

(2011) 09 DEL CK 0479

In the Delhi High Court

Case No : Writ Petition (C) No. 2439 of 2006

Arjun Singh Rawat

APPELLANT

Vs

Director Don Bosco Ashalayam

RESPONDENT

Date of Decision : 28-09-2011

Acts Referred:

Constitution of India, 1950 — Article 12, 14, 16, 226

Citation : (2011) 10 AD 604

Hon'ble Judges : M.L. Mehta, J

Bench : Single Bench

Advocate : Ravi Kishan, for the Appellant; A.K. Pandey, for the Respondent

Final Decision : Dismissed

Judgement

M.L. Mehta, J.—This petition under Article 226 of the Constitution of India has been filed by the petitioner for issuance of writ of mandamus or any other appropriate writ against the respondent.

2. The petitioner had joined the services of the respondent Ashalayam on 6.1.2004 as in-charge of its night shelter and worked there till 4.11.2004. His services were terminated with effect from 5.11.2004 allegedly on the ground that he had misused his position, as instead of street children he permitted the outsiders to stay in Ashalayam by providing them lodging and boarding; that he mismanaged the accounts of the Ashalayam and further that his behavior towards his seniors and juniors was not good. A show cause notice was issued to him which was replied by him denying all the allegations. It is averred by the petitioner that at the time of joining of respondent he was assured that he will not be terminated and his services will be regularized and that his termination from service was malafide. The petitioner has claimed for regularization of his services and has sought reinstatement with full back-wages since 5.11.2004.

3. The respondent contested the petition mainly on two grounds. Firstly, the present petition was not maintainable since the respondent was a society

registered under the Societies Registration Act, and not an instrumental agency of the government. In this regard, it is submitted that the respondent was running and managing its affairs on the contributions and donations received from the generous public and the organizations. Secondly, the petitioner was only engaged as a volunteer to implement the Asha Anubhav Project of the respondent for making the street children empowered through non-formal education. He was engaged for a limited period i.e. till 31.12.2004 and the Identity Card issued to him would clearly testify this fact. It was averred that petitioner was assigned to manage the night shelter near Old Delhi Railway Station, but he was not performing his duties properly despite various warnings and show cause notices. It was alleged that the petitioner also permitted some outsiders to reside in the night shelter without there being any permission in this regard. The petitioner worked till 5.11.2004 and was relieved of his duties. Since the project was to end in December 2004 and the terms of his engagement were to come to an end, he requested for issuance of an experience certificate so as to enable him to join some other organization and it was on his request that such a certificate was issued. It was reiterated that the petitioner left the engagement after taking the entire dues and the said experience certificate. On this premise, it is submitted that the petitioner had no right to reinstatement or regularization of his employment.

4. I have heard learned counsel for the parties and perused the record.

5. There was no dispute about the fact that the respondent was a society registered under the Societies Registration Act and was solely dependent on donations and contributions from generous public and organizations for its running and functioning. There is also nothing on record to suggest that there was any grant-in-aid or any funding being given to the respondent by the State or Central Government. If that was so, it cannot be said to be any instrumentality or agency of the government. In the case of N.C. Rastogi Vs. Union of India and Others, an Army Welfare Housing Organization was a society Registered under the Societies Registration Act. It was managing its own affairs without the financial assistance of the Government. The funds were created by the society itself. In this case it was held as under:

14. There is no State financial assistance to AWHO as would transform the welfare activity of promoting housing schemes for the army/ ex-servicemen in State action. The provisions relating to financing of the schemes are contained in Rr. 9 to 12 of the Rules and Regulations of AWHO. For the purpose of certain pre-operative expenses, a sum of Rs.5 lacs had been advanced as loan from welfare funds at the disposal of Army Headquarters and this amount has been repaid. There is no extensive Governmental support or unusual financial assistance given by ht Government. It is only a loan of Rs.5 lacs from a welfare fund. The funds of AWHO are created by the society itself. Suitable financial arrangements for the participants of the schemes are made from various financial agencies including such as Life Insurance Corporation of India, Nationalized commercial banks,

Hindustan Urban Development Corporation and loan from Central Government. No instrumentality of the Government is involved in making suitable financial arrangement from the aforesaid four organizations. A private agency or an individual can take financial assistance from the aforesaid first three organizations and any Government servant, if otherwise eligible; can take loan from the Central Government. In the financing of the individuals under the schemes, there is no involvement of the State as such.

