
(2009) 12 AHC CK 0042
In the Allahabad High Court

Ajai Shanker Rai	Vs	APPELLANT
M.D., U.P. Shram Evam Nirman Sahkari Sangh Ltd. and Others		RESPONDENT

Date of Decision : 07-12-2009

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 226, 309
Uttar Pradesh Industrial Disputes Act, 1947 — Section 2, 6N

Citation : (2010) 4 AWC 3431

Hon'ble Judges : S.C. Chaurasia, J;Devi Prasad Singh, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Devi Prasad Singh, J.—Heard Sri U.K. Srivastava, learned Counsel for the petitioner and Shri Rakesh Kumar, learned Counsel for the respondents.

2. Petitioner was appointed as Assistant Engineer in the U.P. Cooperative Labour Federation (in short hereinafter referred ("as Federation")) and approached this Court under Article 226 of the Constitution of India feeling aggrieved with the impugned order of termination from service.

3. In brief, initially on 2.1.1989 petitioner was appointed by the Federation on the post of Apprentice Assistant Engineer in stop gap arrangement for 89 days on consolidated salary. Appointment was extended after lapse of 89 days from time to time by passing orders on 5.4.1989, 5.7.1989 and 5.10.1989. Thereafter, by an order dated 13.9.1989 he was appointed as Assistant Engineer on ad hoc basis in stop gap arrangement in the regular pay scale with the rider that services may be terminated at any time. Again on 22.3.1990 he was appointed on ad hoc basis for 89 days. The term of appointment was expired on 13.6.1990.

4. It appears that petitioner had filed Writ Petition No. 7491 of 1990 with the prayer for quashing of the oral termination order dated 1.7.1990. Writ Petition No. 7491 of 1990 was allowed on 13.11.1991 with direction to the respondents

to permit the petitioner to continue in service. In the said writ petition counter-affidavit has been filed. While allowing the writ petition this Court had observed that the services could not have been terminated without due compliance of provision contained in Section 6N of the U.P. Industrial Disputes Act. The petitioner should have been given notice as well as compensation in lieu of retrenchment. After receipt of judgment passed by this Court, the Managing Director of the Federation had allowed the salary of three months to the petitioner by order dated 17.12.1991 and thereafter again services were terminated on 24.12.1991 with one month salary. The order of termination dated 24.12.1991 again impugned by the petitioner in Writ Petition No. 75 (SB) of 1992 pointing out that the services were terminated without following the retrenchment procedure given under the Industrial Disputes Act. In pursuance to interim order passed earlier, High Court had also passed the interim order thereafter by judgment and order dated 18.9.1992 the Writ Petition No. 75 (SB) of 1992 was decided finally and order of termination dated 24.12.1991 was set aside with liberty to respondents to pass afresh order. In consequence thereof petitioner was allowed to discharge duty. Thereafter, petitioner had filed a Writ Petition No. 7988 of 1992 with the prayer that he may be given revised pay scale and also be regularised in the services. It appears that after filing of writ petition again petitioner's services were terminated on 2.12.1992 with one month salary and compensation in accordance to provision contained in Section 6N of the U.P. Industrial Disputes Act. The order of termination dated 2.12.1992 has been challenged in the present writ petition. A Division Bench of this Court by interim order dated 22.12.1992 had declined to grant any interim order but provided that in case the post of Assistant Engineer is vacant or filled up in due course of time the petitioner may be given preference over and above freshers.

5. While filing the supplementary affidavit and assailing the impugned order it has been stated by the petitioner's counsel that six sanctioned post have been filled up from identically situated person but petitioner's case has not been considered only because he approached this Court for judicial review of the order. It has also been stated that petitioner has been discriminated by the opposite parties in the matter of appointment and regularisation and the impugned order suffers from substantial illegality.

6. While refuting the arguments advanced by the petitioner's counsel, Shri Rakesh Kumar, learned Counsel for the respondents submits that services were terminated keeping in view the observation made by this Court in earlier writ petition (supra). Since order has been passed keeping in view the observation made by this Court in earlier petition (supra) the impugned order does not suffer from substantial illegality. It has also been stated that since, petitioner was appointed in ad hoc arrangement, he has got no right to claim regularisation.

7. The other submission of the learned Counsel for the respondents is that in view of law settled by Constitution Bench of Hon'ble Supreme Court in a case of Secretary, State of Karnataka and Others Vs. Umadevi and Others, petitioner

does not have any statutory right to claim regularisation or continuance in service.

