
(1979) 10 AHC CK 0019
In the Allahabad High Court

Jagdish Prasad Gupta and Others

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 09-10-1979

Acts Referred:

Constitution of India, 1950 — Article 226, 227, 311
Road Transport Corporations Act, 1950 — Section 3, 34, 45

Citation : (1980) 2 LLJ 48

Hon'ble Judges : K.N. Singh, J;B.D. Agarwal, J

Bench : Division Bench

Judgement

K.N. Singh, J.—By means of these two petitions under Article 226 of the Constitution the petitioners have challenged validity of the order of the State Public Service Tribunal (1), Lucknow, dated 12-8-1977, dismissing the petitioners' claim petitions on the ground that it had no jurisdiction to decide the dispute raised by the petitioners.

2. The petitioners were recruited in service as conductors and drivers" in the erstwhile U.P. Government Roadways, a transport undertaking run and maintained by the Transport Department of the State Government. The U.P. State Road Transport Corporation was set up in June, 1972 and the petitioners' services were placed on deputation with the Corporation. Since then, the petitioners have been continuing in service with the U.P. State Road Transport Corporation, hereinafter referred to as the Corporation. The petitioners' services were terminated by the Corporation by separate orders. The petitioners thereupon filed separate claim petitions before the U.P. Public Service Tribunal u/s 4 of the U.P. Public Service (Tribunal) Act, 1976, challenging validity of the orders terminating their services. The Corporation contested the reference and raised a preliminary objection that the reference petitions were not maintainable as the Tribunal had no jurisdiction to entertain the references or to grant any relief to the petitioners. The Tribunal by a common order dated 12-8-1977 upheld the objection and dismissed all the claim petitions on the preliminary ground of jurisdiction. Aggrieved, the petitioners have approached this Court

under Article 226 of the Constitution.

3. The U.P. Public Service Tribunals Act, 1976, hereinafter referred to as the Act, was enacted by the State Legislature providing for the constitution of Tribunals to adjudicate disputes in respect of matters relating to employment of public servants of the State. A Tribunal constituted u/s 3 of the Act has exclusive jurisdiction to hear and decide claims in respect of matters relating to employment of public servants, to the exclusion of civil Court's jurisdiction. Section 4 lays down that any public servant, or who has been a public servant may refer claim before the Tribunal in matters relating to employment on the grounds mentioned therein. The decision of the Tribunal is final, subject to the provisions of Articles 226 and 227 of the Constitution. The remedy provided by the Act is however, not available to all the public servants. Section 1(4) lays down that Section 4 is not applicable to the class of public servants specified therein which include members of judicial service officers and servants of the High Court, members of the Secretariat staff of State Legislature, members of the staff of the State Public Service Commission and a workman as defined by the Industrial Disputes Act, 1947, or the U.P. Industrial Disputes Act 1947. Reference of a claim petition at the instance of the public servant falling within any of the aforesaid categories is not maintainable and the Tribunal has no jurisdiction to entertain or adjudicate the dispute raised by them.

4. In the instant case, the Tribunal held that the Corporation is an industry engaged in the business of transport drivers and conductors working with it fall within the definition of "workman" as defined by the U.P. Industrial Disputes Act, consequently the petitioners fall within the excluded category and they were not entitled to maintain any reference u/s 4 of the Act. In coming to that conclusion the Tribunal placed reliance on a decision of this Court in Bhagwati Prasad Chaurasia v. U.P. Public Service Tribunal and Ors. : (Civil Misc. Writ Petition No. 4580 of 1975) decided on 27-1-1977. The Tribunal noted that initially the petitioners were employed as Government servants, but after the constitution of the Corporation their services were placed at the disposal of the Corporation and as the Corporation exercised supervisory and disciplinary control over the petitioners, they have become its employees and the relationship of master and servant existed between the Corporation and the petitioners and as such they fall within the category of workman. Learned Counsel for the petitioners challenged the view taken by the Tribunal, he submitted that the petitioners continued to be Government servants as they had not been absorbed in the service of the Corporation. The State Government continued to be their employer and no relationship of master and servant ever existed between the petitioners could not be held to be workmen. Learned Counsel for the Corporation, on the other hand, urged that the Tribunal has not committed any manifest error of law in holding the petitioners to be workman as it has followed the decision of a Division Bench of this Court in Bhagwati Prasad Chaurasia's case.

