
(2002) 03 GUJ CK 0016
In the Gujarat High Court

Balubhai G. Makwana

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 08-03-2002

Acts Referred:

Constitution of India, 1950 — Article 14, 16
Industrial Disputes Act, 1947 — Section 2(j), 2(oo), 25F

Citation : (2002) 22 GLH 290 : (2002) 4 GLR 2940

Hon'ble Judges : K.A. Puj, J

Bench : Single Bench

Judgement

K.A. Puj, J.—The petitioner, in this petition, has sought the mandatory relief from this Court directing the respondent-authorities to treat the impugned action on the part of the respondents in not regularising the services of the petitioner and in terminating the services of the petitioner by adopting the modus operandi of 29 days appointment, as illegal, unjust, arbitrary, discriminatory, unconstitutional and non-est in the eye of law and has further sought directions to the respondents to treat the petitioner in continuous services of the respondents right from the initial entry of the petitioner in the service of the respondents. The petitioner has further prayed for a declaration from this Court to the effect that the Order s creating artificial break in the service of the petitioner, after his initial appointment, as illegal, non-est and of no effect whatsoever and to treat the services of the petitioner as continuous for all purposes. Lastly, the petitioner has prayed for directions to the respondents to confer upon the petitioner all benefit of regular service from his initial entry in the service of the respondents, such as fixation of pay, arrears of salary, status, seniority etc., treating the petitioner in me continuous service of the respondents. By way of an interim relief, the petitioner has prayed for injunction restraining the respondents from terminating the services of the petitioner in any manner whatsoever and permitting him to discharge his duties and to pay him his regular salary accordingly in the regular pay-scale. The petition was admitted by this Court on 26-2-1991 and while granting ad-interim relief, this Court has passed an Order to maintain status quo

in respect of the work/service of the petitioner. While confirming the ad-interim relief, this Court has passed an Order on 8-7-1992 directing the respondents that the services of the petitioner were not to be terminated except in accordance with law, subject of course to the fact that the petitioner was actually working with respondent No. 2. Under this interim relief, the petitioner has been working with the respondents during the pendency of this petition before this Court.

2. The petitioner has urged in the petition that he has been rendering services to the utmost satisfaction of the respondent-authorities since 1986 regularly and continuously without any breaks, except the artificial breaks created by the respondent-authorities. It is further stated in the petition that there is nothing against the petitioner and his work has been appreciated by the respondent-authorities. The petitioner further stated that ever since his initial appointment, he was being served with the appointment Order of 29 days, though the petitioner has been continuously working. The petitioner has further alleged in the petition that the artificial breaks were given to the petitioner only with a view to disentitle the petitioner from claiming any right for the services rendered by him or any claim for the regularisation. The petitioner has filed a detailed list showing particulars of all appointment Orders and copies of certain appointment Orders, along with the petition.

3. The petitioner, in support of his contention raised in the petition, has placed reliance on the decision of this Court in the case of Ghanshyam M. Pandya v. State of Gujarat reported in 1985 GLH 41, which was subsequently confirmed by a Division Bench of this Court in L.P.A. No. 326 of 1985. The petitioner has also relied upon a judgment of the Hon'ble Supreme Court in the case of Surinder Singh and Another Vs. Engineer-in-chief, C.P.W.D. and Others, . Based on these judgments, the petitioner has submitted that the petitioner has been working on a clear vacancy for the years" to come with the respondent authorities and that the act on the part of the respondent-authorities in not regularising his services and in terminating his services by adopting the modus operandi of 29 days appointment is absolutely) illegal, unjust, arbitrary, discriminatory and violative of Article 14 and 16 of the Constitution of India. The petitioner has further raised the contention that if his services were terminated and/or the same were not regularised by the respondent-authorities, the petitioner would be put in a miserable condition and that he would not be in a position to get any employment in any other Government organisation because of certain handicaps such as age-bar etc. It is further submitted that, after taking services of the petitioner for all these years, the respondent-authorities could not be permitted to play with the future of the petitioner by adopting the artificial break of 29 days" appointment. The petitioner has further raised the contention that the petitioner is a workman within the meaning of Section 2(j) of the Industrial Disputes Act and hence the termination of his services could not be effected without payment of retrenchment compensation as required u/s 25F of the Industrial Disputes Act, and hence, the termination of the services of the petitioner without payment of retrenchment compensation was bad, illegal, and

violative of provisions of Section 25F of the Industrial Disputes Act.

