(2004) 01 AHC CK 0011

In the Allahabad High Court

Case No : C.M.W.P. No. 2093 of 1991

Akhalesh Kumar Sharma — APPELLANT

Vs

U.P. Co-operative Sugar Factories Federation Ltd. and Another — RESPONDENT

Date of Decision : 13-01-2004

Acts Referred:
Allahabad High Court Rules, 1952 — Rule 2
Constitution of India, 1950 — Article 12, 14, 16, 19, 226
Industrial Disputes Act, 1947 — Section 25F, 6N

Citation : (2004) 5 AWC 4311

Hon'ble Judges : R.B. Misra, J

Bench : Single Bench

Advocate : Devendra Dhama, for the Appellant; S.R. Misra and A.K. Misra, for the Respondent

Final Decision : Dismissed

Judgement

R.B. Misra, J.—Heard Sri. Devendra Dhama, learned Counsel for the Petitioner, and Sri. A.K. Misra, learned Counsel for the U.P. Co-operative Federation.

2. In this petition prayer has been made to quash the order dated 6.11.1990 (Annexure-7 to the writ petition) with a further prayer to direct the Respondent not to interfere with the service of the Petitioner as Extension Officer and to continue to pay his salary and other allowances admissible to him.

3. Counter-affidavit has already been filed long back. The rejoinder-affidavit even at this belated stage of 14 years is accepted by the Court and is kept on record and with the consent of the parties this writ petition is decided in reference to Second Proviso to Rule 2 to Chapter XXII of the Allahabad High Court Rules, 1952.

4. According to the Petitioner, U.P. Co-operative Sugar Mills Federation in its different mills intended to make deployment of young, courageous and dedicated

youths as Extension Officer for one year, for the first year on Rs. 1,500 per month consolidated salary with a condition that upper age limit would be 30 years on 1.7.1989, and keeping in view the work, performance and output the employer might consider to give a regular appointment in the establishment. The Petitioner, however, was given appointment on 2nd November, 1989 in Kisan Co-operative Sugar Mills Limited, Roopapur, Hardoi on Rs. 1,500 per month on consolidated salary absolutely on temporary basis for one year at first instance as an Extension Officer (Sugar) with indication that the service of the Petitioner was absolutely temporary and could be terminated without any notice, with other conditions as indicated in the order of appointment dated 2.11.1990 (Annexure-3 to the writ petition). However, during the employment of one year the Petitioner was shifted to different units of Sugar Federation and under a policy decision the service of the Petitioner was terminated by order dated 6.11.1990 along with one other person after one year in consonance to the terms and conditions of employment. According to the Petitioner, this order of termination was not conveyed to him at late stage in the year 1991 and by that time he has already rendered 240 days uninterruptedly continuously in his deployment and keeping in view his performance as noted in the order dated 28th August, 1990 (Annexure-8 to the writ petition) the Petitioner was liable to be regularised in service, however, dispensation of the service of the Petitioner being in derogation to the provisions of Articles 14, 16 and 19 of the Constitution of India as well as to the provisions of Section 6N of the Industrial Disputes Act, 1947 and the Rules framed thereunder, was arbitrary, discriminatory and illegal.

5. Learned Counsel for the Petitioner has submitted that the contents of paragraph No. 14 of the writ petition asserting that the Petitioner had rendered service of 240 days during deployment and non-observance of the provisions of Section 6N of the Industrial Disputes Act before dispensation of his service has not been controverted in the counter-affidavit in the respective paragraphs, therefore, keeping in view non-observance of Section 6N and assurances given in the advertisement (Annexure-1 to the writ petition) the Petitioner''s service was allowed to be continued in the light of the decision in Krishna Kumar Dubey v. U.P. State Food and Essential Commodities Corporation and Anr., , where the termination of an employee having rendered 240 days service without complying the provisions of Section 25F of the Industrial Disputes Act, 1947 was held to be illegal and was quashed and the writ Petitioner was directed to be reinstated into service.

6. Counter-affidavit has been filed indicating that the Petitioner has not rendered 240 days of service continuously and the appointment of the Petitioner was for the fixed term for one year and in terms of the appointment Petitioner''s service was dispensed with. According to the Respondent there is no illegality or arbitrariness or discrimination, and if the Petitioner was treating himself to be workman then for alleged non-compliance of Section 6N of the Industrial Disputes Act he was supposed to resort to the Labour Court or Industrial Tribunal for redressal of his grievance inter alia for adjudication of disputed questions of

facts of rendering 240 days of service. According to the Respondent, the present writ petition is not maintainable as the mill is neither State Government under Article 12 of the Constitution nor instrumentality of the State Government, therefore, the writ petition is not maintainable.

