
(2009) 03 AHC CK 0192
In the Allahabad High Court

Ajai Kumar Dubey

APPELLANT

Vs

Farrukhabad District Cooperative Bank Limited and Others

RESPONDENT

Date of Decision : 19-03-2009

Acts Referred:

Citation : (2009) 3 AWC 2184 : (2009) 2 UPLBEC 1854

Hon'ble Judges : Sudhir Agarwal, J;S. Rafat Alam, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

S. Rafat Alam and Sudhir Agarwal, JJ.—This intra court appeal is preferred against the judgment dated 11.11.2008 whereby the Hon"ble single Judge has dismissed Civil Misc. Writ Petition No. 26630 of 1990 of the petitioner-appellant Shri Ajay Kumar Dubey (hereinafter referred to as the appellant).

2. Shri Shesh Kumar, advocate assisted by Km. Beena Mishra, advocate appearing for the appellant contended that the Hon"ble single Judge has declined to consider the claim of the appellant with respect to regularization on the ground that no amendment in the regulation has been shown to the effect that cut off date prescribed earlier as 1.5.1983 was extended to 1.10.1986 though such amendment was made and, therefore, the appellant is entitled to be considered for regularization under this amended regulation. He further contended that the Hon"ble single Judge has erred in observing that on 15.12.1987 there were no rules permitting regularization of the employees appointed in the year 1985 as he has omitted to consider the U. P. Regularization of Ad hoc Appointments (on the post within the purview of the U. P. Co-operative Institutional Service Board). (First Amendment) Regulation, 1990 (hereinafter referred to as the First Amendment Regulation 1990) published in the U. P. Gazettee dated 25.8.1990.

3. We have heard learned Counsel for the parties and perused the record.

4. It is no doubt true that for the purposes of regularization of ad hoc employees

of co-operative societies, which were made against the posts, which were within the purview of Cooperative Societies Institutional Service Board (hereinafter referred to as the Board), the regulation was framed in the year 1985, i.e., U. P. Regularization of Ad hoc Appointments (on Posts within the Purview of the U. P. Co-operative Institutional Service Board) Regulations, 1985 (hereinafter referred to as "1985 Regulations"). The said regulation was also amended by the First Amendment Regulation, 1990, which was published in the U. P. Gazette dated 25.8.1990, a copy whereof has been placed on record alongwith a brief note of written arguments taken on record. Therefore, the Hon"ble single Judge in so far as it has observed that there is no rules providing for regularization of employees of co-operative societies appointed in the year 1985 is not. correct and it appears that the appellant having failed to place the aforesaid amended regulation before the Hon"ble single Judge, the said observation has been made.

5. However, this, by itself, would not help the appellant for claiming regularization under the aforesaid rules unless he could show that he is an employee said to have been appointed on ad hoc basis since the aforesaid rules are applicable only to the persons, who were appointed on ad hoc basis and not to others.

6. The capacities in which a person can be employed by an employer i.e., the nature of appointment, are well known in service jurisprudence. Broadly, a person can be appointed on temporary basis or substantive basis. This includes an appointment of a person on substantive basis but initially made on probation. The temporary appointment may be officiating, ad hoc, stop gap, tenure appointment etc. Besides, a person can be employed on daily wage basis, contractual basis on fixed term, substitute appointment etc. All these appointments may have different characteristic and not necessarily can be placed in a common category. They also cannot be dealt with generally in homogeneous category, i.e., constituting one class. In other words, all these kind of appointments cannot be placed in a common category. A person appointed for fixed tenure and further for payment of fixed salary stand on different pedestal. Thus, a person appointed on minimum of pay scale applicable to a regular employee but without undergoing process of selection and also without any limitation of period may fall within the category of "ad hoc appointment".

7. From the own case of the appellant, it is evident that he made an application to the Registrar Banking Co-operative Societies, Lucknow stating that he has been informed that there are some vacancies in District Co-operative Bank Ltd., Fatehgarh on the post of clerk and, therefore, his candidature may be considered for appointment on one of such posts. By an order dated 25.4.1985 the Secretary of the Bank appointed the appellant as class IV employee for a period of 89 days till 19.7.1985 and it was liable to be ceased after the expiry of the period of 89 days. It is also provided very specifically that the appointment shall not be a basis for regular appointment in the Bank. The appellant's appointment was termed as temporary appointment in the pay scale of 80-130, liable to be

