
(2007) 03 UK CK 0043

In the Uttarakhand High Court

Case No : Special Appeal No. 22 of 2001

Asstt. Commissioner, Kendriya Vidyalaya Sangathan and
Another

APPELLANT

Vs

Diwakar Prasad

RESPONDENT

Date of Decision : 22-03-2007

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 21, 23, 309

Citation : (2007) 03 UK CK 0043

Hon'ble Judges : Rajeev Gupta, C.J.; J.C.S. Rawat, J

Bench : Division Bench

Advocate : Gopal Narain, for the Appellant; Tumul Nailwal, on behalf of S.N. Babulkar, for the Respondent

Final Decision : Allowed

Judgement

Rajeev Gupta, C.J.—The Appellants have filed this Special Appeal against the impugned judgment dated 06-08-2001 passed in Writ Petition No. 1033 of 2001 (S/S).

2. Respondent Diwakar Prasad Bhatt had filed the writ petition in the year 1991 before Allahabad High Court for the following reliefs:

- i) Issue any order or direction or writ in the nature of Mandamus commanding the Respondent not to interfere with the working of the Petitioner to his respective post.
- ii) Issue any order or direction in the nature of Mandamus commanding the Respondent to pay the Petitioner his respective salary regularly from month to month.
- iii) Issue any order or direction in the nature of Mandamus to direct the Respondent to treat the Petitioner in regular and continuous service till the regular candidate selected or joins the post.

iv) Issue any order or direction to direct the Respondent to regularise the service of the Petitioner to his respective post which he is holding.

v) Any order of direction which this Hon'ble Court may deem fit and proper in the circumstances of the case.

vi) To award the costs of petition to the Petitioner.

3. Thus, the Petitioner, in substance, was seeking regularisation of his services with a further direction to the Respondents to allow him to continue on the post of Lower Division Clerk.

4. Petitioner Diwakar Prasad Bhatt was appointed as Lower Division Clerk vide order dated 14-02-1990 (Annexure No. 2 of the writ petition) in Kendriya Vidyalaya Sangathan for a limited period. The term of the Petitioner's appointment was extended from time to time, the last being vide order dated 17-08-1991 for a period up to 21-12-1991. The Petitioner, apprehending that his services were not likely to be extended further after 21-12-1991, filed the writ petition on 18-12-1991.

5. The Respondents, in the writ petition, had filed their counter affidavit, wherein it was categorically pleaded that as the Petitioner was appointed on ad-hoc basis for a limited period, he had no right to continue after the expiry of the said period.

6. The learned Single Judge, on a thorough consideration of the pleadings of the parties and their submissions, passed the following impugned order on 06-08-2001:

This writ petition has been filed by the Petitioner seeking writ of certiorari to quash the termination order passed by the Respondents, terminating the services of the Petitioner. The Petitioner was appointed on ad-hoc basis. This Court, while entertaining the writ petition in the month of December 1991, stayed the termination order of Petitioner till January 1992. Thereafter on 26-2-1992 this Court provided that the Petitioner's services shall not be terminated until further orders of this Court. The Petitioner is continuing in service in terms of the interim order passed by this Court from 1992 and in counter affidavit, it has not been stated that the services of the Petitioner were terminated on the ground of unsuitability and on account of non-availability of post. Therefore, the writ petition is allowed. The impugned termination order dated 21-12-1991 is hereby quashed. The Petitioner shall be treated to be regular in service.

7. In the appeal, filed by the Appellants Kendriya Vidyalaya Sangathan, the operation of the impugned judgment dated 06-08-2001 was stayed vide order dated 31-07-2006.

8. The application filed by the Respondent, seeking vacation of the interim order dated 31-07-2006, was dismissed vide order dated 23-08-2006.

9. Respondent Diwakar Prasad Bhatt challenged the order dated 23-8-2006 by filing a SLP before the Apex Court.

10. The Special Leave Petition, filed by Respondent Diwakar Prasad Bhatt [SLP (Civil) No. 15219 of 2006], came to be finally decided vide order dated 19-01-2007 with the following order:

Heard learned Counsel for the parties.

This SLP is directed against the interim order whereby the Division Bench stayed the order of the learned Single Judge. Now a decision has been rendered by this Court in case of Secretary, State of Karnataka and Others Vs. Umadevi and Others, . The Division Bench of the High Court may dispose of the matter in the light of Uma Devi case. However, till the matter is disposed of by Division Bench stay order granted by the High Court will continue. It is requested that the High Court may dispose of the matter expeditiously.

