

CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH, CUTTACK

O.A.No.911 of 2011

Cuttack this the 21st day of February, 2018

CORAM:

THE HON'BLE SHRI S.K.PATTNAIK, MEMBER(J)
THE HON'BLE DR.MRUTYUNJAY SARANGI, MEMBER(A)

Prafulla Kumar Mallick, aged about 46 years, S/o. late Krushna Chandra Mallick, At-Kautara, PO-Digiri, Via-Bolagada, Dist-Nayagarh – at present working as “Bearer”, NALCO Guest House, 5/12, Sarvopriya Vihar, Hauz Khas, New Delhi

...Applicant

By the Advocate(s)-Ms.M.Jesthi

-VERSUS-

Union of India represented through:

1. The Secretary, Ministry of Steel & Mines, New Delhi
2. Chairman-cum-Managing Director, NALCO, 303, Mercantile House-15, Kasturba Gandhi Marg, New Delhi
3. Regional Manager, Regional office(NR), New Delhi
4. Executive Director, HR & A, NALCO, Nalco Bhawan, P-1, Nayapalli, Bhubaneswar, Khurda, Odisha

...Respondents

By the Advocate(s)-M/s.R.C.Swain
Sujata Mohanty
M.K.Mishra

ORDER

DR.MRUTYUNJAY SARANGI, MEMBER(A):

The applicant was engaged on daily wage basis in the NALCO in the year 1985 and has been continuing in the post. He has prayed for the following reliefs in the O.A.

- i) To direct the respondents to regularize the service of the applicant.

- ii) To pass appropriate orders directing the respondents to extend all other service and consequential benefits to which he is entitled.
- iii) To pass such further order/orders, direction/directions as are deemed just and proper in the facts and circumstances of the case and allow the O.A. with costs.

2. The applicant's prayer is based on the ground that he has been working continuously since the year 1985 on daily wage basis without any break and receiving wages from the Management of NALCO. On 8.1.2001, the Company invited applications for the post of Bearer and the applicant had applied for the same on 12.01.2001. Neither he nor any other person was appointed and he was allowed to continue on daily wage basis without any break. The applicant receives conveyance allowance and Provident Fund is being deducted from his pay. Having put in more than 25 years continuous service, the applicant is eligible for regularization.

3. Respondent Nos. 2 to 4 representing NALCO filed their reply on 28.9.2012 in which they have contested the claim of the applicant. It is their contention that the applicant was engaged as a Security Guard at NALCO, Bhubaneswar by M/s. Investigation & Security Services India Pvt. Ltd. from 14.11.1985 to 26.06.1998 and worked as Helper in NALCO School Bus Corporate Office, Bhubaneswar. His appointment has been on daily rated basis with intermittent breaks every year. He was given employment as Bearer in NALCO, New Delhi

Guest House on daily rate basis for three spells of 89 days between 7.7.2004 and 31.05.2005. He was engaged by M/s. Commercial & Industrial Man Power Security Agency from 1.6.2005 in NALCO, New Delhi Guest House and by M/s. Eurotouch Security Services from November, 2011. He has not been a regular employee of NALCO. He had not received fixed conveyance allowance like regular employees of NALCO. It was only a reimbursement of his transport costs when he had to visit any place for duty at New Delhi. The deduction of Provident Fund is not a conclusive proof that he was a regular employee of NALCO. Provident fund contribution was deducted with matching contribution by NALCO during the applicant's engagement for temporary period in NALCO. Thereafter, Provident Fund was deducted by the concerned contractor and deposited in Contractor's Code whenever he was engaged by the contractor. Respondents have submitted that the applicant has no legal claim for regularization and therefore, the O.A. is liable to be dismissed. The Respondents have cited the following judgments to contest the claim of regularization by the applicant.

- i) (2006) SCC 1 (Secretary, State of Karnataka & ors. vs. Uma Devi & Ors.
- ii) Civil Appeal No.2835/2014 (Nand Kumar vs. State of Bihar & Ors.
- iii) (2004) 7 SCC (A.Umarani vs. Registrar, Cooperative Societies & Ors.

- iv) (2005) 5 SCC 112 (Madhyamik Shiksha Parishad, UP vs. Anil Kumar Mishra & Ors.)

4. The applicant has filed a written note of submission on 21.5.2014 and has reiterated that he was receiving the wages from NALCO as revealed by the Journal Voucher and PF Sanction letter. The service of the applicant was being extended by NALCO itself and not through a service provider. The wages, travelling allowance and the deduction of Provident Fund by NALCO prove that these benefits were not given by the service provider, but by NALCO itself. The applicant had appeared for the interview twice with the NALCO for the post of Bearer, but no appointment order was issued.