5. There is no dispute that till May 31, 1972, the U.P. Government Roadways

functioned as a State Road Transport undertaking which carried on road transport business. The employees of the U.P. Government Roadways were Government servants and the terms and conditions of their services were regulated by the rules applicable to Government servant of the State. There is further no dispute that the petitioners were initially recruited in service of the U.P. Government Roadways. On May 31, 1972, the State Government issued a notification constituting the U.P. State Road Transport Corporation with effect from June 1, 1972, u/s 3 of the Road Transport Corporation Act, 1950. The Corporation was directed to take over the management of the existing U.P. Government Roadways and to carry on the work of transport business. The State Government issued another order on June 7, 1972 which among other things contained a direction that the services of all the employees of the erstwhile Government Roadways Organization, permanent or temporary, shall be on deputation with the Corporation under Fundamental Rule 110 as contained in Financial Handbook, Part II. The officers and employees while on deputation will be entitled to the same salary and allowance which they would have received in Government service. The order further directed that the services of the temporary employees will be on deputation for a period of six months and within that period the Corporation would formally absorb them in its service, and on such absorption, the period of deputation would come to an end. Clause 5 of the Government order stated that the officers and employees of the erstwhile Government Roadways shall be given option by the Corporation for recruitment in its service and thereupon it will be open to the officers and employees concerned to exercise their option to join the service of the Corporation within the period prescribed. In case an employee exercised his option for joining the services of the Corporation it shall be deemed that he has resigned his Government service but in case the employee did not opt for joining the service of the Corporation, his services would be terminated by the Government in accordance with Article 436 of the Civil Services Regulations:

Clause 1(ka) all the officers/officials of the State Roadways Organization and all the officers/officials concerned with the affairs of the Roadways, posted at the headquarters of the Transport Commissioner, whether permanent or temporary, shall be treated as on deputation in the Corporation with effect from June, 1972, on the existing terms and conditions of their service, within the meaning of Rule 110 of the Financial Handbook, Volume II, in accordance with Clause (b) below, during the period of deputation, these officials/officers shall be getting the same pay and allowance which they would have otherwise received from time to time, had they been in the Government service. No additional pay, and allowances, etc. shall be admissible to them on account of their being on deputation.

The order contains 12 Clauses, but it is not necessary to reproduce all these clauses as the directions contained therein were cancelled by Government by its order No. 3414 XXX-2-170/72 dated Lucknow July 5, 1972. We consider it necessary to reproduce the entire Government order dated July 5, 1972. The order reads thus:

In modification of G.O. No. 3000/XX-2 170A/72 dated June 7, 1972 I am directed to say as under in connection with the merger of the officers/officials working under the U.P. Government Roadways in the services under the State Road Transport Corporation after its establishment.

(1) According to the provisions as contained in para (1)(ka) of the aforesaid Government order, the services of all such permanent or temporary officers/officials, who prior to the constitution of the State Road Transport Corporation, were in the service of the Government Roadways, shall be treated as on deputation in the corporation. No period of deputation is being fixed at present.

(2) No rules have so far been framed by the State Road Transport Corporation u/s 45 of the Transport Corporation Act in regard to the conditions of service of its subordinate officers and officials. Hence, barring the above mentioned para 1(1)(ka), the remaining paras shall be deemed to have been cancelled, but whenever the rules regarding service conditions are framed by the Corporation they shall incorporate this assurance of the Government that in no case the conditions of services of the officers/officials under deputation shall be inferior to those which were available to them under the U.P. Government Roadways prior to the merger and that their seniority, promotion, pay fixation, leave title and pecuniary benefits shall be considered in the same manner in which it would have been done had they been in Government service.