4. At the time of hearing of this petition, the learned Advocate for the petitioner has reiterated the submissions which were made in the petition and over and above the judgments relied on in the petition, he has further placed reliance on the recent judgment of the Hon"ble Supreme Court in the case of Gujarat Agricultural University Vs. Rathod Labhu Bechar and Others, . He has invited my attention to Para 16 of the Judgment, wherein it is held as under:

16.It is also well settled, if work is taken by the employer continuously from daily wage workers for a long number of years without considering their regularisation for its financial gain as against employees" legitimate claim, has been held by this Court repeatedly as an unfair labour practice. In fact, taking work, from daily wage worker or ad hoc appointee is always viewed to be only for a short period or as a stop-gap arrangement, but we find new culture is growing to continue with it for a long time, either for financial gain or for controlling its workers more effectively with Sword of Damocles hanging over their heads or to continue with favoured one in the cases of ad hoc employee with stalling competent and legitimate claimants. Thus, we have no hesitation to denounce this practice. If the work is of such a nature, which has to be taken continuously, and in any case, when this pattern become apparent, when they continue to work for year after year, only option to me employer is to regularise them. Financial viability no doubt is one of the considerations but then such enterprise or institution should not spread its arms longer man its means. The consequent corollary is, where work is taken not for a short period or limited for a season or where work is not of part-time nature, and if pattern shows work is to be taken continuously year after year, there is no justification to keep such persons hanging as daily rate workers. In such situation, a legal obligation is cast on an employer if there be vacant post to fill it up with such workers in accordance with Rules if any and where necessary by relaxing the qualifications, where long experience could be equitable with such qualifications. If no post exists then duty is cast to assess the quantum of such work and create such equivalent post for their absorption.

My attention is also drawn to Para 26 of the said judgment, which reads as under:

26.We feel that daily rate workers who have been working on the aforesaid posts for such a long number of years without complaint on these posts is a ground by itself for the relaxation of the aforesaid eligibility condition. It would not be appropriate to disqualify them on this ground for their absorption, hence Clause 1(a), need modification to this effect.

On the basis of the aforesaid judgment, Mr. Yagnik, the learned Advocate for the petitioner has urged that since the petitioner has put in more than 12 years of service at the time when the petition was filed, and thereafter, he has put in another 10 years service under the Order of this Court, it is a fit case wherein this Court should direct the respondents to regularise the services of the

petitioner.

5. Ms. Nita Panchal, the learned Advocate appearing for the respondent Nos. 2 and 3 has relied on the affidavit-in-reply filed by the respondents and the documents attached along with the said affidavit. She has submitted that the respondent No. 2, Taluka Panchayat has appointed the petitioner on the basis of the requirement of the work and according to the grant given by the State Government. The petitioner was appointed only on temporary basis, and hence, the petitioner had no right to make any claim for regularisation. It is further submitted that the Development Commissioner (Panchayat) has not sanctioned the post of Workcharge Clerk for Road & Buildings Department, and therefore, the respondent Nos. 2 and 3 have no right to make appointment of the petitioner. It was further contended in the affidavit-in-reply that the petitioner was appointed only on the basis of the availability of work and when it was necessary and especially when the grant was given by the State Government. All the appointments were temporary and it was made clear in each and every appointment Order that the services would be terminated without any notice. The learned Advocate has drawn my attention to the Circular dated 27th April, 1976 issued by the Government of Gujarat, General Administration Department, Gandhinagar, in respect of appointment of temporary staff on provisional and stop-gap arrangement basis outside the prescribed mode of recruitment, wherein it is clearly stated that any recruitment to the clerical posts and posts of typists in the governmental departments and offices within the purview of the Gujarat Public Service Commission, made otherwise than prescribed mode of appointment is irregular and the appointments made are liable to be terminated at any time and immediately as soon as the regular recruits from the select lists prepared under the requisite Rules become available. It is further stated in the said Circular that the powers of making temporary stop-gap appointments from candidates through Employment Exchange or otherwise till regular recruits are available, are totally withdrawn. A clear-cut instruction was given in the said Circular that no recruitment to the posts of Clerks, Clerk-Typists and Typists should at all be made from 1st April, 1976 onwards through the Employment Exchange or otherwise. It is also made clear in the said Circular that if it is found that any such irregular recruitment is made by departments/offices in spite of the above instructions, the officers who have made such irregular appointments will be personally held responsible for the default.

