
(2004) 11 AHC CK 0225

In the Allahabad High Court

Case No : CMWP No. 41552 of 1998 & Civil Misc. Writ Petition No. 41552 of 1998

Kailash Narain Agnihotri

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 10-11-2004

Acts Referred:

Uttar Pradesh General Clauses Act, 1904 — Section 6
Uttar Pradesh Urban Planning and Development (Amendment and Validation) Act,
1985 — Section 8
Uttar Pradesh Urban Planning and Development (Amendment and Validation)
Ordinance, 1984 — Section 5A
Uttar Pradesh Urban Planning and Development Act, 1973 — Section 59, 5A

Citation : (2005) 6 AWC 5332 : (2005) 1 ESC 31 : (2005) 98 RD 331 : (2005) 1
UPLBEC 283

Hon'ble Judges : Vikram Nath, J; Dilip Gupta, J; B.S. Chauhan, J

Bench : Full Bench

Advocate : V.C. Mishra and Vivek Mishra, for the Appellant; Sudhir Agarwal,
Addl. A.G., A.K. Mishra, Ashok Mohiley and U.K. Uniyal and SC, for the
Respondent

Final Decision : Dismissed

Judgement

B.S. Chauhan, J.

The controversy as to whether a person who is working in the Palika Centralised Service and subsequently transferred to the Development Authority can claim a right of absorption was decided by a Division Bench of this Court in Raj Kumkar Wadhani v. State of U.P. and Ors., (1994) 24 ALR 331 and the claim of the petitioner therein was rejected. This Court considered the effect and impact of the provisions of Section 6 of the General Clauses Act, 1897; the provisions of Sections 5-A and 59 of The Uttar Pradesh Urban Planning and Development Act, 1973 (hereinafter called as the "Act, 1973"); provisions of The Uttar Pradesh Nagar Mahapalika Adhiniyam, 1959 (hereinafter called as the "Act, 1959"); the provisions of Municipalities Act, 1961 (hereinafter called as the "Act", 1961");

and the Ordinance Nos. 19 of 1984, 10 of 1985 and Act No. 21 of 1985 having bearing on the provisions of Section 5-A of the Act, 1973.

2. Another Division Bench while hearing a writ petition placed reliance upon the judgment of a learned Single Judge in Writ Petition No. 9226 of 1989, Narain Ji Gopal v. State of U.P. and Ors., decided on 24.4.1992, wherein a similar claim had been allowed and made the reference with an observation that there is a conflict in the two judgments in view of the fact that the SLP (Civil) No. 321 of 1993, State of U.P. v. Narain Ji Gopal and Ors., was dismissed by Hon"ble the Supreme Court in limine by its order dated 7.1.1993 and so it stood affirmed and approved.

3. We have heard Sri V.C. Mishra, learned Senior Counsel for the petitioner and Sri Sudhir Agrawal, learned Additional Advocate General appearing for the respondent Nos. 1 to 3 and Sri A.K. Mishra, learned Counsel for respondent No. 4.

4. The first issue that arises for consideration is whether the dismissal of the SLP by the Hon"ble Supreme Court in limine i.e. by a non-speaking order, amounts to affirmation or confirmation or approval of the order impugned before the Supreme Court. On this issue a large number of judgments have been cited including; Workmen of Cochin Port Trust Vs. Board of Trustees of The Cochin Port Trust and Another, ; Ahmedabad Manufacturing and Calico Printing Co. Ltd. Vs. Workmen and Another, ; Sahu Govind Prasad Vs. Commissioner of Income Tax, ; Late Nawab Sir Mir Osman Ali Khan Vs. Commissioner of Wealth Tax, Hyderabad, ; Indian Oil Corporation Ltd. Vs. State of Bihar and others, ; Supreme Court Employees" Welfare Association and Others Vs. Union of India (UOI) and Another, ; Rup Diamonds and Others Vs. Union of India and Others, ; Supreme Court Employees" Welfare Association and Others Vs. Union of India (UOI) and Another, ; Yogendra Narayan Chowdhury and Ors. v. Union of India and Ors., AIR 1996 SC 751; State of Manipur Vs. Thingujam Brojen Meetei, ; Union of India and another Vs. Sher Singh and others, ; M/s. Sun Export Corporation, Bombay Vs. Collector of Customs, Bombay and another, ; V.M. Salgaocar & Bros. (P) Ltd. v. Commissioner of Income Tax, AIR 2000 SC 1623; Kunhayammed and Others Vs. State of Kerala and Another, ; Saurashtra Oil Mills Association, Gujarat Vs. State of Gujarat and Another, and Union of India (UOI) and Others Vs. Jaipal Singh, . A perusal of these judgments leave no manner of doubt that the dismissal of the SLP in limine does not mean that the reasoning of the judgment of the High Court against which the SLP had been filed before the Supreme Court stands affirmed or the judgment and order impugned merges with such order of the Supreme Court on dismissal of the petition. It simply means that the Apex Court did not consider the case worth examining for the reason, which may be other than merit of the case. Nor the order of the Supreme Court operate as res judicata. An order rejecting the SLP at the threshold without detailed reasons, therefore, does not constitute any declaration of law or a binding precedent.