The effect of the aforesaid order was that the service of the employees of the erstwhile U.P. Government Roadways were placed on deputation in the Corporation without there being any restriction relating to the period of probation. The Corporation was directed to frame rules u/s 45 of the Transport Corporation Act regulating conditions of service of its officers and officials. The Government, however, directed that while framing conditions of service, the conditions of service of the erstwhile employees of the U.P. Government Roadways shall not be inferior to those which were available to them under the U.P. Government Roadways, on June 30, 1972, the State Government issued a notification in exercise of its powers u/s 34 of the Road Transport Corporation Act giving directions to the Corporation for carrying out its business in the same manner as it was being done earlier till it framed its own regulations. It is not necessary to refer to any other Government order or notification as it is admitted by the parties that the Corporation has not framed any regulation as yet as contemplated by Section 45 of the U.P. Road Transport Corporation Act, 1950, Consequently, the officers and employees of the U.P. Government Roadways Organisation are continuing in service with the Corporation on deputation.

6. The question then arise, what is the status of Government servant transferred on deputation to a private or public undertaking? Does he lose the status of Government servant on such transfer if he continues to enjoy the constitutional and statutory protection as available to a Government servant? These questions can be answered in the light of the statutory rules as contained in the Fundamental Rules. Rule 110 of the Financial Handbook, Volume II, Part II to IV,

deals with the transfer of a Government servant to a foreign service. Whenever the Government is satisfied that the service of a Government servant is required by a statutory Corporation or by private undertaking, it may transfer the services of the Government servant to the said Corporation or private undertaking if it considers so necessary in the public interest. Such a transfer is in the nature of deputation and the terms and conditions of which are regulated by the rules contained in Chapter XII of Volume II of the Financial Handbook and the Government orders issued from time to time. Fundamental Rule 113 lays down that Government servant transferred to a foreign service shall continue to remain in the cadre in which he was included prior to his transfer. These rules show that a Government servant, even after his transfer to a foreign service on deputation, continues to the benefit of status of a Government servant. Merely because a Government servant is on deputation with a Corporation or a private undertaking does not become the employee of such Corporation or private undertaking instead he continues to retain the status and character of a Government servant. A Government servant holding civil post under the State Government is entitled to constitutional protection of Article 311 and statutory protection of rules regulating the terms and conditions of service. He cannot be deprived of the constitutional protection and statutory benefits merely on his transfer to post on deputation to foreign service.

7. In the instant case there is no dispute that the petitioners were recruited in the service of the erstwhile U.P. Government Roadways Organization prior to the setting up of the Corporation. The petitioners' services were placed on deputation with the Corporation on the condition that they shall continue to be regulated by the terms and conditions applicable to the Government order dated June 7, 1972 and July 5, 1972 make it amply clear that the petitioners continued to be Government servants but their services were on deputation with the Corporation. These facts demonstrate that the State Government continued to be the petitioners' employer although for administrative purposes the petitioners' service had been placed at the disposal of the Corporation. The petitioners were no doubt under the supervision and administrative control of the Corporation but they were not amenable to disciplinary control of the Corporation. The Corporation could not take disciplinary action against the petitioners nor it could suspend, terminate or dismiss the petitioners.

8. The question then arises as to whether the petitioners are workmen within the meaning of the term "workman" as defined by Section 2(S) of the U.P. Industrial Disputes Act, 1947. The expression workman is defined as under :

The "workman" means any person (including apprentice) employed in any industry to do any skilled or unskilled, manual, supervisory, technical or clerical work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an Industrial Disputes Act, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of that dispute, or whose

dismissal, discharge or retrenchment has led to that dispute, but does not include any such person.

