

(2013) 05 AHC CK 0169

Allahabad High Court

Case No: Civil Misc. Writ Petition No. 13005 of 2012

Mahesh Upadhyay

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision: May 27, 2013

Citation: (2013) 6 ADJ 237 : (2013) 100 ALR 41 : (2013) 139 FLR 236 : (2013) 3 UPLBEC 1986

Hon'ble Judges: Vineet Saran, J; B. Amit Sthalekar, J

Bench: Division Bench

Advocate: Ajay Shankar, Ajay Rawat, Ashok Khare and R.C. Tiwari, for the Appellant;
Nripendra Mishra, Pankaj Kumar Shukla, Sunil Kumar Dubey and Vivek Ratan, for the Respondent

Final Decision: Partly Allowed

Judgement

1. The brief facts of this case are that the petitioner was appointed as Assistant Engineer (E) in the Haryana Vidyut Prasar Nigam Ltd. (HVPNL) on 11.8.2004. While he was working with HVPNL, the U.P. Power Corporation Ltd. (UPPCL) invited applications from engineers of 9 different Power Corporations including the HVPNL, for joining UPPCL on deputation. In the meantime, on 25.3.2009, the petitioner was promoted as Assistant Executive Engineer in the HVPNL. Then on 18.11.2009, the Managing Director of HVPNL recommended the name of the petitioner for being taken on deputation by the UPPCL. In pursuance thereof, on 3.12.2009 the UPPCL wrote to the Paschimanchal Vidyut Vitran Nigam Ltd. (PVVNL) for giving charge to the petitioner on deputation for a period of one year. Since the petitioner was initially posted on deputation as Assistant Engineer, he represented to the UPPCL on 14.12.2009 stating that since he was Assistant Executive Engineer in HPVNL, which is a Class I post, his posting on deputation as Assistant Engineer, which falls in the category of Class II post, is not proper and therefore he requested that he be considered for deputation on the higher post of Executive Engineer. In pursuance thereof, on the very next day i.e. 15.12.2009, the Director (Personnel) UPPCL wrote to the Managing Director PVVNL to post the petitioner on deputation as Executive

Engineer. Pursuant thereto on 17.12.2009 the deputation of the petitioner on the post of Executive Engineer was approved by the HVPNL. On 23.12.2009 the Chairman-Managing Director of UPPCL also approved the deputation of the petitioner on the post of Executive Engineer in the UPPCL. Then by order dated 26.12.2009, the Committee constituted under orders of the Apex Court dated 21.3.2007 passed in Public Interest Litigation No. 79 of 1997 also approved the transfer/posting on deputation of the petitioner as Executive Engineer at Ghaziabad. Consequently by order dated 29.12.2009 the petitioner was posted as Executive Engineer at Ghaziabad on a vacant post on which post he took charge on 4.1.2010. On 6.7.2010 he was transferred to a different division in Ghaziabad itself. On 6.10.2010, before the period of deputation of the petitioner was to come to an end, he moved an application requesting for his absorption in UPPCL., on which application the UPPCL wrote to the HVPNL on 10.11.2010 to give its no objection to such absorption of the petitioner. Pursuant thereto, on 15.12.2010 HPVNL sent its no objection certificate to the UPPCL for permanent absorption of the petitioner, with the condition that he will not be allowed terminal benefits of his service in HPVNL and will have no right to claim his lien on the post of Assistant Executive Engineer in HPVNL after his absorption in UPPCL. It is admitted that till that date there was no provision for absorption in UPPCL and it was only on 19.5.2011 that the Uttar Pradesh Power Corporation Limited Mey Pratiniyukti Par Aane Wale Sewako (Shashan Va Anya Pradesh Key Vidyut Nigamo Avam Sarvajanik Upkramo Jaha Vitran Avam Pareshan Ka Karya Sanchalit Kiya Jata Ho) Ka Samviliyan Viniyam, 2011 (hereinafter referred to as the Absorption Regulation, 2011) came into force. In the meantime, on 18.12.2010 the period of deputation of the petitioner was extended for a further period of one year. The matter relating to absorption of the petitioner in UPPCL came up before the Board of UPPCL on 12.10.2011 and by order dated 24.12.2011 it was communicated to the petitioner that he has been absorbed on the post of Assistant Engineer (E & M).