6. The learned Advocate for the respondent Nos. 2 and 3 has further drawn my attention to another Circular dated 3-2-1987 issued by the Road & Buildings Department, Government of Gujarat, Gandhinagar, wherein it was pointed out that though there were restrictions imposed on the appointment of temporary staff or on making such appointments by way of stop-gap arrangement, certain offices and Government departments are not following the earlier instructions. It was, therefore, made clear that if any one was acting contrary to this instruction he was held to be personally liable and the disciplinary action would be taken against him. Lastly, my attention was drawn to the Circular issued by the

Panchayat and Rural Housing Development Department, Government of Gujarat, Gandhinagar, on 17-9-1990 wherein also the earlier instructions given were reiterated and any person who violates the standing instructions of the Government, would be held personally responsible and disciplinary actions would be taken against him under the Gujarat Services (Discipline and Appeal) Rules. On the basis of all the three above referred circulars, it was urged before me that the petitioner's appointment as Workcharge employee was not in accordance with the Government instructions and statutory Rules. It was not a permanent sanctioned post. The respondent No. 2 has to obtain the necessary sanction from the State Government and for that purpose a proposal was to be forwarded to the State Government and only after the receipt of the sanction from the Government a person can be appointed on the regular establishment. Since no sanction was ever granted by the State Government, there was no question of regularising the petitioner and since the petitioner's services were not required the same came to an end after the expiry of the period stated in the appointment Order and it required no notice as contended by the petitioner.

7. In support of me case of the respondent Nos. 2 and 3, the learned Advocate for the respondent Nos. 2 & 3 has relied on the decision of the Hon"ble Supreme Court in the case of Rajendra and Others Vs. State of Rajasthan and Others, , wherein it is held as under:

13. In our opinion, when the posts temporarily created for fulfilling the needs of a particular project or scheme limited in its duration come to an end on account of the need for the project itself having come to an end either because the project was fulfilled or had to be abandoned wholly or partially for want of funds, the employer cannot by a writ of mandamus be directed to continue employing such employees as have been dislodged because such a direction would amount to requisition for creation of posts though not required by the employer and funding such posts though the employer did not have the funds available for the purpose. The decision taken by the respondent-State to abolish the posts was a bona fide decision taken after due application of mind by appointing an Expert Committee which went deep into all relevant considerations and made recommendations in the interest of rationalisation. The decision is based on administrative and financial considerations. There is nothing wrong in the societies having acted on the policy decision of the State Government. Really speaking there was hardly anything left to be done by the D.R.D.A. societies at their own end. Inasmuch as the societies did not have any funds of their own, independent of those made available by the State Government how could the societies have continued with the posts and the incumbents thereon though they were left with no merits to pay salaries attaching with the posts.

8. The learned Advocate for the respondent Nos. 2 and 3 has also placed reliance on the decision of this Court in the case of Deputy Executive Engineer, Gujarat Maritime Board Vs. Hasmukh M. Jasani, , wherein certain guidelines were laid down by this Court, which are as under:

7.