9. The definition of "workman" is wide enough to include any person employed in any industry for doing skilled or unskilled, manual or supervisory or clerical work, even if a person is dismissed, discharged or retrenched from service he is included within the definition of workman for the purposes of Industrial Disputes Act. The essential conditions for a person being workman are that he is employed to do work in an industry and there is jural relationship of master and servant between him and the employer. Expression "industry" as defined by Section 2(j) of the U.P. Industrial Disputes Act, 1947 means any business, trade, undertaking, manufacture or calling of employers including any selling service, employment handicraft or industrial occupation or avocation of workman. The industry as defined by Section 2(j) has a wide import. The expression "Industry" has been considered by the Supreme Court in a number of cases and there has been divergence of opinion on this question. The Supreme Court has recently settled the controversy finally in the Bangalore Water Supply and Sewerage Board v. Rajappa and Ors. AIR 1978 S.C. 542. In this case all earlier decisions were considered and guidelines have been laid down which are necessary to be considered in adjudication of the question whether a particular activity falls within the term "industry". The term "industry" as interpreted by the Supreme Court, lays down that where there is (i) systematic activity, (ii) organized by Corporation between employer and employee, (iii) for the production and/or distribution of foods and services calculated to satisfy human wants and wishes, prima facie there is an "industry" in that enterprise. Absence of profit motive or gainful objective is irrelevant, be the venture in the public, joint, private or other sector. The Supreme Court emphasised that true focus is functional and the decisive test is the nature of the activity with special emphasis on the emphasis on the employer-employee relations. If the organisation is trade or business it does not cease to be one because of philanthropy animating the undertaking. It is not necessary to deal with the question whether the activity carried on by the Corporation falls within the expression. Industry as it is admitted at all hands that the Corporation carries on business of transporting passengers and goods in a systematic organised manner. Its activity merely falls within the ambit of transport business as it is engaged in a commercial activity. By all standards, the Corporation is engaged in transport business, therefore, it seems industry and its employees would be workman within the meaning of Section 2(s) of the U.P. Industrial Dispute Act, 1947, provided the relationship of master and servant exists between the employees and the Corporation.

10. The question whether the jural relationship of master and servant existed between the petitioner and the Corporation is to be examined in the light of the Government orders and notifications issued in the matter. As already discussed, the petitioners were initially employed by the erstwhile U.P. Government Roadways and they enjoyed the status of Government servants. On the establishment of the Corporation, the petitioners' services were placed on

deputation and the Corporation did not absorb them in its service, instead they continued on deputation and the period of deputation continued to be regulated by the terms and conditions as laid down in Fundamental Rules 110 to 113 itself. Since the Corporation did not absorb them, they continued to be Government servants. In the absence of any law framed by the legislature or rules or regulations framed by the Corporation, the petitioners could not be forced to be employees of the Corporation. A person in the employment of a particular employer cannot be held to be in the employment of another employer unless a jural relationship of master and servant is created by operation of law or by voluntary choice, as it is always open to a person to change his employer. The scheme as initially set out in the Government order dated June 7, 1972 contemplated absorption of the employees of the U.P. Government Roadways Organisation in the Corporation's service and for that purpose an opportunity was to be given to the employees concerned to exercise their option, but that scheme was subsequently modified and the services of such employees were kept on deputation till the Corporation framed its own regulations u/s 45 of the transport Corporation Act, 1950 regulating the conditions of service of its employees. As discussed earlier on such regulations have been framed. The petitioners were never given any opportunity to exercise their option for their absorption in the service of the Corporation, nor any statutory rule or regulation was framed absorbing them in the service of the Corporation. The petitioners therefore continued to be on deputation with the Corporation and the State Government continued to be their employer. The Corporation was, therefore, not competent to take any disciplinary action against the petitioners by terminating their services.

11. Learned Counsel for the Corporation then urged that since the Corporation had power to regulate, control and supervise the work of the employees in the erstwhile U.P. Government Roadways Organisation and further as the Corporation has been paying wages to the said employees the petitioners by implication become employees of the Corporation and the privity of contract of service existed between them and the Corporation. Reliance was placed on a number of authorities reported in. *C. Works Ltd. v. State of Saurashtra* AIR 1967 S.C. 264, and *Bank Voor Hend v. Stafford and Anr.* (1952) 2 A.N.R. 252. It is not necessary to consider all these cases in detail as in our opinion in none of these cases the question with which we are dealing was considered. In none of the aforesaid cases the status of a Government servant placed on deputation with the Public Corporation was considered or decided. The test laid down in the aforesaid cases makes out general principle for determining the relationship of employee and employer working in private undertakings. An employee working in a private undertaking, factory, mill or shipyard is not entitled to the constitutional protection of statutory rules and he does not enjoy the status of a Government servant, whereas a person employed in the Government service enjoys a different status and terms and conditions of service are regulated by the Constitutional and statutory provisions. He cannot be deprived of that status

without his consent or without the law made by Competent Authority.