7. According to learned Counsel for the Respondent the aspect of rendering work for more than 240 days by the Petitioner was only to be relevant when the Petitioner approached Labour Court or was persuading before the Industrial Tribunal and the Petitioner was not entitled to be regularised merely on the ground that he had rendered 240 days of work.

8. However, in the present facts and circumstances, this Court is not relegating the writ petition on the ground of alternative remedy though the same is a potential aspect and is also not throwing the writ petition on the ground of its maintainability.

9. For this purpose learned Counsel for the Respondent has placed reliance on the judgment of Supreme Court passed on 8th October, 2003 in Civil Appeal No. 5466 of 2002, General Manager, Kisan Sahkari Chini Mills Ltd., Sultanpur, U.P. v. Satrughan Nishad and Ors., which was decided along with large number of civil appeals, where the Supreme Court while allowing the Civil Appeals of Mills was pleased to set aside the decision of High Court adjudicating the disputed questions of facts instead by relegating the matter for adjudication under Industrial Disputes Act. The observations of the Supreme Court in Kisan Sahkari Chini Mills (supra) are given as below:

Writ applications were contested by the Mill on the grounds, inter alia, that the Mill, which is co-operative society, was neither State nor instrumentality or agency of the State within the meaning of Article 12 of the Constitution of India, hence, the writ jurisdiction of the High Court could not be invoked. According to them, service conditions of the contesting Respondent, who were the workmen, were governed by standing orders of the Mill and the dispute raised by them related to enforcement of rights and obligations created under the Act, as such the remedy available to them was to raise an industrial dispute under the provisions of the Act. Further ground of contest was that although the workmen had claimed to have worked between the years 1983-84 to 2000-01 but in not a single year, the Mill was operational for a period of 240 inasmuch as the period of operation of the Mill during the aforesaid period was from 45 days to 199 days. According to them, the contesting Respondent were seasonal workers and as they did not work for a period of 240 days in any year, were not entitled to claim protection u/s 6N of the Act.

The learned single Judge of the High Court overruled preliminary objection raised on behalf of the Mill, came to the conclusion that the Mill, which is a society, was State within the meaning of Article 12 of the Constitution as it was instrumentality of the State and there was infraction of the provisions of Section 6N of the Act. Accordingly, the writ applications were allowed, orders of termination of the contesting Respondent were quashed and it was directed that their services shall be regularised in a phased manner within a period of two years. The said order has been affirmed by the Division Bench on appeals being preferred by the Mill. Hence, these appeals by special leave.

Shri. Rakesh Dwivedi, learned senior advocate appearing in support of the appeals, submitted that the contesting Respondent could not have been allowed to invoke writ jurisdiction of the High Court as the Mill, which is a registered co-operative society, was not State within the meaning of Article 12 of the Constitution as it was neither instrumentality nor agency of the Government of Uttar Pradesh. On the other hand, Shri. Sunil Gupta, learned senior advocate appearing on behalf of the contesting Respondent, submitted that the Mill was an instrumentality of the Government, as such it was an authority within the meaning of Article 12 of the Constitution.

The point raised is no longer res integra as the same is concluded by decisions of this Court. In the case of Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others, , a Constitution Bench of this Court, while approving the tests laid down in the case of Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, , as to when a corporation can be said to be an instrumentality or agency of the Government, observed as page 736 which runs thus:

The tests for determining as to when a corporation can be said to be an instrumentality or agency of Government may now be culled out from the judgment in the International Airport Authority case. These tests are not conclusive or clinching but they are merely indicative indicia, which have to be used with care and caution, because while stressing the necessity of a wide meaning to be placed on the expression "other authorities". It must be realised that it should not be stretched so far as to bring in every autonomous body which has some nexus with the Government within the sweep of the expression. A wide enlargement of the meaning must be tempered by a wise limitation. We may summarise the relevant tests gathered from the decision in the International Airport Authority case as follows:

(1) One thing is clear that if the entire share capital of the corporation is held by Government, it would go a long way towards indicating that the corporation is an instrumentality or agency of Government (SCC p. 507, para 14).

