

(2018) 06 CAL CK 0167
In the Calcutta High Court

Case No : CAN 2638, 2639 of 2018 In F.M.A. 3708, 3707 of 2014

Abinash Debnath And Others

APPELLANT

Vs

Sudhangshu Sen And Others

RESPONDENT

Date of Decision : 19-06-2018

Acts Referred:

Bengal Municipal Act, 1932 — Section 66, 66(4), 66(5)
Constitution of India, 1950 — Article 16

Citation : (2018) 06 CAL CK 0167

Hon'ble Judges : SANJIB BANERJEE, J; ABHIJIT GANGOPADHYAY, J

Bench : Division Bench

Advocate : Swapan Kr. Datta, Dipankar Das Gupta, Anindya Lahiri, Sambuddha Dutta, Kamalesh Jha

Final Decision : Disposed Of

Judgement

In view of the good grounds shown, the order dated May 04, 2018 dismissing the appeal being F.M.A. 3708 of 2014 for default is recalled and the

appeal is re-admitted and CAN 2638 of 2018 is allowed. The order impugned is rather unusual in that in the year 2014 the services of seven illegally

appointed employees in a municipality have been restored with retrospective effect from 1991. There is no dispute that the respondent-writ petitioners

were inducted as casual employees in the Birnagar Municipality in Nadia in or about the year 1989. However, nothing turns on the writ petitioners

having been initially inducted as casual employees since an order of regularisation passed by this Court in the pre-Umadevi days did not cover these writ petitioners.

In 1991, shortly before the then chairman of the municipality, who did not enjoy the majority support of the commissioners, demitted office, such

chairman wrote identical or similar letters to the seven writ petitioners appointing them as employees, albeit on a temporary basis, in the municipality.

The letters of appointment were issued on September 24, 1991 and were purported to be against permanent vacancies. The appointment in each case

was to be effective from the date of the concerned petitioner joining his post. The pay scale varied from one petitioner to another, but the minimum

scale of pay began at Rs.800/-. It also appears that the chairman, who authored the questioned letters of appointment, sought to have the appointments

approved by the board of the municipality despite five of the nine commissioners on the board communicating their objection in writing to the

appointments being approved. The outgoing chairman purported to convene a meeting of the board with four commissioners attending the same who

sought to approve the appointments on October 14, 1991.

A new chairman and vice-chairman were installed on October 28, 1991 after a fresh election. The new board of commissioners unanimously resolved

on November 07, 1991 to cancel what they perceived were the illegal appointments handed to the seven writ petitioners by the preceding chairman of

the municipality. The resolution of the board passed on November 07, 1991 is in Bengali, but it accurately translates to the board being of the opinion

that the appointments were made without following the employment rules of the State government or through Employment Exchanges or by adhering

to the principles of reservation and in derogation of Section 66 of the Bengal Municipal Act, 1932. The board perceived the appointments to be illegal

(beaini), it found the purported approval to be with ulterior motive (uddeswa pronodito) and the decision pertaining to appointment being the unilateral

diktat of the preceding chairman of the municipality (ekok siddhanta). On such perception that the appointments were illegally made, the same were

annulled and the concerned persons were required by the resolution of November 07, 1991 to be informed accordingly.

It appears that the present petitioners instituted a petition in the year 1992 challenging the cancellation of what the petitioners perceived was the illegal

termination of their services from the municipality. Such petition was, however, dismissed as withdrawn in the year 1998 with liberty to file afresh.

Such fresh petition was filed in 1999 which culminated in the order impugned being passed on August 19, 2014. By such order, the municipality was

directed to reinstate the petitioners in service, subject to their age qualification. The reinstatement was to be in existing vacancies and the order further provided that If no such vacancies exist, they shall be paid the salary for the entire period for which they had been unjustly terminated.

Ordinarily, courts do not allow reinstatement except in the extreme case of illegality. Further, even if reinstatement is directed, scarcely would a court require the entire back-wages to be paid for the period that no services were rendered by the employee. In this case the writ petitioners rendered service, if at all, for a period of about a month and the order of reinstatement was passed 23 years after the cancellation of their appointments. The order is not only unusual, it is somewhat shocking and which may be why no reasons were deemed necessary to be furnished as its operation was stayed immediately upon the appeals being filed.

The order impugned found that the writ petitioners were not liable to lose their positions without first being issued a notice. The reasoning in the judgment impugned is that the services of the petitioners could never have been terminated without adhering to the principles of natural justice. What was missed by the Single Bench was that this was not a case of termination of the services of the petitioners; it was a case of the cancellation of their illegal appointments.