5. The following facts emerge from the records filed by both the parties.

- i) A note put up for the approval by the CMD for engaging five persons on daily wage basis. The Note is dated 13.8.1988 and against P.K.Mallick, the year of recruitment is mentioned as 1985 and his monthly attendance is mentioned as 23 days.
- ii) Letters at various times of the Employees' Unions to the Management for regularization of the service of the applicant in this O.A.
- iii) Representations by the applicant and similarly placed persons for regularization at various times.
- iv) The EPF statement in respect of the applicant with membership shown from 1.11.1998. Against the contribution by the employees there is also an employers' component in the EPF statement.
- v) The deduction for certain periods is made towards NALCO Employees Provident Fund Trust.

6. The Respondents have enclosed copies of the note-sheets where decisions have been taken to engage “a few hands on temporary basis for 89 days pending regular arrangement for the Pantry Service in NALCO Bhawan, Delhi”. The note is dated 23.6.1998. There is also a statement of wages paid to contract labourers from October, 2001 to September, 2002. This record shows that the applicant has been paid an amount of Rs.30,739.50 for the said period. Applicant had worked for 297 days during this period of one year. EPF and ESI amount has been deducted from the applicant @ 13.75%. In the Annexure-R/2 series under heading “Gratuity Paid” to the Ex-Security Guards of ISS at NALCO, it is mentioned that date of appointment of Shri P.K.Mallick is 18.01.1985 and date of resignation is 26.6.1998 and his service period is mentioned as 12 years 5 months and he has been paid a gratuity of Rs.5773.75. There is another salary statement which shows that the wages have been paid to the contract labourers engaged in the Pantry Service, NALCO Bhawan by M/s.B.N.Das Catering. As per the statement, the applicant Shri Mallick has worked for 28 days in January, 2004 and has received a net amount of Rs.3177.89.

7. It is the contention of the applicant that he has been working for 26 years from 1985 to 2011 as a contractual labourer with the respondent-company and therefore, his services are to be regularized. He had also attended interview

twice in 2001 and 2007 for the post of Bearer, but no decision was taken on his appointment despite repeated representations.

8. Respondents on the other hand, have challenged the claim of the applicant. It is their contention that the applicant has been working only on a contract basis, his services have been sporadic and he has not been engaged on a continuous basis. The applicant was engaged as Security Guard at NALCO, Bhubaneswar by M/s. Investigation & Security Services India (P) Ltd. from 14.11.1985 to 26.6.1998 and worked as Helper in the NALCO School Bus Corporate Office, Bhubaneswar. Later on, he was engaged as Bearer by M/s.P.K. Rockdrills from October, 2001 to December, 2003 for pantry services and then by M/s.B.N.Das Catering from January, 2004 to June, 2004. After that he was engaged as Bearer in NALCO New Delhi Guest House on daily rated basis for three spells for 89 days each between 07.07.2004 and 31.05.2005 with breaks. He was engaged by M/s. Commercial & Industrial Man Power Security Agency from 01.06.2005 in NALCO, New Delhi Guest House and subsequently, by M/s.Urotouch Security Services from November, 2011. Since he is not an employee of NALCO on contractual basis his claim for regularization cannot be sustained.

9. The applicant in his rejoinder filed on 13.1.2014 has reiterated that he was working under NALCO and has produced

the Journal Voucher, payment of T.A., deduction of Provident Fund etc. to prove that he was not an employee of the Service Provider, but of NALCO. Had he been an employee of the Service Provider, the matching contribution for EPF would have been given by the Service Provider and not by NALCO. Moreover, he has been already called for interview twice and in the interview held in November, 2007, his name was recommended by the Selection Committee. However, he has not been given the letter of appointment.

10. In the course of arguments, the respondents have cited the judgment of the Hon'ble Supreme Court in [**Secretary, State of Karnataka & Ors. vs. Uma Devi(2006) 4 SCC 1**] in which it has been held that absorption/regularization or permanent continuance of temporary, contractual, casual, daily wage or ad hoc employees appointed/recruited and continued for long in public employment are dehors the constitutional scheme of public employment and amount to creating another mode of public appointment which is not permissible. Similarly in **Civil Appeal No.2835/2014 (Nand Kumar vs. State of Bihar & Ors.)**, the Hon'ble Apex Court has held that when daily wage workers were appointed it was within their knowledge that all the consequences of appointments were temporary and therefore, they have no right to invoke the theory of legitimate expectation for being confirmed in the post. In **A.Umarani vs.Registrar, Cooperative Societies & Ors (2004) 7 SCC 112**,

the Hon'ble Supreme Court in Paragraph-39 of the judgment has held as under:

“39.Regularisation, in our considered opinion, is not and cannot be the mode of recruitment by any “State” within the meaning of Article 12 of the Constitution of India or anybody or authority governed by a statutory Act or the Rules framed thereunder. It is also now well settled that an appointment made in violation of the mandatory provisions of the statute and in particular, ignoring the minimum educational qualification and other essential qualification would be wholly illegal. Such illegality cannot be cured by taking recourse to regularization”.