12. In *D.C. Works Ltd. v. State of Saurashtra*, (supra) the Supreme Court considered the question whether the workmen employed by a contractor were the workmen of the factory which manufactured salt. The Supreme Court observed:

The essential condition of a person being a workman within the terms of this definition is that he should be employed to do the work in that industry that there should be in other words, an employment of his by the employer and that there should be the relationship between the employer and him as between the employer and employee or master and servant. Unless a person is thus employed there can be no question of his being a workman within the definition of the terms as contained in the Act.

After making the aforesaid observations the Supreme Court further examined the principles according to which the relationship as between the employer and employee or master and servant should be determined. After referring to the Halsbury's Laws of England and a number of English decisions the Supreme Court observed as under:

The principle which emerges from these authorities is that the prima facie test for the determination of the relationship between master and servant is the existence of the right in the master to supervise and control the work done by the servant not only in the matter of directing what work the servant is to do but also the manner in which he shall do his work, or to borrow the words of Lord Uthawatt at page 23 in *Mersey Docks and Harbour Board v. Coggins and Griffith (Liverpool) Ltd.* [1947] A.C. 1, at page 23. The proper test is whether or not the hirer had authority to control the manner of execution of the act in question.

Relying upon the aforesaid observation the counsel for the Corporation strenuously urged that since the officers of the Corporation exercise control over the work of the employees of the erstwhile U.P. Government Roadways organisation and they further control the manner in which work is to be executed, the test as laid down by the Supreme Court is fulfilled, consequently the relationship of master and servant existed between the parties. As discussed earlier the relationship of master and servant never existed between the petitioner and the Corporation. Both the parties were aware of this fact. The State Government who are the petitioner's employer, placed their services on deputation with the Corporation on the conditions laid down in the order as well as in the Fundamental Rules 110 to 127. The Corporation was required to pay wages to the petitioners for the work done by them. The Corporation was further authorised to take work from them but the Corporation was not authorised to exercise any disciplinary control over them or to terminate the jural relationship of master and servant as it had no such authority under any law of consent of the petitioners express or implied in nature. The test laid down by the Supreme Court in *D. C. Works Ltd. v. State of Saurashtra*, (supra) and the other

authorities relied upon by the Corporation do not touch the question which is involved in the instant cases. It must be noted that in the instant case the State Government had power to withdraw the petitioners from deputation or to abolish the post and terminate their services. The Corporation had no control of such nature over them. Corporation was entitled to take work from the petitioners till their services were placed on deputation by the Government the Corporation could not further change the terms and conditions of the petitioners' employment as the petitioners continued to be employees of the State Government.

13. In *Jestamani Gulabrai Dholkia and Others Vs. The Scindia Steam Navigation Company, Bombay and Others*, , the question of transfer of contract of service of an employee of one employer to another employer was considered in detail. The Supreme Court laid down that a contract of service could be transferred by statutory provision and if the statutory provision itself gave an option to the employee not to join the new concern, there could be no compulsory transfer of contract of service. The Supreme Court further laid down that in the absence of any statutory provision, contract of service could be transferred by consent between the parties. In the absence of statutory or voluntary transfer, the contract of service entered into by the petitioners with the State Government could not be transferred to the Corporation. In our opinion the jural relationship of master and servant never existed between the petitioner and the Corporation and none of the authorities cited on behalf of the Corporation support the respondent's contention.

14. Learned Counsel for the Corporation urged that the State Government had issued directions u/s 34 of the Road Transport Corporation Act conferring disciplinary powers on the officers of the Corporation over the employees of the erstwhile U.P. Government Roadways whose services were placed at the disposal of the Corporation, therefore, an implied contract of service would arise between the employees and the Corporation and the officers of the Corporation have power to take disciplinary action against the employees. He referred to the directions contained the Government order dated June 30, 1972. The relevant clause of the order reads thus:

The administrative and financial powers delegated by the State of Uttar Pradesh to the Transport Commissioner, U.P. and Other officers subordinate to him immediately prior to June 1, 1972, shall continue to vest in exercise of powers by the General Manager and other officers of the Corporation to the same extension each case and hereto before and similar duties, responsibilities and functions shall continue to be performed by them as they have been performing so far.