- (i) The nature of appointment, whether for a fixed period or otherwise is primarily determined on the basis of the contents of appointment letter;
- (ii) Where there is no such letter of appointment, it can be determined from other documentary evidence if any produced by the parties;
- (iii) If no documentary evidence is available or has been produced assistance of oral evidence on record can be taken for determining the real nature of appointment;
- (iv) Admission of the employee in such matters will also be a material evidence for determining the nature of appointment;
- (v) The nature of appointment, namely, whether on a permanent post or on work of permanent nature will also render some clue in determining the nature of appointment;
- (vi) If the appointment is on a project for a fixed term this will also render assistance in coming to the conclusion about real nature of appointment;
- (vii) The real intention of the employer is also a relevant factor to be taken into consideration. Instances are not rare where no appointment letter is issued for casual labourers. In such cases, real intention of the employer is certainly a material factor in determining the nature of appointment;
- (viii) Acceptance of terms of appointment by the employee or the workman will also render assistance in determining the nature of appointment;
- (ix) When after expiry of initial period of appointment extension is granted whether orally or through fresh appointment letters then such appointment letters or oral Orders will also have material bearing in determining the nature of appointment;
- (x) The nature of work, namely, permanent or temporary or project type of work, will also give some indication as to what was the real nature of appointment;
- (xi) The applicability of Rules of appointment for regular employees of the department, if made applicable to project work employees will also render some assistance in determining the nature of appointment.

This Court has held that the respondent was appointed for a fixed period of 3 months which was subsequently extended and continued for a further period of 3 months and his appointment came to an end automatically on 30th April, 1992. As such the provisions of Section 25F of the Act were not applicable and the Order of reinstatement, in these circumstances suffers from manifest error of law and in these circumstances the Order directing the reinstatement of the respondent cannot be sustained. Based on this judgment, it was urged before me that the petitioner is not entitled to regularisation and that the petitioner's services were rightly terminated automatically on expiry of the period stated in

the appointment Order.

9. The learned Advocate for the respondent Nos. 2 and 3 has further relied on the decision of this Court in the case of Anvarkhan R. Makarani v. State of Gujarat and Ors. reported in 2002 (1) GLH, wherein it is held that the employment of the petitioner under the respondent all throughout remained outside the regular set-up and on a particular job or work as distinguished from being against any vacancy and the employment having been terminated in terms of the last appointment Order appointing him on scarcity relief work, the petitioner was neither entitled to reinstatement nor regularisation. The petitioner has failed to establish that he had in any way acquired the status of a temporary Government servant.

10. The learned Assistant Government Pleader appearing for the respondent No. 1 has not made any submission except supporting the case of the respondent Nos. 2 and 3.

11. I have heard at length the learned Advocates appearing for the respective parties. I have also gone through the pleadings made in the petition as well as the affidavit-in-reply, and I have also considered the authorities relied upon by the respective parties. The Supreme Court decision in the case of Gujarat Agricultural University (supra) relied upon by the petitioner does not help the petitioner in this wise that the scheme was framed in that case and it was observed by the Hon"ble Supreme Court that the larger issues inter-se between the University and its workers are no more contentions as the University has decided to grant permanent status to the contesting and other workers in a phased manner for which the aforesaid scheme has been finalised. The Hon"ble Supreme Court's attention was focused on the issue as to whether the scheme subserves the workers' aspirations and satisfies the judicial scrutiny, and in this context the aforesaid observations relied upon by the petitioner were made by the Hon"ble Supreme Court. In the present case, there is no such scheme and the appointment was made contrary to the governmental instructions and circulars issued by the State Government. The Hon"ble Supreme Court has taken the view in the case of Ashwani Kumar v. State of Bihar reported in 1997 (2) SCC 13 that, where the initial entry itself was unauthorised and not against any sanctioned vacancy, the question of regularising the incumbent would never survive for consideration. It was held in that case that the posts or vacancies must be backed up by budgetary provisions so as to be included within the permissible infrastructure of the scheme, and that any posting which is de hors the budgetary grant and on a non-existing vacancy, would be outside the sanctioned scheme and would remain totally unauthorised. No right would accrue to the incumbent of such an imaginary or shadow vacancy.