11. Mr. Gopal Narain, the learned Counsel for the Appellants contended that the learned Single Judge has fallen into error in passing the impugned judgment treating the writ petition as the one seeking a writ of certiorari to quash the termination order of the Petitioner, whereas, the writ Petitioner in the writ petition did not seek any writ of certiorari and what was sought in the writ petition was only a direction to the Respondents to regularise the Petitioner's services and to allow him to continue on the post of Lower Division Clerk.

12. Mr. Tumul Nailwal, the learned Counsel for the Respondent, though conceded that Respondent Diwakar Prasad Bhatt did not seek any writ of certiorari in the writ petition for quashing the order of Petitioner's termination, submitted that as the Respondent's case for regularisation was recommended by the authorities, the Appellants have erred in not accepting the Petitioner's claim for regularisation. The learned Counsel further submitted that a vacant post of Lower Division Clerk was available and the Respondent was working on the post of Lower Division Clerk for a period of about two years on the date of filing of the writ petition.

13. From the above-quoted reliefs, sought by Petitioner Diwakar Prasad Bhatt in the writ petition, it is apparent that the Petitioner never sought writ of certiorari for quashing the order of termination of the Petitioner, and in fact, the Petitioner was seeking only a direction to the Respondents to regularise his services on the post of Lower Division Clerk.

14. Respondent Diwakar Prasad Bhatt, admittedly, was appointed on the post of Lower Division Clerk without following the prescribed procedure of recruitment. As such, his entry in the service, for all purposes, would be a "backdoor entry" and the same will not create any right in his favour to continue on the post of Lower Division Clerk.

15. The Apex Court, in the case of Secretary, State of Karnataka and Others Vs. Umadevi and Others, while considering the right of those appointed as daily

wager, temporary, ad-hoc or on contractual basis, observed in paras 47 to 52:

47. When a person enters a temporary employment or gets engagement as a contractual or casual worker and the engagement is not based on a proper selection as recognised by the relevant rules or procedure, he is aware of the consequences of the appointment being temporary, casual or contractual in nature. Such a person cannot invoke the theory of legitimate expectation for being confirmed in the post when an appointment to the post could be made only by following a proper procedure for selection and in cases concerned, in consultation with the Public Service Commission. Therefore, the theory of legitimate expectation cannot be successfully advanced by temporary, contractual or casual employees. It cannot also be held that the State has held out any promise while engaging these persons either to continue them where they are or to make them permanent. The State cannot constitutionally make such a promise. It is also obvious that the theory cannot be invoked to seek a positive relief of being made permanent in the post.

48. It was then contended that the rights of the employees thus appointed, under Articles 14 and 16 of the Constitution, are violated. It is stated that the State has treated the employees unfairly by employing them on less than minimum wages and extracting work from them for a pretty long period in comparison with those directly recruited who are getting more wages or salaries for doing similar work. The employees before us were engaged on daily wages in the department concerned on a wage that was made known to them. There is no case that the wage agreed upon was not being paid. Those who are working on daily wages formed a class by themselves, they cannot claim that they are discriminated as against those who have been regularly recruited on the basis of the relevant rules. No right can be founded on an employment on daily wages to claim that such employee should be treated on a par with a regularly recruited candidate and made permanent in employment, even assuming that the principle could be invoked for claiming equal wages for equal work. There is no fundamental right in those who have been employed on daily wages or temporarily or on contractual basis, to claim that they have a right to be absorbed in service. As has been held by this Court, they cannot be said to be holders of a post, since, a regular appointment could be made only by making appointments consistent with the requirements of Articles 14 and 16 of the Constitution. The right to be treated equally with the other employees employed on daily wages, cannot be extended to a claim for equal treatment with those who were regularly employed. That would be treating unequals as equals. It cannot also be relied on to claim a right to be absorbed in service even though they have never been selected in terms of the relevant recruitment rules. The arguments based on Articles 14 and 16 of the Constitution are therefore overruled.

49. It is contended that the State action in not regularising the employees was not fair within the framework of the rule of law. The rule of law compels the

State to make appointments as envisaged by the Constitution and in the manner we have indicated earlier. In most of these cases, no doubt, the employees had worked for some length of time but this has also been brought about by the pendency of proceedings in tribunals and courts initiated at the instance of the employees. Moreover, accepting an argument of this nature would mean that the State would be permitted to perpetuate an illegality in the matter of public employment and that would be a negation of the constitutional scheme adopted by us, the people of India. It is therefore not possible to accept the argument that there must be a direction to make permanent all the persons employed on daily wages. 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 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.