The appellants refer to Section 66 of the Act of 1932 and the second proviso to sub-section (4) thereof that requires appointments to a post carrying a monthly salary of more than Rs. 750/- to be made with the prior approval of the State. The appellants also refer to Section 66 (5) of the Act, but such provision pertains to class-IV posts and it is not clear that the posts in which the writ petitioners were inducted were class-IV posts or not.

What is evident from the resolution of November 07, 1991 is that the appointments given to the writ petitioners were perceived by the municipality, under its new Board, to be illegal. As to why the board perceived the appointments to be illegal is clearly spelt out in the resolution since there is a reference to Section 66 of the Act of 1932 and a specific mention that the appointments were made de hors the State Government rules of appointment. There is no doubt that the board or the attendees at the relevant meeting had the second proviso to Section 66 (4) of the Act in mind.

In the light of the clear resolution adopted by the municipality with specific

reference to the legal provision of which it claimed violation, there was no scope for the Single Bench in this case to deem the action of the municipality as terminating the services of the writ petitioners. What the resolution of November 07, 1991 intended to do, was to cancel the illegal appointments of the writ petitioners and once the appointments were seen to be illegal â" as juxtaposed to irregular â" there was no question of any prior notice being issued to the writ petitioners or such petitioners being given any opportunity of being heard.

An illegal act is such an act that cannot be cured. An irregular act, on the other hand, is something that is curable. It is inconceivable that in the year 1991, more than 40 years after the Constitution had come into effect, a chairman of a municipality, with the support of four of the nine members on the board of a municipality, would have the authority to appoint persons of his choice without reference to the entirety of the board or without the prior approval of the State government. The writ petitioners have not attempted to show any meaningful exercise of recruitment undertaken by the board prior to the writ petitioners being issued the letters of appointment of September 24, 1991.

It is the case of the writ petitioners that they were regularised into vacant permanent posts that were available. There is no record in such regard and though the writ petitioners cannot be blamed for not having the records available with them, it is inconceivable that an exercise of recruitment could have been undertaken without any advertisement or in total derogation of the rule that is enunciated in Article 16 of the Constitution in matters pertaining to public appointments. If any modicum of an exercise of recruitment had been demonstrated, the writ petitioners could have made out a case of irregularity and the matter may have required further investigation. However, what appears to have happened is that an outgoing chairman of the municipality who knew that his days were numbered, purported to illegally issue letters of appointment to a chosen few without the approval of the State government and without even the concurrence of the majority on the board of the municipality at the relevant point of time.

The manner in which the appointments were handed out made them ripe for cancellation by the board at any time shortly thereafter. The board resolution of November 07, 2011 merely righted a wrong and any opportunity

that may have been afforded to the writ petitioners for a hearing could never have changed the result. In other words, even if the writ petitioners had been told that they were to face cancellation of their appointments, nothing they could have said would have altered the position. For the proposition that when an illegal action is annulled, the principles of audi altertem partem may have no manner of application, the appellants have relied on a judgment reported at (2007) 4 SCC 54.

The writ petitioners, however, have referred to the exception in the rule enunciated at paragraph 53 of the judgment in Umadevi, reported at (2006) 4

SCC 1. The writ petitioners have also relied on a Division Bench judgment of the Patna High Court reported at (1985) 2 SLR 495. In that case, the

Managing Director of a Government company engaged certain personnel on a temporary basis and, later, their services were sought to be regularised

by the same Managing Director. A challenge to such subsequent action of the Managing Director as to his authority to regularise such employees was

thrown and it was in such context that the Court held that the concerned employees had a right to be heard in the matter.

In the present case, when there was no recruitment exercise undertaken by the municipality but certain selected temporary employees were issued

letters of appointment by an outgoing chairman, the same principle would not apply. The exception carved out to the rule enunciated in Umadevi would

also not apply in this case, particularly since this was not a case of regularisation as the letters of appointment issued to the writ petitioners made out

that fresh appointments were given rather than the writ petitioners' services being regularised. In any event, the induction of the writ petitioners

into the municipality was not against any existing vacancies.

Â The writ petitioners were sought to be appointed in derogation of Section 66 of the said Act of 1932 and their appointments have been appropriately

cancelled at the meeting of November 07, 2011. Since the appointments were void ab initio, no previous notice was required to be served on the writ

petitioners. In the light of the aforesaid, the judgment and order dated August 19, 2014 and all findings rendered in favour of the writ petitioners therein

stand set aside.

F.M.A. 3708 of 2014 and CAN 2638 of 2018 are allowed as above. In the view of the above, the other appeal has become infructuous though the

same is restored by allowing CAN 2639 of 2018. FMA 3707 of 2018 stands disposed of. There will be no order as to costs.