of conferring such discretion or the policy for implementing which such discretion has been conferred. In all such cases and in any other fit and proper case a High Court can, in the exercise of its jurisdiction under Article 226, issue a writ of mandamus or a writ in the nature of mandamus or pass orders and give directions to compel the performance in a proper and lawful manner of the discretion conferred upon the Government or a public authority, and in a proper case, in order to prevent injustice resulting to the concerned parties, the Court may itself pass an order or give directions which the Government or the public authority should have passed or given had it properly and lawfully exercised its discretion. "

49. There is another aspect of the matter. The tendency of some authorities to reject the claim of an employee on flimsy pretexts

which are contrary to the findings and directions of the Court made while remanding the matter for consideration. The employee is consequently sent into a perpetual orbit of litigation. Such actions by some authorities are frequent. These authorities are habituated to act so. This trend of behaviour of some officials was noted by this Court. In *Kalawati Vs State of U.P. through Secretary Mahila Evam Bal Vikas Vibhag and Another*, reported at 2017 (1) ADJ 450, this Court found thus:-

"20. Once learned Standing Counsel has made a submission in this Court in writ petition No. 1128 (S/S) of 2008 that the case of petitioner is squarely covered by the judgement in *Smt. Ram Devi (supra)*, it was not open to the Director to reiterate the same stand. If he was satisfied that the petitioner's case was not covered by *Smt. Ram Devi (supra)* and the learned Single Judge has wrongly applied the law, it was open to the Director to file a review application against the said order or to file special appeal, however, the Director neither filed special appeal nor review application and has reiterated the same stand which was set aside by this Court. Not only this on the third occasion when the learned Single Judge has considered the Government Order 20.04.2005 and set aside the order impugned therein, the Director again did not file special appeal but he opted to stick to his stand which has been repeatedly set aside by this Court. In fact, in my view, the conduct of the Director is contemptuous.

21. The experience reveals that when an order of the authority is set aside and a direction is issued to decide the matter afresh in the light of the observations made in the order, after the remand the authority concerned ignoring the observations of the Court, takes a fresh ground for rejection of the claim of the petitioner. There are several examples when again the order is challenged and the matter is remitted back, the authority finds out some other ground to reject the claim.

22. Once a direction has been issued to decide the matter afresh in the light of the observations made in the order, the said observation cannot be ignored by the authority concerned. It has to confine its order in terms of the observations of the Court. It is not open to it to reject the claim on a fresh ground which was not mentioned in the earlier impugned order, and ignore the observations of the

Court. This type of attitude of the authorities not only wastes the invaluable public time but also cause loss to the public exchequer. If any authority or person finds that the observation of the Court is contrary to the law and is improper, it is always open to the State/ its functionaries/ aggrieved person to challenge the order/ observation of the Court taking recourse to such proceeding which is available to him but the direction of the Court must be obeyed. It cannot be ignored.

23. In the case in hand the petitioner who comes from the weaker section of the society has been compelled to file one after another writ petition, as mentioned above, however the second respondent has taken an adamant attitude and has rejected again the claim of the petitioner by a skeletal order."

50. This defiance cum harassment syndrome was fully manifested in the instant case too. In the case of Kalawati (supra) this Court mandamus the authorities without remanding the matter for fresh consideration by holding thus:-

"29. Having regard to the aforesaid law, I issue a direction to the second respondent to pass appropriate order for promotion of the petitioner within two weeks from the date of communication of this order."

16. In wake of the preceding discussion, the impugned order dated 09.05.2022 passed by the respondent No. 2 i.e. Director Social Welfare, Uttar Pradesh, 3 Prag Narain Road, Lucknow is arbitrary and illegal. The impugned order dated 09.05.2022 passed by the respondent No. 2 i.e. Director Social Welfare, Uttar Pradesh, 3 Prag Narain Road, Lucknow is liable to be set aside and is set aside.

17. A writ in the nature of mandamus is issued commanding the respondents to execute the following directions:-

i) The petitioner shall be regularized from the date of his

attaining majority. An order to this effect shall be forthwith issued by the appointing authority of the petitioner.

ii) The services rendered by the petitioner from the said date of regularization till his retirement shall be computed towards pensionable service and his pension shall be fixed accordingly.

18. The writ petition is **allowed**.

Order Date :- 22.11.2024

Jaswant