In **Madhyamik Shiksha Parishad, U.P. vs. Anil Kumar Mishra & Ors. [(2005) 5 SCC 122]**, the Hon'ble Supreme Court held that the High Court while ordering reinstatement of the respondents as casual workers had erred in doing so since there was no sanctioned post in existence to which the respondents could be said to have been appointed.

11. We have heard the arguments from both the sides and perused the documents. The issue to be decided in this O.A. is whether the applicant has a legal and valid claim for regularization in his service while he has been working as a contract worker/daily rated worker. From the records it is quite obvious that the applicant has been working in NALCO from the year 1985 on contract basis or daily rated basis from time to time. His initial appointment was approved by the CMD, NALCO in the year 1985. Initially the applicant was working in the School Bus of NALCO Corporate Office. From the year 1998, he has been working as Pantry/Bearer in the NALCO Guest

House, New Delhi. Documents show that at certain periods of time his wages have been paid by NALCO and on some other periods of time, the wages have been paid by the Outsourced Agency. The applicant has made a strong plea that since his Provident Fund contribution is collected by the NALCO Employees Provident Fund Trust and the matching contribution is being paid by NALCO, he should be treated as an employee of NALCO. Records also show that he has been paid a gratuity amount of Rs.5851.25 in the year 1998 when his date of resignation has been shown as 26.6.1998. Subsequently, the applicant is being shown as an employee of Outsourced Agency, M/s.P.K.Rockdrills.

12. The fact remains that the applicant was continuing as Bearer in the NALCO Guest House at New Delhi at the time of filing the O.A. The Respondents have submitted that the applicant was not a regular employee of NALCO. From the documents annexed to the O.A. and also by the respondents, it emerges that for certain intermittent spells the applicant was directly engaged as daily wage worker by NALCO. The Respondents in their counter have stated that the applicant was engaged as Security Guard at NALCO, Bhubaneswar by M/s. Investigation & Security Service India (P) Ltd., from 14.11.1985 to 26.6.1998. He was engaged as Helper in NALCO School Bus at Bhubaneswar on daily rated basis by NALCO from 1.7.1998 to 1.10.2001 with the approval of the competent authority from

time to time based on requirement. He was engaged as a Bearer at NALCO Guest House, New Delhi from October, 2001 to December, 2003 and then by M/s.B.N.Das Catering from January, 2004 to June, 2004. He was engaged as Bearer again by NALCO in three spells of 89 days each between 7.7.2004 and 31.5.2005. He was further engaged by M/s. Commercial & Industrial Employer Security Agency from 1.6.2005 in the NALCO Guest House, New Delhi till November, 2011 after which he has been engaged by M/s.Urotouch Security Services.

13. A perusal of the documents attached and the statement made by the respondents in the counter shows that the applicant has been working in the NALCO from the year 1985 either through a contract engagement by NALCO or through Outsourced Agency. All his employment is either on contract or through daily wage basis. Records also show that he was called for interview twice in November, 2007. Records show that in a related case of Shri Hrusikesh Parida in O.A.No. 910 of 2011 the applicant along with one Shri Hrusikesh Parida was recommended for appointment as Bearer by the Selection Committee. The note dated 7.5.2008 reads as follows:

“Sub: Interview for engagement in the job of bearer on contractual & fixed tenure basis for a period of one year of Sh.Hrusikesh Parida & Sh.P.K.Mallick

The interview for the above was held in the month of November, 2007 in Delhi Office a committee comprising the undersigned DGM(HRD), Mr.Murmu & Sh. S.C.Rai, M(A) as the members.

Both the candidates were found suitable & the committee recommended for the said appointment. Both these candidates have been working for a very long period (i.e., about 20 years) under different (temporary) schemes & are known to be very hard working, sincere & dedicated workers, who have also been strongly appreciated time & again by the top management executives of the company for their good work & nature as well.

It was also understood that formalities for issuance of appointment letters were almost completed at Corporate Office some time ago. Both the candidates deserve sympathetic consideration.

Submitted for kind attention & consideration of D(P&A)".

