
(2008) 12 AHC CK 0396

In the Allahabad High Court

Case No : Special Appeal Nos. 1906 and 1907 of 2008

Brij Bhushan Singh Andanother

APPELLANT

Vs

State of U.P.and Others

RESPONDENT

Date of Decision : 19-12-2008

Acts Referred:

Industrial Disputes Act, 1947 — Section 2(oo)
Uttar Pradesh Co-operative Societies Employees Service Regulations, 1975 —
Regulation 10, 11, 12, 13, 14

Citation : (2008) 12 AHC CK 0396

Hon'ble Judges : S.Rafat Alam, J and Sudhir Agarwal, J

Final Decision : Dismissed

Judgement

Sudhir Agarwal, J.—Both these cases are connected involving common questions of facts and law and, therefore, as requested and agreed by learned counsel for the parties have been heard together and are being decided by this common judgement.

2. These intra Court appeals have been filed against the judgement dated 05.08.1999 of Hon''ble Single Judge dismissing the Writ Petition No. 27567 of 1992. The aforesaid writ petition was filed by seven persons but the two appeals have been preferred only by the persons who were impleaded as petitioners no. 1, 3 and 5 therein.

3. The petitionerappellants (hereinafter referred to as the "petitioners") were appointed in Banda District Cooperative Bank Ltd., Banda (hereinafter referred to as the "Bank") on daily wage basis. The copy of the appointment letter dated 15.09.1988 of Vinod Kumar, one of the petitioner, is Annexure5 to the writ petition. The appointment was made by the Secretary/General Manager of the Bank. The appointment letter clearly states that the petitioner, Vinod Kumar shall be entitled for wages for those days only on which he would be engaged by the Bank. The petitioner, Brij Bhushan Singh was appointed vide order dated 06.04.1990 (Annexure8 to the writ petition). In all other aspects it is similar to

that of appointment letter of Vinod Kumar. The petitioner, Kailash Chandra Dhuria claims to have worked as daily wager since 01.10.1988 and onwards and in this regard instead of filing his appointment letter he has filed a copy of the certificate dated 30.03.1992 (Annexure2 to the writ petition). Vide order dated 24.10.1991 the petitioners alongwith eight others were made ad hoc and placed in the pay scale of Rs. 8151520. The said appointment was for a period of six months and with a further stipulation that their services are temporary and liable to be terminated at any time without any prior notice. The aforesaid order is Annexure13 to the writ petition. The said engagement was extended up to 31.05.1992 vide order dated 08.05.1992. Thereafter it is said that the petitioners were not allowed to work and respondents Bank advertised eight vacancies of Assistant to be filled in by direct recruitment on temporary basis. Challenging the aforesaid termination as well as advertisement the the petitioners filed Writ Petition No. 27567 of 1992 seeking the following reliefs:

"(i) issue writ, order or direction in the nature of certiorari quashing the orders dated 08.05.1992 and 27.06.1992;

(ii) issue writ, order or direction in the nature of mandamus commanding the respondents to regularise the services of the petitioner as they are continuing for the last three years;

(iii) issue writ, order or direction in the nature of mandamus restraining the respondents not to proceed with any appointment in pursuant of the advertisement published in the daily newspaper Dainik Trishul dated 27.06.1992;

(iv) issue writ, order or direction in the nature of mandamus directing the respondents to permit the petitioners to function as Sahyogi in the Zila Sahkari Bank and put their signatures on the attendance register;

(v) issue such other writ, order or direction as this Hon'ble Court may deem fit and proper in the circumstances of the case;

(vi) Award cost of the writ petition."

4. The respondentBank filed counter affidavit in the writ petition stating that the recruitment and condition of service of the employees are governed by U.P. Cooperative Employees Societies Services Regulation, 1975 (hereinafter referred to as the "Regulation 1975"). It is also said that the recruitment to class IV posts can be made under Regulation 5 to 15 of the Regulation, 1975 i.e. by advertisement of vacancies, selection through a regular selection committee constituted in accordance with the Regulation, 1975 etc. Since regular selection was to take some time, the Bank resolved to make stop gap arrangement and in pursuant thereto the petitioners and some other were engaged on daily wage basis and subsequently they were made ad hoc appointees on tenure basis which has not been extended after 31.05.1992. The appointment being for a fixed tenure, had automatically come to an end after expiry of the said period and, therefore, the petitioners are not entitled to continue.