terminated at any point of time without any prior notice or show cause. The appellant continued as class IV employee pursuant to the said appointment accordingly. It appears that the Branch Manager wrote a letter dated 21.8.1986 seeking permission of the Secretary of the Bank to take work from the appellant on the post of clerk till regular arrangement is made, which was granted by the Secretary vide letter dated 22.8.1986 observing that such arrangement is purely officiating arrangement and would entitle the appellant for payment of extra 20% officiating allowance only. By order dated 15.12.1987 the General Manager pursuant to the resolution dated 4.12.1987 made a number of employees including the appellant permanent w.e.f. 14.4.1987 and in the aforesaid order the name of the appellant was mentioned at serial No. 10 showing that he was made permanent on the post of sewak, i.e., class IV post. The appellant thereafter made representation for giving him promotion on the post of clerk but the same was declined by the Bank vide letter dated 25.8.1989 informing him that his recruitment was not made in accordance with Regulations, i.e., through the Board and, therefore, he cannot be promoted, and he may continue to discharge the duties as class IV employee until further orders. The appellant thereafter was transferred vide order dated 23.4.1990, working on the post of sewak, i.e., class IV post, from the city Branch to the Chhibramau Branch of the Bank with the direction to join thereat immediately. Pursuant thereto the appellant joined at Chhibramau Branch. By the order dated 18.8.1990 the administrator terminated the appellant on the ground that his appointment was illegal and irregular having not been approved by the Board and, therefore, is being terminated accordingly. It is this order, which was challenged in writ petition by the appellant seeking following reliefs:

- (i) to issue writ, order or direction in the nature of certiorari to quash the impugned order dated 18.8.90 (Annexure-IX) to this writ petition.
- (ii) to issue writ, order or direction in the nature of mandamus commanding the respondents (opposite parties) not to interfere in the discharge of duties of the petitioner on his post and not to disturb him in any other manner and to pay him salary and other emoluments which are permissible under the law on the post.
- (iii) to issue any other relief which this Hon'ble High Court may think fit and proper and necessary in the facts and circumstances of the case, and
- (iv) to award cost of the writ petition to the petitioner.

8. It is not disputed by the learned Counsel for the appellant that even appointment on class IV post in cooperative bank could have been made after the approval of the Board. He, however, submitted that for fixed term appointment made on 25.4.1985 no approval of the Board was required, as contemplated in the Regulations. However, he could not dispute this fact that before making an appointment on temporary basis in regular pay scale it was incumbent upon the authority concerned to obtain approval from the Board and no such appointment could have been made without the approval of the Board.

The order of appointment dated 10.6.1986 ceased to have effect after expiry of 89 days i.e., the period for which such appointment was made. Before expiry of the said period the Secretary of the Bank by an order dated 10.6.1985 appointed the appellant on temporary basis in the regular pay scale of 80,130 on the post of sewak. However, the aforesaid appointment could not have been made without the approval of the Board. It is not in dispute that recruitment and appointment in the co-operative society in question is governed by the U. P. Co-operative Societies Employees' Service Regulations, 1975 (referred to as the 1975 Regulation). Regulation 5 provides for recruitment and reads as under:

[5. Recruitment. - (i) Recruitment for all appointments in a cooperative society shall be made through the Board whether the recruitment is:

(a) direct; or

(b) by promotion from employees already in the service of the society; or

(c) by taking on deputation or otherwise, person already in the service of another society registered or deemed to have been registered under the Act, or a person in employment under a corporation an undertaking owned or controlled by the Central or the State Government body corporate administering a local fund.

(ii) Notwithstanding anything in Clause (i) no reference to the Board shall be necessary in the following cases:

(a) When it is proposed to fill with the concurrence of the Registrar any post by means of deputation of a Government servant, or

(b) When the Managing Committee or any other authority competent to make the appointment proposed to fill up as a stop gap measure for a period not exceeding six months a post by promotion from amongst the employees in the just below cadre on the principle of seniority subject to the rejection of the unfit:

Provided that any appointment thus made without consultation with the Board shall in every case, cease to have effect from the date on which the period of six months expires and the employees promoted to the higher post shall unless he has already been reverted to his original post within the said period of six months be deemed to have reverted from that date, to the post held by him immediately before such promotion:

Provided further that the employee appointed to the higher post under this sub-clause shall, in no circumstances, be promoted under this sub clause to any still higher post within the said period of six months, nor shall be appointed under this sub-clause to the same post again after his reversion under the first proviso.

(iii) To facilitate the performance of the duties enjoined upon the Board under Clause (i), every cooperative society shall communicate to the Board by 31st December every year the approximate number of vacancies likely to arise during the course of the next calendar year by reasons of creation of new posts,

retirement, deputation otherwise.

(iv) Notwithstanding anything contained in Clause (i) recruitment to posts in Category IV shall be made by a selection committee, which:

(1) In case of District Central Cooperative Banks, District Cooperative Federations, Uttar Pradesh Postal Employee's Cooperative Bank Limited, Lucknow and Oudh and Rohilkhand Railway Employees' Cooperative Bank Limited, Lucknow shall consist of:

(a) Chairman/Administrator of the Society, who shall be the Chairman;

(b) the Secretary of the Society, who shall be the Convener: and

(c) Assistant Registrar of the District, and

(2) In case of apex cooperative societies all consist of:

(a) Chairman/Administrator of the Society or his nominee, who shall be the Chairman;

(b) Secretary/Managing Director of the Society, who shall be the Convener; and

(c) on officer not below the rank of an Additional Registrar, nominated by the Registrar.