8. Attention has been invited by the respondents counsel towards the judgment in State of Orissa and Ors. v. Prasana Kumar Sahoo 2007 (2) UPLBEC 1822 : 2007 (6) AWC 6153 (SC), where Hon''ble Supreme Court held that only because of some other persons similarly placed have been appointed would not advance the case of person since an illegality committed by the authorities does not create right to claim parity. Article 14 speaks for positive equality and not negative equality.

9. While relying upon the judgment of Umadevi (supra) their Lordship of Hon''ble Supreme Court held that policy decision to absorb a person who is not in employment of the State without following the recruitment rules, would not confer any legal right.

10. In a case of Kendriya Vidyalaya Sangathan and Ors. v. L.V. Subramanyeswara and Anr. 2007 (2) UPLBEC 1940 : 2007 (6) AWC 5711 (SC), Hon''ble Supreme Court ruled that person appointed, on leave vacancy or in stop gap arrangement shall not be entitled for regularisation relying upon the judgment of Umadevi's case (supra).

11. In a case of Mahadeo Bhau Khilare (Mane) and Ors. v. State of Maharashtra and Ors. 2007 (2) UPLBEC 1961, Hon''ble Supreme Court again held that appointment done de hors the rules or scheme shall not confer any right for regularisation or absorption even if a person served for long period.

12. The aforesaid proposition of law has again be reiterated in a case State of U.P. and Others Vs. Desh Raj,

13. In a case of Chief Commissioner of Income Tax, Bhopal and Ors. v. Leena Jain and Ors. AIR 2006 SCW 6066 : 2007 (5) AWC 4477 (SC), their Lordship of Hon''ble Supreme Court held that persons appointed on casual/contractual basis shall have no right to claim regularisation merely because of longevity of service.

14. In a case of Indian Drugs and Pharmaceuticals Ltd. v. Workman, Indian Drugs and Pharmaceuticals Ltd. 2006 AIR SCW 5994, their Lordship of Hon''ble Supreme Court held that a temporary workmen engaged without following the statutory rules has no right to the post and also cannot claim regularisation. High Court cannot give direction for the continuity of temporary workmen till they attain the age of superannuation. It has been further held that direction issued by Hon''ble Supreme Court in some of cases without laying down principle is not a precedent. It has been further observed that Hon''ble Supreme Court directs appointment of someone or regularisation of temporary employees or payment of salary without laying down any principle of law on humanitarian consideration shall not create precedent.

15. In Surendra Prasad Tewari Vs. Uttar Pradesh Rajya Krishi Utpadan Mandi Parishad and Others, Hon''ble Supreme Court held that persons working on daily

wage basis, ad hoc or temporary or on account of contractual appointment de hors the rules have no statutory or fundamental right to claim regularisation. In case person is appointed without following the procedure laid down under Articles 14 and 16 read with Article 309 of the Constitution of India he or she cannot be directed to be regularised in service. Accordingly, Hon''ble Supreme Court upheld the dismissal of contractual employee seeking direction for regularisation. It shall be appropriate to reproduce the relevant portion from the judgment of Surinder Prasad Tiwari (supra) as under:

25. The appellant submitted that he has been continued in service for 14 years and is entitled for regularization. This aspect of the matter has also been specifically dealt with by the said Constitution Bench in para 45 of the judgment and it was observed as under : (Umadevi (3) case, SCC pp. 37-38):

45. While directing that appointments, temporary or casual, be regularized or made permanent, the Courts are swayed by the fact that the person concerned 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 open eyes. 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...

26. An argument was made before the Constitution Bench that the State action in not regularizing the employees was not fair within the framework of the rule of law. The Court observed that if the appointments, which have not been made according to the constitutional scheme, are regularized, that would amount to perpetuate an illegality in the matter of public employment and that would be a negation of the constitutional scheme adopted by the people of this country.

16. In a case of A. Umarani Vs. Registrar, Cooperative Societies and Others, their Lordships held that appointment are made in contravention of provision of the Act or statutory rules framed thereunder and in ignorance of necessary qualification the same be illegal and services of such employees cannot be regularised.