The aforesaid clause does not confer powers on the officers of the Corporation to take disciplinary action against the employees of the erstwhile U.P. Government Roadways, instead it merely conferred administrative and financial powers to carry on the work of the Corporation. We have already noticed that the employees of the erstwhile U.P. Government Roadways Organisation and their

services were placed on deputation with the Corporation and since they have not been absorbed in the services of the Corporation and they still continue to be Government Servants. No doubt, the direction issued by the State Government u/s 34 of the Road Transport Corporation Act operated as law and it is binding on the Corporation but the relevant clause of the Government order dated June 30, 1972, as quoted earlier, does not transfer the services of the employees to the Corporation and it further does not confer power to terminate their services. The direction contained in the aforesaid clause is merely for the purpose of maintaining continuity in the administrative powers and connections of officers and for that purpose the Transport Commissioner and other officers of the Corporation were vested with the same power which they had been exercising prior to June 30, 1972. The aforesaid directions do not create any express or implied contract of service between the employees of the erstwhile U. P. Government Roadways and the Corporation. No such contract could be inferred in the present case either on facts or in law. The Corporation was never authorised or empowered by that State Government to exercise disciplinary control over the erstwhile employees of the U.P. Government Roadways Organisation. The Corporation therefore could not exercise power to terminate their services as no privity of contract of service existed between the petitioners and the Corporation. The second essential condition for being a workman never existed. Therefore the petitioners did not fall within the definition of the expression "workman" as defined by the Industrial Disputes Act, 1947.

15. The Tribunal, relying upon the decision of this Court in Bhagwati Prasad Chaurasia (supra) has held that the petitioners are workmen. In that case H.N. Seth, J., held that Bhagwati Prasad Chaurasia who was a conductor in the Roadways Department of the U.P. Government prior to the establishment of the Corporation was a workman in the employment of the Corporation. Brother Mufti, J., however, did not agree with the view taken by brother Seth, J. as he held the employees of the erstwhile U.P. Government Roadways were on deputation with the Corporation and they retained their character of Government servant as they had not been absorbed in the service of the Corporation. After considering the relevant Government orders, Mufti, J. further held that there was no relationship of master and servant between those employees and the Corporation, therefore Chaurasia was not a workman as contemplated by the two Industrial Disputes Act. Though there was difference of opinion between two learned Judges the question was not referred to a third Judge as the case was disposed of on a question over which there was no difference of opinion. We agree with the view taken by brother Mufti, J. and we regret our liability to accept the view taken by H.N. Seth J. In U.P. State Road Transport Corporation v. State of U.P. (Civil Misc. Writ Petition No. 8193 of 1978) decided on 12th July, 1979 a Division Bench of this Court held that the employees of the U.P. Government Roadways Organisation were placed on deputation with the Corporation and as they have not been absorbed in the services of the Corporation, they continue to be Government servants and the officers of the Corporation have no authority in law

to terminate their services or to compulsorily retire them.

16. For the reasons stated above, we hold that the petitioners continue to be in service of the State Government although they were on deputation with the Corporation. There has been no priority of contract of service between the petitioners and the Corporation and as such the relationship of master and servant did not exist between the parties. The petitioners did not fall within the category of workman as defined in the two Industrial Disputes Act, 1946, The petitioners do not further fall within the excepted category of public servants as contemplated by Section 1(4) of the U.P. Public Services Tribunal Act, 1976. Therefore, the Tribunal had jurisdiction to entertain the petitioner's claims in view of these findings, the petitioners, claim petitions u/s 4 of the Act were maintainable and the Tribunal committed patent error of law in rejecting their petitions on the ground that it had no jurisdiction to entertain the same.

17. In the result, we allow the petitions and quash the order of the Tribunal dated 12-8-77. We further direct the tribunal to hear and decide the petitioner's claim petitions in accordance with law. Parties shall bear their own costs.