2. On receipt of the said order of absorption, the petitioner represented to the UPPCL on 9.1.2012 stating that during the period of deputation he had been working on the post of Executive Engineer and as such he should be absorbed as Executive Engineer, which is a class I post, as the petitioner had been working in HPVNL as Assistant Executive Engineer, which was also a Class I post. In the said representation it was contended by the petitioner that the post of Assistant Engineer, on which the petitioner was being absorbed is a Class II post and as such he prayed that "for the foregoing reasons and circumstances, the undersigned, by means of this representation, respectfully, seek your indulgence to withdraw the letter dated 24.12.2011 thereby cancelling the appointment of the undersigned on the post of Executive Engineer. Also, till such orders, as aforesaid, are passed, the letter dated 24.12.2011 be stayed/not given effect to, and suitable/ appropriate orders be passed so as to extend the deputation period of the undersigned and he be permitted/allowed to continue to work, as earlier, on deputation on the post of

Executive Engineer." A reminder in this regard was also sent by the petitioner on 17.2.2012. When no orders were passed on the said application of the petitioner, the petitioner filed this writ petition, with the prayer for a direction in the nature of certiorari quashing the order dated 24.12.2011 passed by the UPPCL and further to issue a writ in the nature of mandamus commanding the respondents to absorb the petitioner on the post of Executive Engineer in the UPPCL or on any other equivalent post and pay the salary and other consequential benefits of the post as and when it falls due.

3. It is contended that when on 12.3.2012 a copy of the writ petition was served on the learned standing counsel for the UPPCL, the Chairman/Managing Director of UPPCL on the very next day i.e. 13.3.2012 passed an order cancelling the earlier order of absorption dated 24.12.2011. On the same date i.e. 13.3.2012 Chairman cum Managing Director, UPPCL passed another order repatriating the petitioner to the HPVNL, and in compliance thereof the Superintending Engineer by his order also dated 13.3.2012 directed the petitioner to handover the charge. The salary of the petitioner was also calculated and given effect to on the same date. Two amendment applications in this regard were filed, which were allowed and the prayer for quashing the three orders dated 13.3.2012 were permitted to be added. The first prayer of the petitioner with regard to quashing of the order dated 24.12.2011 was also amended to the extent that the said order may not have the effect of reverting the petitioner to the post of Assistant Engineer from the post of Executive Engineer.

4. We have heard Shri T.P. Singh, learned Senior Counsel alongwith Shri Siddharth Nandan, learned counsel for the petitioner as well as learned standing counsel for the State-respondent No. 1, Shri Shashi Nandan, learned Senior Counsel alongwith Shri Nipendra Mishra for the contesting respondent Nos. 2, 3, 4 and 5 (UPPCL) and Shri Vivek Ratan for the respondent No. 6 (HVPNL) and perused the record. Pleadings between the contesting parties have been exchanged and with the consent of learned counsel for the parties, this writ petition is being disposed of at the admission stage itself.

5. In short the submission of learned counsel for the petitioner is that once the petitioner had been working on the post of Executive Engineer on deputation, he ought to have been absorbed as Executive Engineer and not on the post of Assistant Engineer. He has further submitted that as Assistant Executive Engineer in HVPNL he was working on a Class I post, which post is equivalent to the post of Executive Engineer, which is also a class I post and not the post of Assistant Engineer, which is a Class II post. Further submission of the learned counsel for the petitioner is that the order dated 13.3.2012, by which the earlier order of absorption dated 24.12.2012 had been cancelled, is wholly unjustified and against the principles of natural justice as the same has been passed without affording the petitioner any opportunity of hearing. It is contended that once the petitioner had been absorbed

in UPPCL, a right had accrued in favour of the petitioner and the same could not have been taken away without complying with the principles of natural justice.

6. On the other hand, Shri Shashi Nandan, learned Senior Counsel appearing for the contesting respondent (UPPCL) has submitted that the deputation of the petitioner was never on the post of Assistant Executive Engineer and it was only on the representation of the petitioner he was permitted to work as Executive Engineer. It is stated that absorption of the petitioner could be made under the Absorption Regulation, 2011 alone and that the same provides for absorption only on the post of Assistant Engineer and not on any higher post. Further submission is that the order dated 13.3.2012 had been passed on the own request of the petitioner vide his representation dated 9.1.2012 in which his first prayer was for withdrawing the letter dated 24.12.2011, thereby cancelling the absorption of the petitioner on the post of Assistant Engineer. According to him, besides the said prayer for cancelling the absorption order dated 24.12.2011, a separate prayer had been made for considering the appointment of the petitioner on the post of Executive Engineer and the third prayer was that the order dated 24.12.2011 be stayed or not given effect to and in the meantime the deputation period of the petitioner be extended and he be permitted to continue on the post of Executive Engineer as his deputation has already come to an end on 18.12.2011. It is thus submitted that since the order dated 13.3.2012 has been passed on the own request of the petitioner, there was no question of giving any opportunity of hearing to him. Although, it was mentioned during the course of arguments that the petitioner herein was taken on deputation and placed on a higher post as he was closely related to a Senior Minister in the U.P. Cabinet at the relevant time but since the question of taking on deputation and absorption is to be considered on the basis of the communication sent by the UPPCL for absorbing officers to Power Corporations of different States vide letter dated 24.7.2008, and the absorption is to be considered as per the Absorption Regulation, 2011, we are not inclined to take into consideration the allegations of extraneous considerations (made orally across the bar and not supported by averments in the affidavits) while deciding this writ petition.

