BEFORE THE UTTARAKHAND PUBLIC SERVICES TRIBUNAL
AT DEHRADUN

Present: Hon'ble Mr. Justice J.C.S.Rawat

------ Chairman

Hon'ble Mr. D.K.Kotia

-------Vice Chairman (A)

CLAIM PETITION NO. 74/09

Rajeshwar Prasad Upreti, S/o Parmanand , R/o Village Sagnoli, Post Office-Pulasu, District Pauri Garhwal. Working as Roller Cleaner in Asthai Khand, Public Works Department, Gauachar, District Pauri Garhwal..

……Petitioner

VERSUS

1. State of Uttarakhand through Secretary, Public Works Department Dehradun, Uttarakhand.
2. Superintending Engineer, 38 Circle Public Works Department, Gopeshwar, District Chamoli, Uttarakhand.
3. Executive Engineer, Asthai Khand, Public Works Department, Gauachar, District Pauri Garhwal, Uttarakhand.

…….Respondents.

Present: Sri V.P.Sharma, Ld. Counsel
for the petitioner.
Sri Umesh Dhaundiyal, Ld. P.O.
for the respondents.

JUDGMENT

DATED: MARCH 11 , 2014.

(Hon'ble Mr.Justice J.C.S. Rawat, Chairman)

1. Petitioner has filed this petition for seeking following relief:-

"In view of the facts and circumstances as mentioned in para 4 and its sub para is referred above the applicant prays for the following relief.

(a) To issue an order or direction by set aside the order dated 20.2.2004 passed by the respondent No. 3.

(b) The appropriate direction may be issued to the respondents not to terminate the service of the petitioner from the post of Roller Cleaner in Asthai Khand Public Work Department, Gauchar, District Pauri Garhwal.

(c) To issue an order or direction to the respondents to regularize the services of the petitioner and reimburse the back wages since 01.10.2002 to till date

(d) To issue any other order or direction which this Hon'ble Tribunal may deemed fit and proper in the circumstances of the case.

(e) To award the cost of petition in favour of the petitioner and opposite party."

2. The brief facts of the case are that the petitioner was engaged as the muster roll helper in the year 1982 and thereafter he was appointed as Roller Cleaner on 1.12.1987 and it was specifically pointed out in the said appointment letter, Annexure-8 to the petition that his appointment would be from 1.12.1987 to 9.3.1988. The petitioner, even after the expiry of the said period, remained in service and by the impugned order, Annexure-1, his services were terminated. The petitioner filed this petition for redressal of his grievances.

3. The written statement/ counter affidavit has been filed by the respondents alleging therein that the petitioner was appointed as a temporary work charge Roller Cleaner and thereafter on 7.10.2002 to 12.10.2002 he sought six days' casual leave and he went to his home. Thereafter, he also sent an application for leave w.e.f. 14.10.2002 to 24.10.2002. Even after the expiry of the said leave, he did not resume his duties and also did not send any application for the leave to the department. Thereafter, several letters were written to the petitioner, but no heed was paid by the petitioner to resume the duties. Thereafter, the respondents sent a notice by way of publication in Dainik Jagran to resume his duties, but when he did not resume the duties, then the impugned order Annexure-1 was passed dispensing with his services from the department.

4. We have heard learned counsel for the parties and perused the record.

5. Before entering into the contentions of the parties, we would like to refer the documents which the petitioner has filed before the Tribunal. Annexure-1 is the order, by which his services have been terminated. Thereafter he filed an order passed by the Hon'ble Uttarakhand High Court passed in writ petition No. 421(S/S) of 2004 by which the petitioner was granted interim relief and the operation of the order dated

20.2.2004 (Annexure-1) was stayed by the Court. Thereafter the petition was dismissed in default on 14.5.2008 after restoring the said petition, the Hon'ble High Court relegated the petition to this Court and Annexure Nos. 2 to 5 are documents to the above effect. Thereafter, one letter written by the Executive Engineer, P.W.D., Gauchar to the Chief Engineer, P.W.D., Pauri Garhwal informing that the order of the Hon'ble Court has been complied with. Documents Annexure Nos. 7 & 8, which have been filed along with the petition are relevant only to show that the petitioner was appointed as work charge Roller Cleaner. Thereafter the petitioner was appointed by the Superintending Engineer w.e.f. 12.1.1987 to 9.3.1988. The petitioner has also filed an application dated 7.12.2002 by which he has sought one day's leave only and thereafter there are certain medical certificates of the petitioner which have been filed to show that the petitioner was suffering from the ailment.