(v) Selection made by the Selection Committee referred to in Clause (v) shall be subject to the approval of the Board and appointments shall be made after the approval of the Board.

(vi) Notwithstanding anything contained in Clause (iv), in a cooperative society in which the appointments are to be made, shall send to the Board a requisition in the Form specified in appendix "A" at least three months before the vacancy is sought to be filled up. No change shall ordinarily be made by the Society in the requisition after the advertisement has been sent for publication.

(vii) In making recruitment to any post, the Board may require the appointing society or the society to which the appointing society is affiliated to send one of its officers to the Board and when the recruitment is to be made for a technical post or a post requiring specialized knowledge or skill, the Board, may also request any appropriate institution or authority to depute a technical advisor to assist the Board.]

Regulation 15 prohibits any appointment except in the manner provided in the regulation and reads as under:

15 (i) No appointment shall be made except in the manner provided for in the Regulations hereinbefore. Where recruitment through or with the approval of the Board is provided for in Regulation No. 5, no appointment shall be made except of the candidate and in the order mentioned in the list communicated by the Board.

(ii) Subject to the provisions of Clause (i) appointment shall be made by the committee of management of the society or by such authority as may be specified in the bye-laws:

Provided that the letter of appointment shall, in the case of Secretary, be issued by the Chairman, and in all other cases, it shall be issued by the Secretary of the society. The letter of appointment shall contain the name of the post, place of posting, nature of appointment, such as regular or temporary, probationary period and security, if any, salary with scale and conditions referred to in Regulation No. 14 and the date by which he has to join.

9. In the case in hand, it is not disputed that the appointment even on class IV post in the co-operative society could have been made only through the Board.

10. Learned Counsel for the petitioner, however, submitted that for making appointment, as a stop gap measure, for a period of 89 days no approval of the Board was necessary and, therefore, the appointment of the appellant, initially made for a period of 89 days, cannot be said to be illegal. If the appellant would have confined his case only up to the stage of appointment made for a period of 89 days by letter dated 25.4.1985, probably it would not have been open to us to declare that there was any error in such appointment, if the same was not made through the Board, but that appointment has gone in the background and what comes on the forefront is the subsequent letter of appointment, i.e., 10.6.1985 whereby the petitioner was appointed on temporary basis on the regular post in the scale of Rs. 80-130 and thereafter the order dated 7.12.1987 whereby he was made permanent w.e.f. 14.4.1987. Both these orders of appointment changes the very tenure and nature of office in which the appellant was initially inducted. These two appointment letters are clearly in the teeth of Regulation 5 read with Regulation 15 of 1975 Regulation. These two appointment letters being wholly illegal and in the teeth of the statutory regulation would not have conferred any benefit of valid status upon the petitioner and, therefore, it was always open to the employer to inform the petitioner about his status and terminate his service accordingly. Here is not a case where the employer has terminated the service of a person, who was validly appointed. The first appointment letter dated 25.4.1985 made appointment for 89 days only and, therefore, would have automatically expired on 19.7.1985, as mentioned in the said letter. The continuance of the petitioner thereafter is, admittedly, founded upon the appointment letters dated 10.6.1985 and 15.12.1987, which are ex facie illegal and contrary to the Regulations. Therefore, the employer in this case has not terminated the service of the petitioner, who was appointed validly in service; but a person, who continued in service wholly illegally and founded on two illegal orders has been terminated. This fact has only been noticed in the termination order and consequential order has been passed by the employer. It is too late in the day to contend that an employer cannot terminate an employee, whose appointment is founded illegally and contrary to rules. An illegal appointment, contrary to the statute, is no appointment in the eye of law and

can be terminated at any point of time. In *Ashok Kumar Sonkar Vs. Union of India (UOI) and Others*, the Apex Court held that the appointment not made in accordance with rules is wholly illegal and does not confer any right upon the appointee. The Court went to the extent that such an appointment is *ex facie* illegal and if an employee has been terminated without notice, the principle of natural justice was not required to be complied with, since it would be a futile exercise in such a case. The Court held that it is not necessary to apply the principle of natural justice where it would be futile exercise. In para 28 of the judgment the Apex Court said that "a Court of law does not insist on compliance with useless formalities. It will not issue any such direction where the result would remain the same, in view of the fact situation prevailing or in terms of the illegal consequences. Furthermore in this case, the selection of the appellant was illegal. He was not qualified on the cut off date. Being ineligible to be considered for appointment, it would have been a futile exercise to give him an opportunity of being heard." In this case, though the nature of illegality is different, but its consequences are not. The appointment of the appellant was not made after following the procedure prescribed in the Regulations ; on the contrary, his continuance or his appointment on temporary basis as well as permanent basis both were illegal being in the teeth of the Regulations. That being so, the appointment do not confer any right upon the appellant to claim any benefit based thereon.