5. There is full agreement at the bar that the judgment of the Single Judge in

Narain Ji Gopal (*supra*) still remained a judgment of the Single Bench. Thus, there is no conflict in the two judgments of the Co-ordinate Benches. In view of the above, it cannot be held that the reference on this ground could be made.

6. However, it has been suggested at the Bar that the matter may be heard on merits considering the other aspects of the case as sending it back to the Division Bench may take a long time.

7. The facts and circumstances of the case are that the petitioner was appointed as Overseer (Civil) at Kanpur Nagar Mahapalika on 13.10.1960 and he was appointed as Overseer in IIT, Kanpur in 1965. The petitioner joined as Overseer (Civil) at HBTI, Kanpur on 26.6.1971, and was appointed on 12.6.1973 as Overseer (Civil) (Junior Engineer) in Kanpur Nagar Mahapalika under U.P. Palka Centralised Service Rules, 1966 (hereinafter called as the "Rules, 1966"), framed under the Act, 1959. The Uttar Pradesh Urban Planning and Development (Amendment and Validation) Act, 1973 was enacted and in view thereof the Kanpur Development Authority came into existence on 13.9.1974. Petitioner was also transferred to the Kanpur Development Authority on 25.6.1975. From there he was transferred to Allahabad Development Authority on 29.6.1978 and was promoted on 25.2.1982 as an Assistant Engineer, i.e. the post created by the Allahabad Development Authority on temporary basis. The petitioner stood subsequently reverted to the post of Junior Engineer vide order dated 15.4.1983 on the ground that he had wrongly been promoted considering him to be the senior most Junior Engineer but the operation of the said order was stayed by this Court and during the pendency of the writ petition, the reversion order was withdrawn. Thus the petition filed by him became infructuous.

8. On 19.10.1984 the Uttar Pradesh Urban Planning and Development (Amendment and Validation) Ordinance, 1984 (hereinafter referred to as the "Ordinance No. 19 of 1984") was promulgated making certain amendments in various provisions of the 1973 Act. Provisions of Section 5-A of the 1973 Act were also inserted pertaining to creation of Centralised Services. Section 5-A provided for absorption of employees on fulfillment of certain conditions.

9. Subsequently, the Uttar Pradesh Urban Planning and Development (Amendment and Validation) Ordinance, 1985 (hereinafter referred to as the "Ordinance No. 10 of 1985") was promulgated on 27.4.1985 giving retrospective effect from 22.10.1984. The provisions of Section 5-A also stood substantially amended. The Uttar Pradesh Urban Planning and Development (Amendment and Validation) Act, 1985 (hereinafter referred to as the "Act No. 21 of 1985") was published in the UP. Gazette on 23.8.1985, but it came into force on 22.10.1984. The provisions of Section 5-A of the Act remained the same as contained in Ordinance No. 10 of 1985.

10. Petitioner made a representation in 1987 seeking absorption in the Development Authorities Centralised Service and also for confirmation on the post of Assistant Engineer and further promotion as Executive Engineer. His case

was considered at various levels but as he could not get the relief of absorption and promotion, he filed Writ Petition No. 44893 of 1993 which was disposed of by this Court vide order dated 19.1.1998 directing the respondent authorities to decide his representation for the said reliefs. The State Government rejected his representation vide impugned order dated 22.8.1998. Hence this writ petition.