7. The initial deputation of the petitioner which was accepted by letter dated 3.12.2009 was on the post of Assistant Engineer. On the representation made by the petitioner on 14.12.2009 his case for being placed on deputation on a higher rank was considered. This itself makes it clear that the petitioner was initially taken in as Assistant Engineer. However, on the very next day i.e. on 15.12.2009, on the representation, the petitioner was permitted to be placed on deputation on the higher post of Executive Engineer, which order was given effect to within the next couple of days. While the petitioner was on deputation and had not completed one year, he made an application on 6.10.2010 for being absorbed. A perusal of the said application does not state that the petitioner wanted to be absorbed only on the post of Executive Engineer. All that is stated in the said application is that he had been working on the post of Executive Engineer, which was to the satisfaction of

superior officers and that since he originally hails from U.P. and all his relatives are here, hence because of family circumstances, he wishes to be absorbed in the UPPCL. It does not indicate that the petitioner was willing to be absorbed only on the post of Executive Engineer. At the time when the application was filed by the petitioner, admittedly there were no absorption Rules. After the Absorption Regulations, 2011 were framed with effect from 19.5.2011, the application of the petitioner was considered Regulation. Regulation 2(a) of the Absorption Regulation of 2011 defines the absorbed person to be such person whose absorption has been accepted by the Corporation. Regulation 2 of the Absorption Regulation, 2011 reads as under:

Regulation 9 of the Absorption Regulation, 2011 relates to the effect of absorption and reads as under:

8. A perusal of regulation 9 would make it clear that the absorption is to be on the post of Assistant Engineer and by the said Regulation it is also provided how the seniority of the absorbed Assistant Engineer is to be fixed. Besides the Absorption Regulation, 2011 learned counsel for the petitioner has not placed any other Rules or Regulations under which the petitioner may be absorbed. Under the aforesaid Regulations also, the learned counsel for the petitioner could not place any provisions under which the absorption could be made on a post higher than that of Assistant Engineer. The effect of absorption is given in the regulation 9. No absorption can be made de hors the Rules or Regulations. As such, the initial prayer of the petitioner which was for quashing the order dated 24.12.2011 and thereafter the prayer modified in the manner that the said order be quashed to the extent of reverting the petitioner on the post of Assistant Engineer, does not deserve to be granted. The petitioner had been absorbed as Assistant Engineer and since there could be no absorption on a higher post (even though the petitioner may have been working on deputation on the post of Executive Engineer), the said absorption order dated 24.12.2011 absorbing the petitioner on a post of Assistant Engineer is in our view perfectly justified and within the provisions of Absorption Regulation, 2011.

9. As regards the prayer for quashing the orders dated 13.3.2012, after having considered the facts and circumstances and the documents placed before us, we find that the passing of the said orders cannot be justified. Although Shri Shashi Nandan, learned Senior Counsel appearing for the UPPCL has vehemently argued that the said order was passed on the own request of the petitioner on 9.12.2011, however, after reading the prayer made in the representation, which is said to be in three parts, we are of the opinion that the entire prayer (which has already been quoted above) ought to be read together. The gist of the said prayer is that the order dated 24.12.2011 be cancelled in so far as it relates to the absorption of the petitioner on the post of Assistant Engineer and that he be permitted to continue on the post of Executive Engineer and be absorbed as such. The first part of the last paragraph of the application (which has already been quoted) cannot be read in

isolation and the entire paragraph has to be read together and on reading of the same we are of the considered opinion that the petitioner in his representation had not prayed for cancellation of the order dated 24.12.2011 alone but it was with the rider that his claim for absorption on the post of Executive Engineer be considered, instead of he being absorbed on the post of Assistant Engineer and till then he be permitted to work on deputation as Executive Engineer. As such once the petitioner had been absorbed, the representation dated 9.12.2011 of the petitioner should have been considered by the UPPCL after taking the entire facts as stated in the representation into account and not merely reading one part of the said representation and taking advantage of that and cancelling the absorption order dated 24.12.2011.

10. Once the right of absorption had accrued to the petitioner, the same could not have been withdrawn without the petitioner being given adequate opportunity of hearing. The same, having been passed in gross violation of principles of natural justice, deserves to be quashed. Even otherwise, once the petitioner had been taken on deputation by UPPCL, as per the communication dated 15.12.2010, his lien on the post of Assistant Executive Engineer in HPVNL had ceased and as such if the absorption order is permitted to be cancelled or withdrawn in the manner as has been done in the case of the petitioner, the petitioner would be adversely affected as he would neither be able to go back to his parent organization of HPVNL nor he would be able to work as Assistant Engineer in the UPPCL. In the result, the writ petition stands partly allowed. The three orders dated 13.3.2012, as added by the amendment made in the writ petition, passed by the UPPCL, are quashed. The prayer for absorption of the petitioner on the higher post of Executive Engineer is declined. The petitioner would be treated as having been absorbed on the post of Assistant Engineer as per the communication dated 24.12.2011.