50. It is argued that in a country like India where there is so much poverty and unemployment and there is no equality of bargaining power, the action of the State in not making the employees permanent, would be violative of Article 21 of the Constitution. But the very argument indicates that there are so many waiting for employment and an equal opportunity for competing for employment and it is in that context that the Constitution as one of its basic features, has included Articles 14, 16 and 309 so as to ensure that public employment is given only in a fair and equitable manner by giving all those who are qualified, an opportunity to seek employment. In the guise of upholding rights under Article 21 of the Constitution, a set of persons cannot be preferred over a vast majority of people waiting for an opportunity to compete for State employment. The acceptance of the argument on behalf of the Respondents would really negate the rights of the others conferred by Article 21 of the Constitution, assuming that we are in a position to hold that the right to employment is also a right coming within the purview of Article 21 of the Constitution. The argument that Article 23 of the Constitution is breached because the employment on daily wages amounts to forced labour, cannot be accepted. After all, the employees accepted the employment at their own volition and with eyes open as to the nature of their employment. The Governments also revised the minimum wages payable from time to time in the light of all relevant circumstances. It also appears to us that importing of these theories to defeat the basic requirement of public employment would defeat the constitutional scheme and the constitutional goal of equality.

51. The argument that the right to life protected by Article 21 of the Constitution would include the right to employment cannot also be accepted at this juncture. The law is dynamic and our Constitution is a living document. May be at some future point of time, the right to employment can also be brought in under the concept of right to life or even included as a fundamental right. The new statute is perhaps a beginning. As things now stand, the acceptance of such a plea at the instance of the employees before us would lead to the consequence of

depriving a large number of other aspirants of an opportunity to compete for the post or employment. Their right to employment, if it is a part of right to life, would stand denuded by the preferring of those who have got in casually or those who have come through the back door. The obligation cast on the State under Article 39(a) of the Constitution is to ensure that all citizens equally have the right to adequate means of livelihood. It will be more consistent with that policy if the courts recognise that an appointment to a post in government service or in the service of its instrumentalities, can only be by way of a proper selection in the manner recognised by the relevant legislation in the context of the relevant provisions of the Constitution. In the name of individualising justice, it is also not possible to shut our eyes to the constitutional scheme and the right of the numerous as against the few who are before the court. The directive principles of State policy have also to be reconciled with the rights available to the citizen under Part III of the Constitution and the obligation of the State to one and all and not to a particular group of citizens. We, therefore, overrule the argument based on Article 21 of the Constitution.

52. Normally, what is sought for by such temporary employees when they approach the court, is the issue of a writ of mandamus directing the employer, the State or its instrumentalities, to absorb them in permanent service or to allow them to continue. In this context, the question arises whether a mandamus could be issued in favour of such persons. At this juncture, it will be proper to refer to the decision of the Constitution Bench of this Court in *Rai Shivendra Bahadur (Dr.) v. Governing Body of the Nalanda College* 34. That case arose out of a refusal to promote the writ Petitioner therein as the Principal of a college. This Court held that in order that a mandamus may issue to compel the authorities to do something, it must be shown that the statute imposes a legal duty on the authority and the aggrieved party had a legal right under the statute or rule to enforce it. This classical position continues and a mandamus could not be issued in favour of the employees directing the Government to make them permanent since the employees cannot show that they have an enforceable legal right to be permanently absorbed or that the State has a legal duty to make them permanent.

16. Now, reverting to the present case, as Respondent Diwakar Prasad Bhatt was appointed on temporary/ad-hoc basis for a limited period on the post of Lower Division Clerk without following the prescribed process for recruitment, he has no right to seek regularisation on the said post or to continue on the said post in the same capacity. In view of the above-quoted dictum of the Apex Court in the case of *Umadevi (supra)*, no mandamus can be issued for regularisation of his services.

17. In this view of the matter, the impugned judgment is liable to be set aside.

18. For the foregoing reasons, the Special Appeal deserves to be allowed and is hereby allowed. The impugned judgment dated 06-08-2001 passed in Writ Petition No. 1033 of 2001 (S/S) is hereby set aside and Writ Petition No. 1033 of

2001 (S/S) is dismissed.

19. No order as to costs