11. Sri V.C. Mishra, learned Senior Counsel for the petitioner has submitted that the petitioner was working in a substantive capacity in the Palika Centralised Service and by virtue of the provisions of the Ordinance No. 19 of 1984 which came into effect on 22.10.1984 he stood absorbed in Development Authorities Centralised Service in view of the provisions of Section 5-A of the 1973 Act. The rights accrued to him were saved by virtue of the provisions of Section 6 of the General Clauses Act, 1987 and the said right could not be taken away even by Act No. 21 of 1985. He, therefore, contended that the order impugned was liable to be quashed.

12. On the contrary Sri Sudhir Agrawal, learned Additional Advocate General has submitted that Ordinance No. 19 of 1984 did not provide for automatic absorption as Sub-sections (3), (4) and (5) of Section 5-A thereof provide for an order to be passed positively by the department for absorption after assessing his suitability.

13. In the instant case, no order was ever passed and the Ordinance automatically lapsed after expiry of its tenure. Ordinance No. 10 of 1985 though promulgated on 27.4.1985 was made operative w.e.f. 22.10.1984 i.e. the date on which the Ordinance No. 19 of 1984 had come into force. Thus, it superseded the earlier Ordinance and has done away with the entire effect of the earlier Ordinance. The Act No. 21 of 1985 was enacted wherein the language of Section 5-A of the 1973 Act is entirely different from the language used in Ordinance No. 19 of 1984. More so, even though the Act received the assent of the President of India on 21.8.1985 but it was published in the Official Gazette on 23.8.1985, and became applicable with retrospective effect from 22.10.1984, i.e. the date of operation of the earlier Ordinance No. 19 of 1984. As no order of absorption of the petitioner was passed, no right ever accrued in his favour under the Ordinance No. 19 of 1984, but, even if there was any, its effect has been taken away and neutralised by the subsequent Ordinance No. 10 of 1985 and Act No. 21 of 1985. The petitioner cannot claim any relief whatsoever by virtue of the provisions of Section 6 of the General Clauses Act. The case of the petitioner is squarely covered by the judgment of this Court in Raj Kumar Wadhani (supra) and the judgment in Narain Ji Gopal (supra) may be a decision inter se parties but does not lay down the law on the issue as it had been decided presuming the facts and averments taken by the petitioner therein to be correct as there had been no rebuttal by the State Government by filing the counter-affidavit. Thus the petition is liable to be dismissed.

14. Sri A.K. Mishra, learned Counsel appearing for the Allahabad Development Authority has adopted the submissions made by Sri Sudhir Agrawal.

15. We have considered the rival submissions made by the learned Counsel for the parties and perused the record.

16. The relevant part of said Section 5-A of Ordinance 19 of 1984 is quoted below :-

"5-A. Creation of Centralised Services.-(1) Notwithstanding anything to the contrary contained in Section 5 or in any other law for the time being in force, the State Government may at any time, by notification, create one or more "Development Authorities Centralised Services" for such posts as the State Government may deem fit, common to all the Development Authorities, and may prescribe the manner and conditions of recruitment to and the terms and conditions of service of persons appointed to such service.

(2) Upon creation of a Development Authorities Centralised Service, a person serving on the posts included in such service immediately before such creation shall, unless he opts otherwise, be absorbed in such service :-

(a) finally, if he was already confirmed in his post, and

(b) provisionally, if he was holding temporary or officiating appointment.

(3) A person referred to in Sub-section (2) may, within three months from the creation of such Development Authorities Centralised Service communicate to the Government in the Housing Department, his option not to be absorbed in such Centralised Service, failing which he shall be deemed to have opted for final or provisional, as the case may be, absorption in such Centralised Service.

(4) Suitability of a person absorbed provisionally, for final absorption in a Development Authorities Centralised Service, shall be examined in the manner prescribed and if found suitable he shall be absorbed finally.

(5) The services of an employee who opts against absorption or who is not found suitable for final absorption, shall stand determined and he shall, without prejudice to his claim to any leave, pension, provident fund or gratuity which he would have been entitled to, be entitled to receive as compensation from the Development Authority concerned, an amount equal to.....