11. In these circumstances, in our view, further contention of the appellant that instead of terminating his services, he ought to have been treated to be regular in view of 1985 Regulations, as amended by First Amendment Regulation 1990 also has no force for the reason more than one. Firstly, here is not a case where the appellant was appointed even on *ad hoc* basis and has continued thereafter so as to seek advantage of Regulation 85. Secondly, 1985 Regulation has no application to the facts of the case of the petitioner, since the cut off date prescribed thereunder was 1.5.1983 though the petitioner was appointed thereafter. So far as first amendment is concerned no doubt true that the same has extended the cut off date upto 1.10.1986, but it further provides that in order to claim benefit of Regulation 9, as inserted by First Amendment Regulation, 1990 the incumbent must have continued on the date of commencement of the First Amendment Regulation, 1990. Regulation 1 (2) of First Amendment Regulation 1990 provides that the same would be effective from the date of publication in the gazette. Copy of the notification of First Amendment Regulation 1990 shows that, it was published in the U. P. Gazette dated 25.8.1990 by which time the appellant was already terminated on 18.8.1990 and was not in service on 25.8.1990. Hence, he cannot claim the benefit of First Amendment Regulation, 1990 also, being out of service on the date of commencement of First Amendment Regulation, 1990.

12. It is then submitted by the learned Counsel for the appellant that the termination order dated 18.8.1990 was stayed by this Court in the aforesaid writ petition and the effect thereof would be that the petitioner must be deemed to

have been continued in service on 26.8.1996. The submission is thoroughly misconceived and untenable in law. It is not in dispute that the writ petition itself was dismissed initially on 16.1.1998 for want of prosecution and was restored only on 8.2.2008 thereafter the Hon"ble single Judge heard the matter and dismissed the writ petition vide judgment dated 11.11.2008. The effect of dismissal of the writ petition is as if no interim order was ever passed by this Court. This aspect has been clarified by several judgments of this Court and this view has been affirmed by the Apex Court in Kanoria Chemicals and Industries Ltd. and Others Vs. U.P. State Electricity Board and Others, . In Kanoria Chemicals and Industries Ltd. (supra) the Apex Court has observed that : "it is equally well settled that an order of stay granted pending disposal of a writ petition/suit or other proceeding, comes to an end with the dismissal of the substantive proceeding and it is the duty of the Court in such a case to put the parties in the same position they would have been but for the interim orders of the Court". Instead of saddling this judgment with several other authorities on the same point it would be useful to refer a recent judgment of this Court in Avinash Mohan (Dr.) v. State of U.P. and Ors. (2008) 3 UPLBEC 2148, where most of these cases are relied and referred.

13. That being so, the petitioner cannot claim any benefit on the post of interim order, which in law became non est after dismissal of the writ petition.

14. There is another facet of the issue. An ex parte interim order is normally granted considering a prima facie case, balance of convenience and irreparable loss but the Court cannot simultaneously put other side in a situation where on account of interim order other side would suffer irreparable loss. "Actus curie neminem gravabit" is now well accepted doctrine applicable in these circumstances. The act of the Court shall prejudice none. No person can claim that because of the interim order of the Court he is entitled to retain certain benefit, for which he is otherwise not entitled. The respondents despite having won the case cannot be put to a disadvantageous position, which it would not have faced, if the said litigation would not have commenced. Mere filing of a case and obtaining an interim order can never result in a situation giving a permanent advantage to petitioner and permanent disadvantage to the respondents, though, ultimately, the writ petition is found to be frivolous or lacking merit and is dismissed. In order to claim benefit of certain statutory provisions, which require continuance of persons service on a particular date, it would mean that such continuance is based on his own rights of the incumbent and not on the clutches founded on interim order of court of law. This aspect has also been dealt with in detail by this Court in Smt. Vijay Rani v. Regional Inspectress of Girls" Schools. Region-I, Meerut and Ors. 2007 (2) ESC 987 and we are in respectful agreement of the exposition of law laid down thereunder, which is fully applicable in the case in hand also. We have no hesitation in observing that the appellant here also cannot take any advantage flowing from the interim order, which he has obtained in the writ petition, which has ultimately been dismissed.

15. Though we have given reasons of our own but we agree with the ultimate conclusion of the Hon'ble single Judge that the petitioner is not entitled for any relief and the writ petition deserves to be dismissed.

16. The special appeal, therefore, lacks merit and is accordingly dismissed. No order as to costs.