(2) Where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the corporation, being impregnated with Governmental character. (SCC p. 508, para 15)

(3) It may also be a relevant factor whether the corporation enjoys monopoly status which is State conferred or State protected. (SCC p. 508 para 15)

(4) Existence of deep and pervasive State control may afford an indication that the corporation is a State agency or instrumentality. (SCC p. 508 para 15)

(5) If the functions of the corporation are of public importance and closely related to governmental functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government. (SCC p. 509 para 16)

(6) "Specifically, if a department of Government is transferred to a corporation, it would be a strong factor supportive of this inference" of the corporation being an instrumentality or agency of Government (SCC p. 510 para 18)

If on a consideration of these relevant factors it is found that the corporation is an instrumentality or agency of Government, it would, as pointed out in the International Airport Authority case, be an ''authority'' and, therefore, ''State'' within the meaning of the expression in Article 12.

In the case of Pradeep Kumar Biswas and Others Vs. Indian Institute of Chemical Biology and Others, , a Bench of seven Judges of this Court in para 27 of its judgment has noted and quoted with approval in extenso the aforesaid tests propounded in International Airport Authority case (supra) and approved in the case of Ajay Hasia (supra) for determining as to when a corporation can be said to be an instrumentality or agency of the Government so as to come within the meaning of the expression ''authority'' in Article 12 of the Constitution. There the Bench referred to the case of Chander Mohan Khanna Vs. The National Council of Educational Research and Training and other[OVERRULED], , where, after considering the memorandum of association and the rules, this Court came to the conclusion that N.C.E.R.T. was largely an autonomous body and its activities were not wholly related to governmental functions and the Government control was confined only to the proper utilization of the grants and since its funding was not entirely from Government resources, the case did not satisfy the requirements of the State under Article 12 of the Constitution. Further, reference was also made in that case to the decision of this Court in The Mysore Paper Mills Ltd. Vs. The Mysore Paper Mills Officers'' Association and Another, , where it was held that the company was an authority within the meaning of Article 12 of the Constitution as it was substantially financed and financially controlled by the Government, managed by a Board of Directors nominated and removable at the instance of the Government and carrying on important functions of public interest under the control of the Government.

From the decisions referred to above, it would be clear that the form in which the body is constituted, namely, whether it is a society or co-operative society or a company, is not decisive. The real status of the body with respect to the control of Government would have to be looked into. The various tests, as indicated above, would have to be applied and considered cumulatively. There can be no hard and fast formula and in different facts/situations, different factors may be found to be overwhelming and indicating that the body is an authority under Article 12 of the Constitution. In this context, Bye-Laws of the Mill would have to be seen. In the instant case, in one of the writ applications filed before the High Court, it was asserted that the Government of Uttar Pradesh held 50% shares in the Mill which fact was denied in the counter-affidavit filed on behalf of the State and it was averred that majority of the shares were held by cane growers. Of course, it was not said that the Government of Uttar Pradesh did not hold any share. Before this Court, it was stated on behalf of the contesting Respondent in the counter-affidavit that the Government of Uttar Pradesh held 50% shares in the Mill which was not denied on behalf of the Mill. Therefore, even if it is taken to be admitted due to non-traverse, the share of the State Government would be only 50% and not entire. Thus, the first test laid down is not fulfilled by the Mill. It has been stated on behalf of the contesting Respondent that the Mill used to receive some financial assistance from the Government. According to the Mill, the Government had advanced some loans to the Mill. It has nowhere been stated that the State used to meet any expenditure of the Mill much less almost the entire one, but as a matter of fact, it operates on the basis of self generated finances. There is nothing to show that the Mill enjoys monopoly status in the matter of production of sugar. A perusal of bye-laws of the Mill would show that its membership is open to cane growers, other societies, Gram Sabha, State Government, etc. and under Bye-law 52, a committee of management consisting of 15 members is constituted, out of whom, 5 members are required to be elected by the representatives of individual members, 3 out of co-operative society and other institutions and 2 representatives of financial institutions besides 5 members who are required to be nominated by the State Government which shall be inclusive of the Chairman and Administrator. Thus, the ratio of the nominees of State Government in the committee is only 1/3rd and the management of the committee is dominated by 2/3rd non-Government members. Under the Bye-laws, the State Government can neither issue any direction to the Mill nor determine its policy as it is an autonomous body. The State has no control at all in the functioning of the Mill much less deep and pervasive one. The role of the Federation, which is the apex body and whose ex officio Chairman-cum-Managing Director is Secretary, Department of Sugar Industry and Cane, Government of Uttar Pradesh, is only advisory and to guide its members. The letter sent by Managing Director of the Federation on 22nd November, 1999 was merely by way of an advice and was in the nature of a suggestion to the Mill in view of its deteriorating financial condition. From the said letter, which is in the advisory capacity, it cannot be inferred that the State had any deep and pervasive control over the Mill. Thus, we find none of the indicia exists in the case of Mill, as such the same being neither instrumentality nor agency of Government cannot be said to be an authority and, therefore, it is not State within the meaning of Article 12 of the Constitution.