6. Ld. Counsel for the petitioner contended that the petitioner was appointed on the work charge basis thereafter he was transferred to the post of Roller Cleaner and had been serving the department for the last 23 years and he is entitled to be regularized in the establishment as well as he has sought to quash the order of termination passed by Respondent No.3. The petitioner further contended that the order of termination was issued without giving him show cause notice and also opportunity of hearing. Ld. Counsel for the petitioner further contended that the impugned order is illegal and arbitrary.

7. Ld. Counsel for the respondents refuted the contention and contended that the petitioner was a work charge employee and he was even not an ad-hoc employee and he is not entitled to any safeguard as contended by the Ld. Counsel for the petitioner. He also contended that the show cause notice was given to him by way of paper publication as well as by registered post, but he did not turn up and thereafter his services were dispensed with. It is clear from the record that the petitioner was appointed long back as a work charge employee. The legal proposition about the work charge employee is that he cannot even claim the same rights which an ad-hoc employee can claim. The Hon'ble Apex Court in

Punjab State Electricity Board and others Vs. Jagjiwan Ram (2009)1SCC (L&S)769 in Para 15 has held as under:-

"What to say of work charged employees even those appointed on ad hoc basis cannot claim parity with regular employees in the matter of pay fixation, grant of higher scales of pay, promotion etc. In State of Haryana vs. Haryana Veterinary & AHTS Association and another (supra), a three-Judge Bench considered the question whether service of an employee appointed on adhoc basis can be equated with that of regular employee for the purpose of grant of selection grade in terms of the policy contained in circulars dated 2nd June, 1989 and 16th May, 1990 issued by the Government of Haryana and answered the same in negative."

A work charge establishment is an establishment of which the expenses are chargeable to works. The pay and allowances of the employees for engaging on a work charge establishment are usually shown under a specified head of the estimate of the cost of the work. The work charge employees are only employed to complete the project and thereafter their services are not charged from the State Ex-chequer, whereas ad-hoc employees are appointed by the appointing authority on the pay scale against the vacancies and their pay and allowances are charged from the State salary budget. Thus, the status of the ad-hoc employee is rather better than the work charge employee. In the case of **State of Rajsthan Vs. Kunji Raman 1997 (2) SCC 517**the Hon'ble Court has held in para 8-

"A work-charged establishment thus differs from a regular establishment which is permanent in nature. Setting up and continuance of a work-charged establishment is dependent upon the Government undertaking a project or a scheme or a "work" and availability of funds for executing it. So far as employees engaged in work-charged establishments are concerned, not only their recruitment and service conditions but the nature of work and duties to be performed by them are not the same as those of the employees of the regular establishment. A regular establishment and a work- charged establishment are two separate types of establishments and the persons employed on those establishments thus form two separate and distinct classes. For that reason, if a separate set of rules are framed for the persons engaged in the work-charged establishment and the general rules applicable to persons working on the regular establishment are not made applicable to them, it cannot be said that they are treated in an arbitrary and discriminatory manner by the Government. It is well settled that the Government has the power to

frame different rules for different classes of employees. We, therefore, reject the contention raised on behalf of the appellant in Civil Appeal No. 653 of 1993 that clauses (g), (h) and (i) of Rule 2 of RSR are violative of Articles 14 and 16 of the Constitution and uphold the view taken by the High Court."

8. Thus, the above discussion clearly reveals that the work charge employee constitutes a distinct class and he cannot be equated with any other category or class of employees much less regular employee and further that the work charge employee even not entitled to service benefits which are admissible to a regular employee under the relevant rules and policies of the State Government. It is admitted case of the parties that the petitioner had been continuously working since 1987 to the date when he left on leave on 7.10.2002, thereafter he remained absent and inspite of the best effort, he did not resume the duties till 20.2.2004 and the services of the petitioner were dispensed with.