(6) It shall be lawful for the State Government or any officer authorised by it in this behalf, to transfer any person holding any post in a Development Authorities Centralised Service from one Development Authority to another."

17. Admittedly, no positive order has ever been passed in favour of the petitioner absorbing him under Ordinance No. 19 of 1984 nor he can claim the automatic absorption either provisionally or finally by operation of law as Section 5-A of the 1973 Act, as amended by Ordinance No. 19 of 1984 provided for assessing the suitability of the candidate and passing a positive order by the authority concerned. If such an order had not been passed, the question of having any right accrued in favour of the petitioner does not arise.

18. The relevant provisions of the Uttar Pradesh Urban Planning & Development (Amendment and Validation) Ordinance, 1985 (hereinafter referred to as Ordinance No. 10 of 1985), which had been made operative w.e.f. 22.10.1984, are quoted below:-

"5-A. Creation of Centralised Services.-(1) Notwithstanding anything to the contrary contained in Section 5 or in any other law for the time being in force, the State Government may at any time, by notification, create one or more "Development Authorities Centralised Services" for such posts, other than the posts mentioned in Sub-section (4) of Section 59, as the State Government may deem fit, common to all the Development Authorities, and may prescribe the manner and conditions of recruitment to, and the terms and conditions of service of persons appointed to such service.

8. (1) The Uttar Pradesh Urban Planning and Development (Amendment and Validation) Ordinance, 1984 is hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken under the Principal Act as amended by the Ordinance referred to in Sub-section (1) which is in conformity with the provisions of that Act as amended by this Ordinance shall be deemed to have been done or taken under the corresponding provisions of the Principal Act as amended by this Ordinance as if the provisions of this Ordinance were in force at all material times."

19. The Uttar Pradesh Urban Planning and Development (Amendment and Validation) Act, 1985 (hereinafter referred to as Act No. 21 of 1985) was published in the U.P. Gazette on 23rd August, 1985. It was, however, deemed to have come into force on 22nd October, 1984. Section 5-A remained the same as in Ordinance No. 10 of 1985. Section 8 of the Act No. 21 of 1985 is quoted below:-

"8. Repeal and Saving.-(1) The Uttar Pradesh Planning and Development (Amendment and Validation) Ordinance, 1985 (10 of 1985) is hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken under the principal Act as amended by the Ordinance referred to in Sub-section (1) which is in conformity with the provisions of that Act as amended by this Act shall be deemed to have been done or taken under the corresponding provisions of the principal Act as amended by this Act as if the provisions of this Act were in force at all material times."

20. Even though no rights had accrued in favour of the petitioner under Ordinance No. 19 of 1984, but even if for the sake of arguments it is accepted that a right had accrued, it stood washed off by virtue of the provisions of Ordinance No. 10 of 1985 and Act No. 21 of 1985. The Ordinance No. 10 of 1985 had been made operative w.e.f. 22.10.1984 and the Act No. 21 of 1985 was also made operative from the same date which is also the date on which the Ordinance No. 19 of 1984 stood promulgated. The provisions of Section 5-A of

the Act subsequently excluded the posts mentioned in Sub-section (4) to Section 59 of the Act, 1973. Admittedly the post held by the petitioner fell within the ambit of this provision.

21. The Division Bench of this Court in Wadhani's case had considered all aspects and submissions made before us and after considering the same, the Court had reached the following conclusion:-

"that Section 8 of the repealing Ordinance No. 10 of 1985 did not save any alleged accrued right of the petitioners of having been provisionally absorbed in the Development Authorities Centralised Service. Yet there is another reason which would show that Clause (2) of Section 8 of the Ordinance No, 10 of 1985 is of no help to the case of the petitioners. Clause (2) of Section 8 of the Ordinance No. 10 of 1985 saves only those things done or action taken under the repealed Ordinance, which are in conformity with the provisions of the Act as amended by the Ordinance No. 10 of 1985, which was subsequently replaced by the Act. The Ordinance No. -10 of 1985 changed the structure of service by excluding the post mentioned in Sub-section (4) of Section 59 of the Act on which the petitioners were working. Even if anything was done for provisional absorption of petitioners in the Development Authorities Centralised Service same being not in conformity with the re-enacted provisions of the Act, the alleged .right of the petitioners was not saved. In view of this the petitioners cannot take any assistance of Clause 8 of the Ordinance No. 10 of 1985 for asking us to hold that they have been provisionally absorbed in the Development Authorities Centralised service and thus cannot be transferred to their parent service. In view of that has been stated above the claim of the petitioners that their right of having been absorbed in the Development Authorities Centralised Service, has been saved by Clause 8 of the Ordinance No, 10 of 1985, must fail."