17. Attention has been invited towards a case Ghaziabad Zila Sahkari Bank Ltd. v. Addl. Labour Commissioner and Ors. AIR 2007 SCW 956 : 2007 (2) AWC 1974 (SC), where Hon''ble Supreme Court held that the Co-operative Society Act being special Act deal with co-operative matter the general law under the Industrial Disputes Act shall not be applicable under the Principle "the general Act should lead to the special Act". Accordingly, Hon''ble Supreme Court held that dispute

with regard to the persons working in the cooperative society, whose disputes are covered by statutory act and rules and regulations framed thereunder may not be adjudicated by the Industrial Tribunal which has no jurisdiction to interfere.

18. Apart from the above, in the present case, petitioner has been holding the office of Assistant Engineer. Prima facie, it appears that the petitioner is not a workmen in view of definition given in Section 2(z) of the U.P. Industrial Disputes Act. It shall be appropriate to reproduce Section 2(z) of the Industrial Disputes Act, which is as under:

2(Z) "workman" means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person:

(i) who is subject to the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950), or the , Navy Act, 1957 (62 of 1957); or

(ii) who is employed in the police service or as an officer or other employee of a prison; or

(iii) who is employed mainly in a managerial or administrative capacity; or

who, being employed in a supervisory capacity, draws wages exceeding one thousand six hundred rupees per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature.

19. However, so far as the present case is concerned since, by earlier judgment of this Court petitioner has been treated as workmen and respondents were directed to pass a fresh order in terms of Section 6N of the Industrial Disputes Act and it attains finality we are not forming any opinion keeping in view the present case as to whether petitioner is workmen or not. We leave it open for adjudication in some other case.

20. Learned Counsel for the petitioner Shri U. K. Srivastava has relied upon a judgment in U.P.S.E.B. v. Pooran Chandra Pandey 2007 (11) SCC 92 : 2008 (1) AWC 331 (SC) and submits that since identically situated persons have been regularised, petitioner's case may also be considered.

21. Argument advanced by petitioner's counsel is not sustainable in view of latter judgment of Hon'ble Supreme Court in Official Liquidator Vs. Dayanand and Others, In the case of Dayanand (supra) three Judges Bench of Hon'ble Supreme Court had overruled the ratio of Pooran Chandra Pandey (supra). It has

been held by Hon"ble Supreme Court that creation and abolition of posts, formation and structuring/restructuring of cadres, prescribing the source and mode of recruitment and qualifications and criteria of selection etc. are matters which falls within the exclusive domain of the employer. Though Hon"ble Supreme Court held that State action with regard to this may be subjected to judicial review but Court will always be extremely cautious and circumspect in tinkering with the exercise of discretion by the employer. The Court may not sit in appeal over the judgment of the employer and ordain that a particular post or number of posts be created or filled by a particular mode of recruitment. The power of judicial review can be exercised in such matters only if it is shown that the action of the employer is contrary to any constitutional or statutory provisions or is patently arbitrary or vitiated by mala fides.

22. In *Dayanand (supra)*, Hon"ble Supreme Court deprecated the back door appointments and referred large number of earlier judgements of Hon"ble Supreme Court where the Court declined to entertain the claim of ad hoc and temporary employees for regularisation of services reversing the order of High Court (paras 69-70).

23. While overruling the ratio of judgment of *Pooran Chandra Pandey (supra)* in the case of *Dayanand (supra)*, Hon"ble Supreme Court observed that the judgment of Constitution Bench in the case of *Umadevi (supra)* has got binding effect and Bench of two-Judges could not have take a different view then what the Constitution Bench has taken. It shall be appropriate to reproduce the relevant portion from the judgment of *Dayanand (supra)*, which is as under:

77. We have carefully analyzed the judgment of the two-Judges Bench and are of the considered view that the above reproduced observations were not called for. The only issue which fell for consideration by two-Judges Bench was whether the daily wage employees of the society, the establishment of which was taken over by the Electricity Board alongwith the employees, were entitled to be regularized in terms of the policy decision taken by the Board and whether the High Court committed an error by invoking Article 14 of the Constitution for granting relief to the writ petitioners. The question whether the Electricity Board could frame such a policy was neither raised nor considered by the High Court and this Court. The High Court simply adverted to the facts of the case and held that once the daily wage employees of the society became employees of the Electricity Board, they could not be discriminated in the matter of implementation of the policy of regularization. Therefore, the two-Judges Bench had no occasion to make any adverse comment on the binding character of the Constitution Bench judgment in *Secretary, State of Karnataka v. Uma Devi (supra)*.