5. The Hon''ble Single Judge after having heard the learned counsel for the parties has dismissed the writ petition observing that the petitioners having been engaged for a fixed term up to 31.05.1992 have no right either to continue or to seek regularisation.

6. Sri K.P. Agarwal, learned Senior Advocate assisted by Km. Suman Sirohi vehemently contended that the Hon''ble Single Judge has clearly erred in law in dismissing the writ petition observing that the petitioners had no right though the petitioners being workmen under the provisions of the Industrial Disputes Act/U.P. Industrial Disputes Act, 1947 and having worked for more than 3 years continuously and 240 days in every year, could not have been terminated without following the procedure of retrenchment under 1947 Act and, therefore, their termination is ex facie illegal. He submitted that the Hon''ble Single Judge has completely failed to consider this aspect of the matter and, therefore, the judgement is erroneous and liable to be set aside. Placing reliance on the Apex Court's decision in Punjab Land Development and Reclamation Corporation Ltd. and others Vs. The Presiding Officer, Labour Court, Chandigarh and others, 1990(61) FRL 73, State Bank of India Vs. N. Sundra Money, 1976(32) FLR 197=AIR 1976 SC 1111 and State of Bombay and others Vs. The Hospital Mazdoor Sabha and others, AIR 1960 SC 610 he contended that the termination of the petitioners in the case in hand clearly amounts to retrenchment and since the procedure prescribed in the statute was not followed, it was illegal and, therefore, the writ petition could not have been dismissed by the Hon''ble Single Judge merely on the ground that the appointment was a tenure appointment.

7. Learned Standing Counsel, however, supported the judgement of Hon''ble Single Judge for the reasons contained therein.

8. Having given our anxious thoughts to the submissions of learned Senior Advocate, Sri Agarwal, we however do not find ourselves persuaded to take a different view than what has been taken by the learned Single Judge and in our view also the writ petition has rightly been dismissed.

9. It is evident from the record that both the petitioners were appointed initially on daily wage basis and then on ad hoc basis for a period of six months which then extended up to 31.05.1992. The aforesaid appointment has not been extended after 31.05.1992 meaning thereby the contract of employment has not been renewed. Without looking to the fact as to whether the provisions of Industrial Disputes Act, 1947 or U.P. Industrial Disputes Act, 1947 would apply to the Bank which is a cooperative society governed by the U.P. Cooperative Societies act, 1965 (hereinafter referred to as the "1965 Act") and the Rules and Regulations framed thereunder, assuming that the said Acts are applicable, we find that the termination of petitioners in the case in hand does not amount to retrenchment under the Industrial Disputes Act, 1947. The term "retrenchment" has been defined in Section 2(oo) of Industrial Disputes Act, 1947 (in short "Central Act, 1947") and reads as under:

"2(oo) "retrenchment" means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action but does not include

(a) voluntary retirement of the workman; or

(b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; or

(bb) termination of the service of the workman as a result of the nonrenewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein; or

(c) termination of the service of a workman on the ground of continued illhealth;"

10. Clause (bb) of Section 2(oo) of Central Act, 1947 clearly provides that termination of service of a workman as a result of nonrenewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under stipulation in that behalf contained therein would not be included by the term "retrenchment". Here is a case where also the contract of employment was for a fixed tenure and it has not been extended or renewed after expiry of the period of contract i.e. 31.05.1992. Therefore, ex facie the termination on the expiry of the tenure of contract of employment would not be a "retrenchment" within the meaning under Section 2(oo) of Central Act, 1947. Such a termination is by efflux of time and does not require any express Act or order to be passed by the employer. A tenure employment comes to an end suo motu by efflux of time as observed by the Apex Court in the case of Director, Institute of Management Development, U.P. Vs. Pushpa Srivastava (Smt.), 1992(4) SCC 33. However, it is true that the definition of retrenchment under U.P. Industrial Disputes Act, 1947 (in short "U.P. Act, 1947") is some what different and reads as under:

"2(s) "Retrenchment" means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include

(i) voluntary retirement of the workman; or

(ii) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf;"