22. The issue of applicability of the provisions of Section 6 of the General Clauses Act has been considered by Hon''ble the Supreme Court instate of Punjab v. Mohar Singh, AIR 1955 SC 84; M.S. Shivananda Vs. Karnataka State Road Transport Corporation and Others, ; Commissioner of Income Tax Vs. Shah Sadiq and Sons, and Vishwant Kumar Vs. Madan Lal Sharma and Another, , wherein it has been held that the rights accrued under the Act/Ordinance which stood repelled would continue to exist unless it has specifically been take away.

23. In the State of Orissa Vs. Bhupendra Kumar Bose, . the Hon''ble Supreme Court has held as under:

"In our opinion, it would not be reasonable to hold that the general rule about the effect of the expiration of a temporary Act on which Mr. Chetty relies is inflexible and admits of no exceptions. It is true for instance that offences committed against temporary Acts must be prosecuted and punished for the Act expires. If a prosecution has not ended before that day, as a result of the termination of the Act, it will ipso facto terminate. But is that an inflexible and universal rule? In our opinion, what the effect of the expiration of a temporary

Act would be must depend upon the nature of the right or obligation resulting from the provisions of the temporary Act and upon there character whether the said right and liability arc enduring or not.....

In other words, this decision shows that in some cases the repeal effected by a temporary Act would be permanent and would endure even after the expiration of the temporary Act."

24. This Court while deciding a similar issue in Committee of Management and Anr. v. Registrar, Co-operative Societies, Gorakhpur and Ors., 2002 (49) ALR 145, observed as under:-

"Section 6 of U.P, General Clauses Act is almost parl materia with Section 6 of the General Clauses Act, 1897 (Central Act). Section 30 (b) of U.P, General Clauses Act provides that the provisions of the Act shall apply in relation to an Ordinance promulgated by the Governor under Article 213 of the Constitution as they apply in relation to Uttar Pradesh Act, made by State Legislature. Section 6-A of this Act makes provision for the time of expiration of temporary Uttar Pradesh Acts and Section 6-B makes provision regarding the effect of expiration of provisions of such Act. Section 6-C is material.....

Section 6-C. Repeal or expiration of law making textual amendments in other laws.....

Sub-section (2) of Section 6-C clearly lays down that where amendment of text of any Uttar Pradesh Act is made by an Ordinance and such an Ordinance ceases to operate without being re-enacted, the amendment of text made thereby shall also cease to operate. This provision squarely applies to the facts of the present case as amendment to Section 29 of the U.P. Co-operative Societies Act had been made by an Ordinance and the said Ordinance has ceased to operate without being re-enacted. Therefore, in view of this statutory provision, the amendment made to Sub-section (2) to Section 29 shall also cease to operate. The contention of Shri Shashi Nandan that the amendment made by the Ordinance stood permanently engrafted in the parent Act and the lapse of the Ordinance could not affect the amendment so made, therefore, cannot be accepted.....that if the matters become accomplished fact and were completed events and became closed matters then the repeal of the enactment or the lapsing of the Ordinance will have no effect. On account of the amending Ordinance, the writ petitioners became entitled to continue beyond 3 years and up to a period of 5 years but, this did not become a completed event and a closed matter. The period beyond 3 years was still running. With the lapsing of the Ordinance the right to continue beyond 3 years has ceased to exist. The petitioners original term of 3 years having expired they have no legal right to function."