9. Ld. Counsel for the petitioner tried to emphasize that the petitioner had been continuously serving the department for 23 years and he cannot be held to be an ad-hoc or work charge employee and he is entitled to get his regularization under the legal cover. Ld. Counsel for the petitioner could not demonstrate any rules and the parameters thereof applicable to the petitioner which makes the petitioner entitled to be a permanent employee of the establishment. It is a settled proposition of law that merely because a work charge, ad-hoc employee or casual worker has worked continuously for a long and considerable period beyond the term of appointment, he would not be entitled to be absorbed in the service or made permanent merely on the strength of such continuance. The petitioner would have to show to seek such relief that his appointment had been made by following the due process of law. Ld. Counsel for both the parties could not demonstrate that the appointment of the petitioner had been made by due process of law. In Para 43 in the case of **Secretary State of Karnataka Vs. Uma Devi 2006 SCC (L&S)753 Hon'ble Apex Court** has held as under:-

"……. It has also to be clarified that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as

envisaged by the relevant rules. It is not open to the court to prevent regular recruitment at the instance of temporary employees whose period of employment has come to an end or of ad hoc employees who by the very nature of their appointment, do not acquire any right…….. Merely because, an employee had continued under cover of an order of Court, which we have described as 'litigious employment' in the earlier part of the judgment, he would not be entitled to any right to be absorbed or made permanent in the service……"

10. Ld. Counsel for the petitioner further tried to emphasize that he had served about 23 years in the department, so on the basis of the doctrine of Legitimate Expectation, the petitioner had an expectation that he would be regularized in the department and so the respondents should be directed to regularize the services of the petitioner. It has been held in Uma Devi (supra) that the fact that all the appointments which had been made without following the procedure, cannot be illegitimate mode of appointment. Petitioner, when entered into the service, had knowledge about the nature of his employment and he accepted the employment with open eyes. The person who had been searching the job and got an employment by the back door, then he cannot claim parity and cannot have a right to legitimate expectation violating the fundamental rules of the Constitution. If the initial appointment is void-ab-initio, he cannot have any legal right to remain on the said post till he is regularized by some statute or the rule. The Court has no power to interfere in such case. Petitioner, when entered into the temporary employment, which was not based on a proper selection as recognized by the relevant rules or procedure, he was aware of the consequences of the appointment being temporary. So the petitioner cannot invoke the theory of legitimate expectation for being confirmed in the post when an appointment to the post could be made only by following a proper procedure for selection. Therefore, the theory of legitimate expectation cannot be successfully advanced by the petitioner. It cannot also be held that the respondents have held out any promise while engaging the petitioner either to continue him where he is or to make him permanent. The respondents cannot constitutionally make such a promise. It is also obvious that the theory cannot be invoked to seek a positive relief of being remained in the post.

11. In Para 36 in the case of **Secretary State of Karnataka Vs. Uma Devi (supra) Hon'ble Apex Court** has held as under:-

" While directing that appointments, temporary or casual, be regularized or made permanent, courts are swayed by the fact that the concerned person has worked for some time and in some cases for a considerable length of time. It is not as if the person who accepts an engagement either temporary or casual in nature, is not aware of the nature of his employment. He accepts the employment with eyes open. It may be true that he is not in a position to bargain -- not at arms length -- since he might have been searching for some employment so as to eke out his livelihood and accepts whatever he gets. But on that ground alone, it would not be appropriate to jettison the constitutional scheme of appointment and to take the view that a person who has temporarily or casually got employed should be directed to be continued permanently. By doing so, it will be creating another mode of public appointment which is not permissible. If the court were to void a contractual employment of this nature on the ground that the parties were not having equal bargaining power, that too would not enable the court to grant any relief to that employee. A total embargo on such casual or temporary employment is not possible, given the exigencies of administration and if imposed, would only mean that some people who at least get employment temporarily, contractually or casually, would not be getting even that employment when securing of such employment brings at least some succor to them. After all, innumerable citizens of our vast country are in search of employment and one is not compelled to accept a casual or temporary employment if one is not inclined to go in for such an employment. It is in that context that one has to proceed on the basis that the employment was accepted fully knowing the nature of it and the consequences flowing from it. In other words, even while accepting the employment, the person concerned knows the nature of his employment. It is not an appointment to a post in the real sense of the term. The claim acquired by him in the post in which he is temporarily employed or the interest in that post cannot be considered to be of such a magnitude as to enable the giving up of the procedure established, for making regular appointments to available posts in the services of the State. The argument