11. This definition under the U.P. Act, 1947 is somewhat similar to that of Section 2(oo) of Central Act, 1947 as it stood prior to its amendment in 1984 which came to be considered before the Apex Court in the case of Punjab Land Development and Reclamation Corporation Ltd. (supra) which is a judgement by a Constitution Bench of the Apex Court which affirmed its earlier judgements

wherein it was held that all cases of termination would be covered by the definition of retrenchment except of those which are expressly excluded therein and, therefore, even where the termination has resulted due to expiry of tenure it would also be included therein. Prima facie, therefore, the termination of petitioners in the case in hand could have been covered by the definition of retrenchment as contained in U.P. Act, 1947 and, therefore, it could have been said that if the procedure prescribed under U.P. Act, 1947 is not observed before such retrenchment, the same may be illegal. However, the matter does not end here for the reason that this brings us to the next issue which goes to the root of the matter as to whether Central Act, 1947 or U.P. Act, 1947 at all will be applicable to the cooperative societies and the employees thereof in the State of U.P. in view of 1965 Act and the rules and regulations framed thereunder.

12. Section 135 of 1965 Act provides as under:

"135. Certain Acts not to apply to cooperative societies. The provisions contained in the Industrial Disputes Act, 1947 (Act XIV of 1947), and the U.P. Industrial Disputes Act, 1947 (U.P. Act XVIII of 1947), shall not apply to Cooperative Societies."

13. It is said that Section 135 has not been enforced so far but the question as to whether despite of nonenforcement of Section 135 of 1965 Act, the Central Act, 1947 or U.P. Act, 1947 would apply to the employees of a cooperative society governed by the provisions of 1965 Act and the rules and regulations framed thereunder came to be considered in Ghaziabad Zila Sahkari Bank Ltd. Vs. Addl. Labour Commissioner and others, JT 2007(2) SC 566 and it was held that Section 135 has been added only by way of clarification and abundant caution and, therefore, where the provisions are contained in 1965 Act, the labour laws and in particular the U.P. Act, 1947 would not be applicable. It is also said that 1965 Act alone would apply in the matter of employment of cooperative societies to the exclusion of all other laws since it is a complete code in itself as regards employment in cooperative societies and its machinery etc. In para 78 of the judgement the Apex Court held:

"It is relevant to mention here that the services of the employees of the Bank are governed by service regulations 1975 framed under the Act of 1965, which provides complete machinery and adjudication. Moreover, the provisions under Section 70 of the U.P. Cooperative Societies Act, 1965 is elaborate in this regard, which provides complete machinery that if there is any dispute between the employers and the employees of the Cooperative Society, the matter shall be referred to the Arbitrator as provided under Section 70 of the U.P. Cooperative Societies Act, 1965. Section 70 of the U.P. Cooperative Societies Act and Section 64 of the M.P. Cooperative Societies Act are pari materia and this Court in the matter of R.C. Tewari vs. M.P. State Cooperative Marketing Federation Ltd. 1997 (5) SCC 125 held that Labour Court and Industrial Laws are not applicable where complete machinery has been provided under the provisions of the Cooperative Societies Act and in such view of the matter the Ld. Additional Labour

Commissioner U.P. has no jurisdiction to pass orders in the nature it has been passed."

14. It is not disputed that the terms and conditions of appointment etc. are governed in the case in hand by Regulation 1975. Regulation 5 provides for recruitment and it has to be made through the Board namely, U.P. Cooperative Institutional Services Board (hereinafter referred to as the "Board"). However, in respect to class IV employees Regulation 5(iv) provides that the recruitment shall be made by a selection committee which consists of Chairman of the Society, Secretary of the Society and Assistant Registrar of the District. Regulation 5(v) also provides that selection made by the selection committee shall be subject to the approval of the Board and the appointment shall be made after the approval of the Board. Regulation 19 further provides that service of an employee shall be terminable in case of temporary employee on one month's notice in writing on either side, or in lieu thereof by payment of one month's salary by the party which gives notice. The proviso to Regulation 19(a) however provides that in case of direct appointment made for a specific period it shall not be necessary to give any notice or any pay in lieu thereof. Therefore, in respect to the petitioners their appointment was for a specific period i.e. up to 31.05.1992 and having not been extended thereafter, came to be terminated in accordance with Regulation 19(a) proviso and in that case the provisions of Central Act, 1947 and U.P. Act, 1947 would not be attracted.