25. While deciding the said case, reliance had been placed by this Court on the judgment in Stevenson v. Oliver, (1841) 151 E.R. 1024, wherein it has been held as under:-

"There is a difference between temporary statutes and statutes which are repealed: the later (except so far as they relate to transactions already completed under them) become as if they had never existed; but with respect to the former, the extent of the restrictions imposed, and the duration of the provisions, are matters of construction.....It is by no means a consequence of an Act expiring, that rights acquired under it should likewise expire.....Therefore, even as regards the effect of the repealing of an earlier Act made by a temporary Act, the intention of the temporary Act in repealing the earlier Act will have to be considered and no general or inflexible rule in that behalf can be laid down."

26. Further reliance had been placed on the judgment of the Apex Court in *T. Venkata Reddy and Others Vs. State of Andhra Pradesh*, , where the constitutional validity of Andhra Pradesh Abolition of Posts and Part-time Village Officers Ordinance, 1984 promulgated by the Governor under Article 213 of the Constitution by which the post of part-time village officers came to be abolished and provision was made for the appointment of Village Assistants. It was held that when the Ordinance ceased to operate as a result of disapproval of State Legislature, the Ordinance would not become void ab-initio and there would be no revival of the posts which were abolished and the persons holding that posts prior to the Ordinance cannot be deemed to be continuing to hold those posts. It was held that by virtue of Section 3 all the posts of part-time village officers stood abolished and the petitioners therein ceased to be employees of the State Government and these matters became accomplished on that date and were completed events. It was further held that even if the Ordinance was assumed to have ceased to operate from a subsequent date by reason of Clause (2) of Article 213; the effect of Section 3 of the Ordinance was irreversible except by express legislation.

27. The general rule in regard to a temporary statute is that, in the absence of special provision to the contrary, proceedings/action being taken under it will ipso facto terminate as soon as the statute expires. When a temporary Act is repealed, the proceedings, instituted under such an Act, terminate at the time the temporary Act would have otherwise expired; However, the legislature can and, often enough does not avoid such anomalous consequences by enacting in the temporary statute a saving provision, and the effect whereof is the same as in Section 6 of the General Clauses Act. (Vide *S. Krishnan and Others Vs. The State of Madras*, ; *The State of Uttar Pradesh Vs. Seth Jagamander Das and Others*, and *Gopi Chand Vs. The Delhi Administration*, .

28. There is a difference between temporary statutes and statutes which are repealed; the later (except so far as they relate to transaction already completed under them) become as if they had never existed; but with respect to the former, the extent of the restrictions imposed and the duration of the provisions are matters of construction. Once a temporary statute expires, it ceases altogether to have effect as if it had never been, except as to transactions passed, and

closed if the operation of an Act is withdrawn by a Notification of the State, such a withdrawal cannot be recorded as being in any sense of repeal (Vide B. Bansgopal Vs. Emperor). The legislature may expressly insert some special provision stipulating that even after the temporary Act expires, its operation and impact may be saved in relation to particular matters. However, that remains a matter of construction regarding the operation and effect of such statutory provisions (Vide Raja Ram Om Prakash v. Union of India and Ors., 1971 All. L.J. 231).

29. A Constitution Bench of the Hon'ble Supreme Court in Trust Mai Lachmi Sialkoti Bradri Vs. The Chairman, Amritsar Improvement Trust, , held that when a temporary Act expires, any appointment, notification, order, rule, bye-law made or issued under the expired Act, will also cease to be operative, and will not be revived or continued even if the expired Act is re-enacted.

30. Thus, from the above, an inference can be drawn that the rights accrued under a temporary Act do not survive if the statute is repealed, unless the repealing Act provides for it. In case of a temporary Act, the effect of its expiry is to be determined considering the nature of the right or obligation arising out of the said temporary Act and upon their character as to whether the said rights and obligations are enduring or not.

31. Be that as it may, as no right had ever accrued in favour of the petitioner for want of positive order of absorption by the competent authority, no provision of the General Clauses Act is applicable and even if any right had ever accrued, the effect of the same was taken away by Ordinance No. 10 of 1985 and Act No. 21 of 1985. Even otherwise, as the absorption was not in conformity with the reenacted provision of the Act, none Of the petitioner's right was saved. More so, the act of absorption was never completed nor it could be held to be a closed matter.

32. We have also reconsidered the issues decided in this case in the light of the submissions made before us but we axe unable to arrive at; a different conclusion.

33. In view of the above, we find no force in the writ petition and it is, accordingly, dismissed. No costs.