12. This Court has also taken the view in the case of Vithalbhai Babaldas Patel Vs. Chairman, Oil and Natural Gas Commission and Others, , that workcharge employees appointed for short periods according to contingencies could not claim that their appointments should be made permanent. It was held in that case that

regular appointments under such authorities were required to be made in accordance with settled law or Rules or regulations governing such appointment and the prescribed procedure. It was further held that if employment or appointment on temporary or ad-hoc appointee is regularised, guarantee of equality and equality of opportunity in matters of public employment enshrined in Articles 14 and 16 of the Constitution would be infringed and such regularisation would encourage backdoor appointments denying equality of opportunity to those who were eligible for the post.

13. This Court has also taken the view in the case of *Nilesh Bhatt v. Administrative Officer, Nagar Prathamik Shikshan Samiti* reported in 1996 (1) GLH 108, that where the appointment was itself ad-hoc, temporary and for a fixed term and subject to further stipulation that it was liable to be brought to an end earlier without notice, the principles of natural justice did not have to be followed while terminating the services of such employees. It was also held that a person who was appointed on temporary basis did not acquire any substantive right to the post and that mere prolonged continuous ad-hoc service did not ripen into a regular service to claim permanent or substantive status.

14. With regard to the petitioner's contention regarding violation of the provisions contained in Section 25F of the Industrial Disputes Act, it is relevant to refer to two decisions of the Hon'ble Supreme Court in the case of *M. Venugopal Vs. The Divisional Manager, Life Insurance Corporation of India, Machilipatnam, Andhra Pradesh and another*, and *State of Rajasthan and others Vs. Rameshwar Lal Gahlot*, wherein it has been laid down that once the appointment is for a fixed period, Section 25F does not apply as it is covered by Clause (bb) of Section 2(oo) of the Act. It is further laid down that in cases of such appointment for a fixed period if the Order of termination is passed, the provisions of Section 25F are not attracted. Hence, neither relief of fresh appointment nor that of reinstatement could be granted. Of course, if according to the Apex Court it is found that the Order of termination was a mala fide or passed, in colourable exercise of powers, such Order of termination can be struck down.

15. In the present case, there is nothing on record to show that the Order of termination was mala fide or it was passed in colourable exercise of powers conferred on the respondent-authorities. From the documents furnished along with the petition, it is clear that the petitioner was appointed for a fixed period. Moreover, the intention of the respondent-authorities was to employ the petitioner for a fixed period and the petitioner accepted the appointment on such terms and conditions, as contained in the initial letter of appointment. Extension thereafter was also made on the said terms and conditions. The nature of work being purely temporary and for a fixed period, the appointment of the petitioner automatically came to an end after the expiry of the period of appointment and the extended period of appointment which was also for a fixed period. In these circumstances, if the petitioner was not continued after the expiry of the period of 29 days as stated in the last appointment Order, it cannot be termed as

"retrenchment" nor the provisions of Section 25F of the Act can be made applicable. Hence, the petitioner is not entitled to claim any compensation on the ground of alleged retrenchment, by invoking the provisions contained in Section 25F of the Industrial Disputes Act.

16. Under the circumstances and for the reasons discussed hereinabove, I am of me view that mere is no substance in the contentions raised and the claims made by the petitioner in this petition. I, however, hold that since the petitioner has put up total service of more than 22 years either under the appointment Orders with artificial break or under the Order of this Court, it is open for the petitioner to make a representation to the respondent Nos. 2 and 3 and it is also open for the respondent Nos. 2 and 3 to consider the representations sympathetically and forward its proposal to the respondent No. 1, i.e., State of Gujarat. While considering such proposal, the State Government would take into consideration the length of service of the petitioner, his conduct and necessary workload and the financial aspect and after taking overall view of the matter, the respondents shall take appropriate decision in the matter. With the above observations, the petition is rejected. Rule is discharged with no Order as to costs.