15. It is clear from the Memorandum, Rules and Regulations of AWHO that the Government does not appoint or nominate the Board of Management or the Executive Committee. The Board of Management as well as the Executive Committee to whom the management and affairs of AWHO are entrusted, are controlled itself by the provisions of the rules of AWHO. An officer becomes an ex-officio member of the Board of Management or Executive Committee by reason of the office or appointment he holds. No specific appointment is required or is made by the Government. The affairs of AWHO are controlled, administered and managed by the Board of Management and the Executive Committee without any supervening authority of the Central Government. The membership of the Board of Management or Executive Committee terminates upon when an officer ceases to hold that office of appointment and there is an automatic appointment of another officer ex-officio who holds that office of appointment. This relates to the six members of the Board. The Director, Army Welfare Housing Organization and Deputy Director may be a serving officer or a retired officer. The appointment of Director and Deputy Director and other staff is by the Board of Management and payment of their salaries and other allowances is by AWHO. Those officers are not paid from the consolidated fund of the Government of India but are paid from the funds of AWHO.

22. In my opinion, the financial resources of the State are not the funding source of the AWHO. AWHO can neither be regarded as a society discharging a function which is a public function in nature nor it is impregnated with governmental character or tied or entwined with Government. There is no department of Government handling the schemes of building of houses for and on behalf of all citizens or Army personnel on no profit or no loss basis and thus no occasion to transfer such department to AWHO. There is hardly any plenary control residing in the Government over AWHO except six serving officers of the Adjutant General being ex-officio members of the organizations. The general Governmental supervision under Rule 19 does not show "deep and pervasive State control". The cumulative effect of these factors persuades me to hold that AWHO cannot be regarded as an instrumentality or agency of the Government and so an authority within the meaning of the term in Art 226 of the Constitution. The result is that the first preliminary objection prevails.

6. Similarly, in *Asha Vij and Others Vs. The Chief of the Army Staff and Others*, , the Army Welfare Education Society being a registered society was managing and running its school without any financial assistance of the government. It was held

to be outside the ambit of Article 12 of the Constitution of India. In this case, it was held as under:

Society who is managing and running the respondent school out of Regimental Fund would not come within the ambit of the expression "State" or any other authority as envisaged under Article 12 of the Constitution of India. The school in question is managed out of the Regimental Fund, which is not a public fund and the said school is managed by a society registered under the Societies Registration Act. The same is neither controlled nor managed by the Government of India or by the State Government nor the society receives any fund from the said Governments.

7. In view of above, there does not remain any doubt that the respondent which was a registered society and not being any instrumentality or agency of the Government, would not be an authority and is not amenable to Article 12 of the Constitution of India.

8. The petitioner himself had stated that he was issued identity card at the time of his employment. Perusal of the identity card would show that he was engaged as volunteer of night shelter till 31.12.2004. Admittedly, the petitioner received a show-cause notice of various allegations relating to his work and conduct in the night shelter. The allegations comprised of his having allowed and permitted the outsiders to stay in the shelter unauthorizedly, his not maintaining the shelter properly and absconding of children from the shelter home having increased during his tenure.