that since one has been working for some time in the post, it will not be just to discontinue him, even though he was aware of the nature of the employment when he first took it up, is not one that would enable the jettisoning of the procedure established by law for public employment and would have to fail when tested on the touchstone of constitutionality and equality of opportunity enshrined in Article 14 of the Constitution of India"

12. The Hon'ble Apex Court has also held that if any illegality had been committed in past, it is beyond comprehension as to how such illegality can be allowed to perpetuate. No equality can be claimed in illegality, it is now settled. Even in this behalf, Article 14 of the Constitution would not be applicable **[**in the **State of U.P. Vs. Neeraj Avasthi 2006 (1) SCC 667].** In view of the above, the petitioner is not entitled to seek regularization by way of this claim petition.

13. Whereas the legality of the impugned order Annexure-1 is concerned, the petitioner had not been attending the office since 2002 and thereafter several notices and reminders were given to him and even the paper publication was made but inspite of that he did not turn up, now the petitioner cannot say that he was not given any show cause notice. The services of the petitioner were just like a daily wager and he cannot claim that his services cannot be dispensed with. Ld. Counsel for the petitioner could not demonstrate any other illegality in the said order.

14. Now one more question arises, the petitioner was either a work charge employee or casual or daily wager or an ad-hoc employee; his status cannot be categorized more than that. As to whether the petitioner had any legal right to enforce his right by way of seeking mandamus for regularization etc. It is a well settled law that when a Court or a Tribunal is approached for relief, the Court or the Tribunal necessarily to ask itself whether the person before it had any legal right to be enforced. The Hon'ble Apex Court in Para 52 of the Uma Devi case (supra) has held as under:-

"Normally, what is sought for by such temporary employees when they approach the court, is the issue of a writ of mandamus directing the employer, the State or its instrumentalities, to absorb them in permanent service or to allow them to continue. In this context, the question arises whether a

mandamus could be issued in favour of such persons. At this juncture, it will be proper to refer to the decision of the Constitution Bench the Nalanda College [(1962) Supp. 2 SCR 144]. That case arose out of a refusal to promote the writ petitioner therein as the Principal of a college. This Court held that in order that a mandamus may issue to compel the authorities to do something, it must be shown that the statute imposes a legal duty on the authority and the aggrieved party had a legal right under the statute or rule to enforce it. This classical position continues and a mandamus could not be issued in favour of the employees directing the government to make them permanent since the employees cannot show that they have an enforceable legal right to be permanently absorbed or that the State has a legal duty to make them permanent."

15. Ld. Counsel for the petitioner has further contended that the petitioner was ill and he sent his application for leave and the copy of the application had been annexed with the petition. It is apparent from the record that the petitioner had only sent an application for leave on 7.10.2002 for one day leave only, however respondents have accepted in written statement that his two leave applications were received; one was for 7.10.2002 to 12.10.2002 and another for 14.10.2002 to 24.10.2002 and thereafter no application was sent by him. The petitioner has not filed any copy of the application regarding the leave. The petitioner was a work charge employee, more or less a daily wager and he has also claimed wages from 7.10.2002 till date. The petitioner had not discharged any work in the establishment as such he is not entitled to get any back wages on the basis of ' no work no pay'.

16. In view of the above we do not find any merit in the petition. The petition is devoid of merit and is hereby dismissed.

Sd/- Sd/-

(D.K.KOTIA) **(JUSTICE J.C.S.RAWAT)**
VICE CHAIRMAN (A) CHAIRMAN

DATED: MARCH 11 , 2014
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