

07.09.2021
SL No.11
Court No.16
(gc)

WPST 23 of 2021

**Shib Narayan Routh
Vs.
Director General, West Bengal Fire Service & Ors.**

(Via Video Conference)

Mr. Swapan Kr. Nandi,
Mr. Sibnarayan Chattopadhyay,
...for the Petitioner.
Mr. Kishore Dutta, Ld. A.G.,
Mr. Anirban Ray, Ld. G.P.,
Mrs. Kakali Samajpaty,
Mr. Sayan Ganguly,
....for the State.

The writ petitioner is a Sweeper engaged on a daily rated basis since 5th June, 1993. He applied for regularization. His prayer was rejected by the Labour Department in its communication dated 7th April, 2004 on the ground that his appointment is irregular. The Petitioner approached the Tribunal challenging the said order and in the said proceeding he has prayed for absorption. The impugned order under challenge before the Tribunal dated 7th April, 2004 was passed in connection with an order passed in an earlier proceeding initiated in the year 2001 in which the writ petitioner claimed absorption in the post of Sweeper under Uttarpara Fire Station. The Tribunal rejected the prayer on the ground that when the petitioner failed to produce any initial appointment letter and in absence of any satisfactory document regarding existence of any sanctioned post against which the writ petitioner was engaged and when the Circular dated 13th March, 1996 is

staring at the face, the prayer for the writ petitioner could not be allowed. The Tribunal read the word “irregular” in the impugned order dated 7th April, 2004 as “illegal”. This order is under challenge before us.

At the outset, we must say that the Tribunal has put the onus on the writ petitioner as Sweeper without requiring the authorities to discharge their initial onus of showing the manner of his engagement and since when he was engaged. It was within the special knowledge of the employer and, accordingly, direction ought to have been given to the employer to produce all the relevant documents to show on what basis he was engaged since 5th June, 1993. In the impugned order dated 7th April, 2004, the Labour Department has categorically stated that the writ petitioner was engaged as Sweeper at Uttarpara Fire Station on daily rated basis since 5th June, 1993. In order to avoid any confusion, the relevant portion of the impugned order dated 7th April, 2004 issued by the Officer-on-Special Duty & Ex. officio Deputy Secretary, Labour Department, Government of West Bengal is reproduced hereinbelow:-

“It is observed that in terms of Labour Deptt’s aforesaid Memo. No.100-Emp., dated 13-03-96, the Casual Worker’s who were engaged prior to 31-12-91 with the prior approval of the Labour Deptt. and the Finance Deptt. And who fulfilled the terms and conditions laid down in the Labour Deptt’s Memo. No.1700-Emp., dated 3-8-79, read with Memo No.1650-Emp., dated 28-08-80, are eligible for consideration of absorption against regular vacancies and that those

Casual Workers who were engaged after 31-12-91 are not entitled to such absorption.

It appears that the petitioner, Shri Shib Narayan Routh was engaged after 31-12-91 as Casual Worker in Uttara para Fire Services without prior approval of the Labour Department and the Finance Department as required in terms of Para 5 of the Labour Deptt's Circular No.100-Emp., dated 13-3-96, this engagement as Daily-rated Sweeper is, therefore, irregular."

The authorities did not appear before the Tribunal. In absence of any pleadings before the Tribunal it was incumbent upon the Tribunal to accept the pleadings and to decide the onus on the well-established principle that any person having special knowledge of fact is required to prove the fact. A Sweeper cannot be asked to produce any initial letter of appointment to substantiate his claim. The very fact that he was engaged on a daily rated basis since 5th June, 1993 and was not considered for absorption under any scheme clearly militates against the principle of social justice enshrined in our Constitution. There is a complete failure to achieve the constitutional object as continuation of such person to function as a Sweeper on a daily rated basis for time immemorial at a meagre pay is like treating the petitioner as a bonded labour. The Labour Department did not consider the appointment as illegal but irregular. It is true that the Labour Department has stated in the impugned communication dated 7th April, 2004 that the Casual Workers who were engaged prior to 31st December, 1991 with the prior approval of the Labour Department and

the Finance Department and who fulfilled the terms and conditions laid down in the Labour Department's Memo. No.1700-Emp., dated 3rd August, 1979, read with Memo No.1650-Emp., dated 28th August, 1980 are eligible for consideration of absorption against regular vacancies and that those Casual Workers who were engaged after 31st December, 1991 are not entitled to such absorption. The said impugned order was issued prior to ***Secretary, State of Karnataka & Ors. Vs. Uma Devi (3) & Ors.*** reported at ***(2006) 4 SCC 1. Uma Devi (3)*** (supra) was considered by us along with other decisions in **WPCT 62 of 2020 (Union of India & Ors. Vs. Subrata Mondal & Anr.)** dated 20th July, 2021 and **WPST 180 of 2019 (Abdul Azad Vs. State of West Bengal & Ors.)** dated 31st August, 2021.