However, the Corporate Office did not issue any appointment letter to them. It is incontrovertible that the applicant has been working for NALCO and fulfilling certain needs for which he has been paid either on contract basis or on daily rate basis. M/s. NALCO obviously had a need for the post of Bearers for which they conducted the interview. At some point of time, they had a plan to fill up those posts. The applicant having worked there continuously from 1998 has been carrying out the duties of Bearer. Although the Respondents claim that his appointment has been given from time to time with breaks, obviously, these are artificial breaks and nothing on record shows that the job of the Bearer was done by any other person during the period that the artificial break was imposed. It is also a fact from the records of Employees' Provident Fund Statement that NALCO was paying

employers' contribution into the EPF for the applicant during certain periods of his employment.

14. Although as per law a contract labour or a daily rated worker does not have an absolute right for employment, in the present case, the applicant has been working for NALCO since 1985 for more than 32 years and has produced sufficient records to show that from time to time, he has been receiving direct payment from NALCO as a contract labourer or as a daily wage worker. At least from the year 1998, the NALCO Guest House, New Delhi has been utilizing the services of the applicant as Bearer. It was the duty of the respondents to get the post sanctioned and make regular appointments within the short period of opening of the Guest House. For reasons best known, they continued to utilize the services of the applicant as a Bearer by paying him only a daily wage for more than a decade. We are aware of the restrictions imposed on regularization from the case laws cited by the Respondents in *Secretary, State of Karnataka & Ors. vs. Umadevi (supra)*. However, the fact that the unsanctioned posts have been operating in the NALCO Guest House at Delhi and persons are being paid at daily wage basis is not a fair labour practice. There is something amiss in the way NALCO has paid the matching contribution for Provident Fund for the applicant and at the same time, claiming that the applicant is only an employee of Outsourced Agency. It is also equally unfortunate

that the post in which the applicant has been working continuously since 1998 remained unsanctioned and the services of the applicant are being utilized as daily wager, although records show that he has been working for NALCO since 1985. In view of his long years of service and the reluctance of NQALCO to get the posts of Bearers sanctioned, the case laws cited by the learned counsel for the Respondents will not be applicable in the present case. The practice of exploiting cheap labour in lieu of regular appointment for 32 years is as illegal and abhorrent as back-door entry into jobs. The balance of justice in the present case is certainly in favour of the applicant.

15. The Hon'ble Supreme Court had dealt with a similar matter in Amarkant Rai vs. State of Bihar & Ors. (Manu/SC/0271/2015 in Civil Appeal No.2835 of 2015 decided on 13.03.2015) where the applicant had served the Ramashray Baleshwar College, Bihar for more than twenty nine years on daily wage basis and the judgment was passed in his favour for regularization. The relevant excerpts from the judgment are as follows:

“14.In our view, the exception carved out in para 53 of Umadevi is applicable to the facts of the present case. There is no material placed on record for the Respondents that the Appellant has been lacking any qualification or bear any blemish record during his employment for over two decades. It is pertinent to note that services of similarly situated persons on daily wages for regularization viz. one Yatindra Kumar Mishra who was appointed on daily wages on the post of Clerk was regularized

w.e.f. 1987. The Appellant although initially working against unsanctioned post, the Appellant was working continuously since 03.1.2002 against sanctioned post. Since there is no material placed on record regarding the details whether any other night guard was appointed against the sanctioned post, in the facts and circumstances of the case, we are inclined to award monetary benefits be paid from 01.01.2010.

15.Considering the facts and circumstances of the case that the Appellant has served the University for more than 29 years on the post of Night Guard and that he has served the College on daily wages, in the interest of justice, the authorities are directed to regularize the services of the Appellant retrospectively w.e.f. 03.01.2002 (the date on which he rejoined the post as per direction of Registrar).

16.The impugned order of the High Court in LPA No.1312 of 2012 dated 20.02.2013 is set aside and this appeal is allowed. The authorities are directed to notionally regularize the service of the Appellant retrospectively w.e.f. 03.01.2002, or the date on which the post became vacant whichever is later and without monetary benefit for the above period. However, the Appellant shall be entitled to monetary benefits from 01.01.2010. The period from 03.01.2002 shall be taken for continuity of service and pensionary benefits.

17.The appeal is allowed in terms of the above. No order as to costs”.

16. Considering all the facts and points of law involved in the present O.A., we are of the considered view that the case of the applicant will follow the precedent laid down in Amalkant Rai (supra). The applicant's case should be treated as exceptional and he needs to be regularized from the date of his initial appointment as Bearer at the NALCO Guest House in New Delhi with applicable scale of pay so that he could come to the regular establishment consequent upon such regularization. The

Respondents are therefore, directed to pass necessary orders to this effect within a period of eight weeks from the date of receipt of this order.

17. With the above direction, the O.A. is disposed of with no order as to costs.

(DR.MRUTYUNJAY SARANGI)
MEMBER(A)

(S.K.PATTNAIK)
MEMBER(J)

BKS