24. While elaborating the binding precedent of larger bench over the judgment delivered by a Bench of lesser number of Judges or of Coordinate Bench Hon"ble Supreme Court observed that judgment of larger Bench or co-ordinate Bench shall be binding unless it is set aside by higher forum. For convenience relevant portion is reproduced as under:

90. We are distressed to note that despite several pronouncements on the subject, there is substantial increase in the number of cases involving violation of the basics of judicial discipline. The learned single Judges and Benches of the High Courts refuse to follow and accept the verdict and law laid down by co-ordinate and even larger Benches by citing minor difference in the facts as the ground for doing so. Therefore, it has become necessary to reiterate that disrespect to constitutional ethos and breach of discipline have grave impact on the credibility of judicial institution and encourages chance litigation. It must be remembered that predictability and certainty is an important hallmark of judicial jurisprudence developed in this country in last six decades and increase in the frequency of conflicting judgments of the superior judiciary will do incalculable harm to the system inasmuch as the Courts at the grass root will not be able to decide as to which of the judgment lay down the correct law and which one should be followed.

92. In the light of what has been stated above, we deem it proper to clarify that the comments and observations made by the two-Judges Bench in *U.P. State Electricity Board v. Pooran Chandra Pandey* (supra) should be read as obiter and the same should neither be treated as binding by the High Courts, Tribunals and other judicial foras nor they should be relied upon or made basis for bypassing the principles laid down by the Constitution Bench.

25. In view of above, petitioner does not have got any help from the judgment of *Pooran Chandra Pandey* (supra).

26. In one another recent judgment in *Harinder Kaur and Others Vs. Union of India (UOI) and Others*, Hon''ble Supreme Court had reiterated the principle enunciated by *Dayanand* (supra). The case of *Pooran Chandra Pandey* (supra) has been held to be per incurium to constitution Bench judgment in *Umadevi 3* (supra). It has further been held by Hon''ble Supreme Court that Court should not encourage the spoil system with regard to back door entry while relying upon *Umadevi 3* (supra). Hon''ble Supreme Court had also relied upon earlier judgment in *State of Karnataka and Others Vs. Sri G.V. Chandrashekar*, It shall be appropriate to reproduce relevant portion which is as under:

We feel bound by the observations made therein.

[See also *State of Karnataka and Others Vs. Sri G.V. Chandrashekar*,

Recently, in *State of Bihar Vs. Upendra Narayan Singh and Others*, a Bench of this Court, while holding that equality clause enshrined in Article 16 mandates that every appointment to public posts or office should be made by open advertisement so as to enable all eligible persons to compete for selection on merit and despite the fact there may be certain exceptions thereto, observed:

17. Notwithstanding the basic mandate of Article 16 that there shall be equality of opportunity for all citizens in matters relating to employment for appointment to any office under the State, the spoil system which prevailed in America in 17th

and 18th centuries has spread its tentacles in various segments of public employment apparatus and a huge illegal employment market has developed in the country adversely affecting the legal and constitutional rights of lakhs of meritorious members of younger generation of the country who are forced to seek intervention of the Court and wait for justice for years together.

The Court noticed the spoil system as also a large number of decisions rendered thereon including Uma Devi (supra) to hold:

33. In view of the above discussion, we hold that the initial appointments of the respondents were made in gross violation of the doctrine of equality enshrined in Articles 14 and 16 and the provisions of the 1959 Act and the learned single Judge gravely erred by directing their reinstatement with consequential benefits.

27. In view of the above, we are of the view that keeping in view the fact that petitioner was appointed on ad hoc basis or in stop gap arrangement though he continued for almost a decade in terms of ad hoc or appointment on stop gap arrangement or for limited period on the basis of appointment order issued from time to time, it does not seem to make out a case to claim for regularisation. In case any person has been regularised against the provision of law it shall not make out a case to claim parity. However, it shall always be open to employer to take a decision to meet out the exigencies of services under the facts and circumstances and experience obtained by the petitioner during the course of employment in accordance to service rules/law.

28. In view of above, law stands today is, appointment done de hors the rules ordinarily shall not extend any right to claim regularisation or continuance of service. Every appointment should be done with due advertisement of vacancies after considering all eligible candidates to compete for selection on merit.

29. Subject to above, writ petition is devoid of merit. Dismissed. Cost easy.