The said decisions have also taken into consideration ***State of Karnataka & Ors. Vs. M.L. Kesari & Ors.*** reported at ***(2010) 9 SCC 247*** where Paragraph 53 of ***Uma Devi (3)*** (supra) was considered in Paragraph 8 of the said judgment. The Government was not unmindful of the fact that the daily rated workers need to be absorbed under a scheme pursuant to the direction passed in ***Uma Devi (3)*** (supra), in fact, the petitioner continued to work since 1993 till today without any Court order and in the facts and circumstances of the case, we feel that Paragraph 8 of ***M.L. Kesari*** (supra) would be applicable in the instant case. The Labour Department never considered his appointment to be illegal. In any event, having regard to the nature of employment and the scheme framed by the Government on

25th February, 2016 which clearly states in Paragraph 3 that on careful consideration, the Governor has been pleased, *inter alia*, to revise the benefits to the all contractual/casual/daily rated workers by way of engagement up to the age of 60 years and for that the scheme was framed. We do not find any reason as to why such scheme could not be made applicable to the present petitioner. The Government is expected to act as model employer and not to exploit the labour force. The State should make all endeavour to act fairly and ensure the welfare of its labour force.

The learned Government Pleader in support of the order of the learned Tribunal has produced before us a Memorandum No.3727-F dated 20th May, 2009, Memorandum No.8662-F dated 7th September, 2009 and Memorandum No.7284-F(P₂)/FA/O/2M-1 dated 27th November, 2017 along with the payments made to the petitioner from Contingency Bill to argue that his employment should be treated as a Part-time Sweeper and the remuneration has been fixed initially in 2009 and thereafter in 2017 which are to be paid from the Contingency fund.

The Memo dated 20th May, 2009 was issued fixing the pay of contingent staff. The pay of the part time contingent staff was subsequently clarified by issuance of the Memo dated 7th September, 2009 whereby the fixed pay not exceeding Rs.2000/- was sub-divided into four sub-categories depending on the hours of work. The fixed pay of

Rs.2000/- of such contingent staff as per Memo dated 20th May, 2009 was enhanced to Rs.3000/- per month vide Memo dated 27th November, 2017.

The Labour Department order dated 7th April, 2004 does not state that the appointment of the petitioner was as a contingent staff. No document was produced by the State either before the Tribunal or before us to show that the petitioner was appointed as contingent staff. In the absence of any document to show that the petitioner was appointed as a contingent staff, the aforesaid Memoranda dated 20th May, 2009, 7th September, 2009 and 27th November, 2017 cannot be applied to the petitioner. The applicability of the aforesaid Memoranda depends upon the nature of appointment as contingent staff which the State has failed to substantiate in the instant case. The petitioner is working since 1993 and the State in course of hearing of the writ petition has produced a document of February-March, 2017 to show that the petitioner was paid from Contingency Bill in support of their plea that the petitioner is a contingent staff. Merely because of the fact that the employer has paid the petitioner from the Contingency Fund does not indicate that the employment of the petitioner was that of a contingent staff. The nature and category of appointment of an employee is to be determined from the terms and conditions incorporated in his appointment letter and not otherwise.

We are unable to treat the employment of the petitioner on a contingency basis as that completely belies the stand taken by the Labour Department on 7th April,

2004. The order of the Labour Department did not specify that the payment was made out of the Contingency fund. Moreover, it is lamentable that the State has adopted such plea for the first time in this writ petition in respect of a Sweeper who admittedly worked on a daily rated basis since 5th June, 1993. We feel that the plea of engagement of the petitioner as a Part-time Sweeper and to be paid out of the Contingency fund only reflects an insensitive and painful stand on the part of the State to resist a *bona fide* claim of the writ petitioner.

The petitioner was engaged as a daily rated worker as evident from the order of the Labour Department dated 7th April, 2004. In the absence of any document contradicting such status of the employee, this Court is of the view that the Memo dated 25th February, 2016 is applicable to the case of the petitioner.

In view thereof, the writ petition, being WPST 23 of 2021, succeeds and, accordingly, disposed of.

The respondent authorities are directed to act on the basis of the Memorandum dated 25th February, 2016 and engage the writ petitioner as a daily rated worker till he attains the age of 60 years. The entire process has to be completed within four weeks from date.

The order of the learned Tribunal is set aside.

All parties shall act on the server copies of this order duly downloaded from the official website of this Court.

(Hiranmay Bhattacharyya, J.)

(Soumen Sen, J.)