Learned Counsel appearing on behalf of the contesting Respondent submitted that even if the Mill is not an authority within the meaning of Article 12 of the Constitution writ applications can be entertained as mandamus can be issued under Article 226 of the Constitution against any person or authority which would include any private person or body. Learned Counsel appearing on behalf of the Appellant on the other hand, submitted that mandamus can be issued against private person or body only if infraction alleged is in performance of public duty.

Reference in this connection may be made to the decisions of this Court in Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Others Vs. V.R. Rudani and Others, , in which this Court examined the various aspects and distinction between an authority and a person and after analysis of the decisions referred in that regard came to the conclusion that it is only in the circumstances when the authority or the person performs a public function or discharges a public duty that Article 226 of the Constitution can be invoked. In the case of K. Krishnamacharyulu and Others Vs. Sri Venkateswara Hindu College of Engineering and Another, and V.S.T. Industries Ltd. v. V.S.T. Industries Worker''s Union and Anr. 2001 (1) AWC 2.7 (SC) : (2001) 1 SCC 298, the same principle has been reiterated. Further, in the case of V.S.T. Industries Ltd. (supra), it was observed that manufacture and sale of cigarettes by a private person will not involve any public function. This being the position in that case, this Court held that the High Court had no jurisdiction to entertain an application under Article 226 of the Constitution. In the present case, the Mill is engaged in the manufacture and sale of sugar which on the same analogy, would not involve any public function. Thus, we have no difficulty in holding that jurisdiction of the High Court under Article 226 of the Constitution could not have been invoked.

Learned Counsel appearing on behalf of the Appellant in the alternative submitted that in the present batch of appeals, there are disputed questions of facts as according to the contesting Respondent they had worked for more than 240 days whereas stand of the Mill was that from the day the contesting Respondent joined, in not a single year, the Mill was functioning for a period of 240 days and during the years in question, the functioning of the Mill was between 45 days to 199 days. Further, according to the contesting Respondent, some of them were permanent and others seasonal but according to the Mill, all the employees were seasonal workmen. In our view, these are disputed questions of facts which cannot be decided in writ jurisdiction and the same can be decided by the Courts constituted under the provisions of the Act. For the foregoing reasons, we are of the view that the High Court was not justified in entertaining the writ applications.

10. Rejoinder-affidavit has been filed controverting the contents of the counter-affidavit and reiterating the stand of the writ petition.

11. I have heard learned Counsel for the parties. I find that the Petitioner was initially appointed for one year in terms and conditions of the appointment order and the Petitioner was sifted to different units of Sugar Federation and in terms of the appointment order the Petitioner was kept on contractual deployment for one year, which was liable to be extended keeping in view his work and performances, however, the contractual deployment was not extended for subsequent another year. Non-renewal of the contractual deployment is not retrenchment or illegal and fatal in view of the decision of the Supreme Court in Escorts Limited v. Presiding Officer, (1997) 11 SCC 521 , which has been passed

following the judgment in M. Venugopal Vs. The Divisional Manager, Life Insurance Corporation of India, Machilipatnam, Andhra Pradesh and another, . The Petitioner shall not be entitled for regular service merely on the ground that a candidate has rendered work continuously for more than 240 days in a calendar year in consonance to verdict of Supreme Court in Khagesh Kumar v. Inspector General Registration (1995) Suppl 4 SCC 182, where registration clerks while working as daily wagers were held not entitled to regularisation merely because they had served for 240 days. In view of the above observations, the disengagement of the Petitioner is not illegal, therefore, there is no occasion to invoke extraordinary discretionary jurisdiction of this Court under Article 226 of the Constitution. The writ petition is dismissed.