
(2007) 03 UK CK 0067
In the Uttarakhand High Court
Case No : Special Appeal No. 126 of 2006

Atul Nautiyal

APPELLANT

Vs

State of Uttaranchal and Another

RESPONDENT

Date of Decision : 12-03-2007

Acts Referred:

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

Citation : (2007) 3 UC 1708

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

Bench : Division Bench

Advocate : Chetan Joshi, for the Appellant; Subhash Upadhyaya, for the Respondent

Final Decision : Dismissed

Judgement

Rajeev Gupta, C.J.—Appellant Atul Nautiyal has filed this Special Appeal against the impugned judgment dated 21-08-2006 passed in Writ Petition No. 932 of 2003 (S/S).

2. Appellant Atul Nautiyal had filed the writ petition for the following reliefs:

A. To issue a writ, order or direction in the nature of mandamus commanding the Respondents to forthwith pay the entire arrears of salary with effect from 1-3-2003 to the Petitioners and also to pay the due salary for the posts held by them regularly from month to month, as and when it falls due.

B. To issue a writ, order or direction in the nature of mandamus restraining the Respondents from interfering in the functioning of the Petitioners in any manner whatsoever except in accordance with law.

C. To issue any other suitable writ, order or direction as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.

D. To award the cost of the writ petition in favour of the Petitioners.

3. The Petitioner was appointed as Clerk-cum-Data Entry Operator vide order of appointment dated 08-11-2001 (Annexure No. 3) for the period upto 31-12-2001. The term of his appointment was extended several times, the last being vide order dated 21-12-2002 (Annexure No. 13) up to 28-02-2003. The Petitioner's entire claim for continuance on the said post was based on the stipulation in the order dated 21-12-2002, which was to the effect that as and when a regularly selected candidate for the said post becomes available, the Petitioner's services will come to an end automatically. The Petitioner has pleaded that as no regularly selected candidate was available for the said post, the Respondents ought to have allowed the Petitioner to continue on the said post.

4. The Respondents had filed their counter affidavit wherein the averments made by the Petitioner in the writ petition were emphatically denied. In their counter affidavit, it was categorically pleaded that Petitioner's appointment on the post of Clerk-cum-Data Entry Operator was a pure and simple contractual appointment for a fixed term and mere extension of the term of the Petitioner's appointment by the Respondents several times will not create any right in favour of the Petitioner to continue on the said post beyond the period of the contractual appointment.

5. The learned Single Judge, on a thorough consideration of the rival submissions of the learned Counsel for the parties and following the recent dictum of the Apex Court in the case of Secretary, State of Karnataka and Others Vs. Umadevi and Others, , held that the Petitioner had no right to continue on the post of Clerk-cum-Data Entry Operator after the expiry of the period of his contractual appointment. The learned Single Judge, therefore, dismissed the Petitioner's writ petition.

6. Mr. Chetan Joshi, the learned Counsel for the Appellant vehemently argued that the learned Single Judge has erred in not accepting the Petitioner's contentions about his claim to continue on the said post. The learned Counsel further contended that as no regularly selected candidate for the said post was available, the Respondents ought to have permitted the Petitioner to continue on the said post.

7. Mr. Subhash Upadhyaya, the learned Standing Counsel for the Respondents, on the other hand, supported the impugned judgment and submitted that in view of the dictum of the Apex Court in the case of Umadevi (supra), the Petitioner cannot be allowed to continue on the post of Clerk-cum-Data Entry Operator.

8. The Apex Court, in the case of Umadevi (Supra) while holding that a person appointed on contractual basis has no right to continue on the post 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 not 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 temporary 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 regularizing 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 backdoor. 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.

9. Now, reverting to the present case, it is not in dispute that Appellant Atul Nautiyal was initially appointed on the post of Clerk-cum-Data Entry Operator for a fixed period from 08-11-2001 to 31-12-2001. The contents of his letter of appointment (Annexure No. 3) make it apparent that the Petitioner's appointment was a contractual appointment for a fixed term. In spite of the subsequent orders extending the term of the Petitioner's contractual appointment the nature of the Petitioner's appointment remained unchanged. The stipulation to the effect that the Petitioner's services will come to an end automatically on the availability of a regularly selected candidate for the said post does not improve the Petitioner's case at all. This stipulation was incorporated in the letter of Petitioner's appointment/extension to provide that as and when such a regularly selected candidate is available, the Petitioner's services will come to an end even before the expiry of the period of his contractual appointment. Thus, we have no manner of doubt that the Petitioner has no right to continue on the post of Clerk-cum-Data Entry Operator after the expiry of the period of his contractual appointment.

10. Thus, we do not find any infirmity in the impugned judgment. The Special

Appeal, therefore, is liable to be dismissed on merits notwithstanding that the same suffers with the defect of the non filing of the certified copy of the impugned judgment.

11. The Special Appeal, therefore, fails and is hereby dismissed summarily.