15. Now coming to the question as to whether the petitioners in any case are entitled for regularisation or not, we find that their appointments were made for a fixed period and came to be terminated by efflux of time. In the absence of any statutory provision they have no right to be considered for regularisation in any manner. This aspect has been considered by this Court in Writ Petition No. 20871 of 2006, Dr. Vijay Kumar Singh and others Vs. State of U.P. and others, decided on 25.04.2006 and it has been held that such an appointment cannot confer any right upon the appointee to claim regularisation or to continue in service beyond the period for which he was employed.

16. A Division Bench has reiterated the aforesaid view after following the aforesaid judgment in Sarvesh Kumar Singh Vs State of U.P and others, Writ Petition No.25849 of 2006 decided on 11.05.2006; and Amar Nath Tiwari Vs State of U.P and others, Writ Petition No.28632 of 2006 decided on 23.05.2006.

17. The Constitution Bench of Apex Court in Secretary, State of Karnataka Vs. Uma Devi, 2006(4) SCC 1 in para 34 of the judgement has also observed as under:

"If it is a contractual appointment, the appointment comes to an end at the end of the contract, if it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued."

18. In State of Punjab Vs. Surinder Kumar, 1992(1) SCC 489 the Court emphasise that specific terms on which appointments were made should be

normally enforced. When a time bound appointment is made the appointee loses any right to continue after expiry of the period for which he was appointed and in the absence of any right no relief can be granted even on the ground of sympathy or sentiments.

19. In *State of Himachal Pradesh and another Vs. Ravindra Singh*, JT 2008 (4) SC 420 in para 36 of the judgement the Court observed:

"We have no doubt in our mind that sympathy or sentiments by itself cannot be a ground for passing an order in relation where to the appellants miserably fail to establish a legal right."

20. Seriously condemning any attempt on the part of the litigants employees or the Courts to allow regularisation of the persons who have not been appointed in accordance with law and also contrary to their terms of appointment the Apex Court in *Official Liquidator Vs. Dayanand and others*, JT 2008(11) SC 467 in para 50 of the judgement quoted with approval para 23 from the judgement of Apex Court in *Delhi Development Horticulture Employees' Union Vs. Delhi Administration*, Delhi, JT 1992(1) SC 394 and the relevant extract therefrom is under under:

"The courts can take judicial notice of the fact that such employment is sought and given directly for various illegal considerations including money. The employment is given first for temporary periods with technical breaks to circumvent the relevant rules, and is continued for 240 or more days with a view to give the benefit of regularization knowing the judicial trend that those who have completed 240 or more days are directed to be automatically regularized. A good deal of illegal employment market has developed resulting in a new source of corruption and frustration of those who are waiting at the Employment Exchanges for years. Not all those who gain such backdoor entry in the employment are in need of the particular jobs. Though already employed elsewhere, they join the jobs for better and secured prospects. That is why most of the cases which come to the courts are of employment in government departments, public undertakings or agencies. Ultimately it is the people who bear the heavy burden of the surplus labour. The other equally injurious effect of indiscriminate regularization has been that many of the agencies have stopped undertaking casual or temporary works though they are urgent and essential for fear that if those who are employed on such works are required to be continued for 240 or more days they have to be absorbed as regular employees although the works are timebound and there is no need of the workmen beyond the completion of the works undertaken. The public interests are thus jeopardised on both counts."

21. Again in para 52 of *Official Liquidator* (supra) the Apex Court quoted and followed the following observations contained in para 47 in *Surinder Kumar* (supra):

"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."

22. Learned counsel for the petitioners further submits that on account of unemployment and lack of bargaining position, the petitioners cannot negotiate with the respondents on equal terms and therefore, the engagement on contractual basis for one fixed tenure is exploitative and is arbitrary. We are afraid that even this submission cannot be accepted. Rejecting similar argument in *Uma Devi* (supra), the Apex Court in para 36 of the judgment has observed as under

"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 eyes open. It may be true that he is not in a position to bargain at arms 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 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 temporarily, contractually or casually, would not be getting even that employment when securing of such employment brings at least some succour 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. In other words, even while accepting the employment, the person concerned knows the nature of his employment. It is not an appointment to a post in the real sense of the term."

23. The question of mandamus directing the employer to regularise the petitioners is to be considered only when they have a legal right and not otherwise. In *Uma Devi* (supra) the Apex Court considered this aspect also and

held:

"In order to 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."

24. We, therefore, do not find any fault with the view taken by Hon"ble Single Judge that the petitioners are not entitled for any relief. These appeals being devoid of merit are accordingly dismissed. No order as to costs.