9. Keeping in view the nature of employment of the petitioner with the respondent as volunteer engaged for a limited period till December 2004, the petitioner could not be said to have any vested right for regularization of the employment. He was only a volunteer for a particular project for a limited period. In such circumstances, the petitioner had no vested right for regularization. In the case of *Secretary, State of Karnataka and others v. Umadevi* (3) and others [(2006) 4 SCC] wherein the Supreme Court held as under:

Persons who get employed, without the following of a regular procedure or even through the backdoor or on daily wages, have been approaching the courts, seeking directions to make them permanent in their posts and to prevent regular recruitment to the posts concerned. The courts have not always kept the legal aspects in mind and have occasionally even stayed the regular process of illegal, irregular or improper entrants be absorbed into service. A class of employment which can only be called "litigious employment", has risen like a phoenix seriously impairing the constitutional scheme. 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. Such an argument fails when tested on the touchstone of constitutionality and equality of opportunity enshrined in Article 14 of the Constitution. Merely because a temporary employee or a casual

wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. It is not open to the court to prevent regular recruitment at the instance of temporary employees whose period of employment has come to an end or of ad hoc employees who by the very nature of their appointment, not acquire any right.

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 arm's 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, perpetuate illegalities 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. If the court were to void a contractual employment of this nature on the ground that the parties were not having equal bargaining power, that too would not enable the court to grant any relief to that employee. A total embargo on such casual or temporary employment is not possible, given the exigencies of administration and if imposed, would only mean that some people who at least get employment when securing of such employment brings at least some succor to them. After all, innumerable citizens of our vast country are in search of employment and one is not compelled to accept a casual or temporary employment if one is not inclined to go in for such an employment. It is in that context that one has to proceed on the basis that the employment was accepted fully knowing the nature of it and the consequences flowing from it.

When the court is approached for relief by way of a writ, the court has necessarily to ask itself whether the person before it had any legal right to be enforced. Considered in the light of the very clear constitutional scheme, it cannot be said that the temporary, contractual, casual or daily-wage employees have been able to establish a legal right to be made permanent even though they have never been appointed in terms of the relevant rules or in adherence of Articles 14 and 16 of the Constitution. It is therefore not possible to accept the argument that the State action in not regularizing the employees was not fair within the framework of the rule of law.

Orders for absorption, regularization or permanent continuance of such employees are passed apparently in exercise of the wide powers under Article 226 of the Constitution. The wide powers under Article 226 are not intended to be used for a purpose certain to defeat the concept of social justice and equal opportunity for all, subject to affirmative action in the matter of public employment as recognized by our Constitution. It is time that the courts desist

from issuing orders preventing regular selection or recruitment at the instance of such persons and from issuing directions for continuance of those who have not secured regular appointments as per procedure established. The passing of orders for continuance tends to defeat the very constitutional scheme of public employment. It has to be emphasized that this is not the role envisaged for the High Courts in the scheme of things and their wide powers under Article 226 are not intended to be used for the purpose of perpetuating illegalities, irregularities or improprieties or for scuttling the whole scheme of public employment. Its role as the sentinel and as the guardian of equal rights protection should not be forgotten.

The High Courts acting under Article 226 should not, therefore, ordinarily issue directions for absorption, regularization, or permanent continuance unless the recruitment itself was made regularly and in terms of the constitutional scheme. Merely because an employee had continued under cover of an order of the court, under "litigious employment" he would not be entitled to any right to be absorbed or made permanent in the service. In fact, in such cases, the High Court may not be justified in issuing interim directions, since, after, if ultimately the employee approaching it is found entitled to relief, it may be possible for it to mould the relief in such a manner that ultimately no prejudice will be caused to him, whereas an interim direction to continue his employment would hold up the regular procedure for selection or impose on the State the burden of paying an employee who is really not required. The courts must be careful in ensuring that they do not interfere unduly with the economic arrangement of its affairs by the State or its instrumentalities or lend themselves the instruments to facilitate the bypassing of the constitutional and statutory mandates.

10. In view of my above discussion, the petition is hereby dismissed. However, in the facts and circumstances of the present case, there shall be no orders as to costs.