

(2007) 10 GAU CK 0015
In the Gauhati High Court

Case No : Writ Petition (Civil) No. 10267 of 2003 and 7654 of 2004

Md.Samsuddin Ahmed

APPELLANT

Vs

Union of India and ors.

RESPONDENT

Date of Decision : 03-10-2007

Acts Referred:

Constitution of India, 1950 — Article 12, 12

Citation : (2008) 1 GLR 299

Hon'ble Judges : B.K.Sharma, J

Bench : Single Bench

Advocate : B.K.Borah, B.P.Borah, J.Borah, K.K.Phukan, Advocates appearing for Parties

Judgement

1. The petitioners who were admittedly appointed under particular schemes being aggrieved by discontinuation of their services, have invoked the writ jurisdiction of this court praying for absorbing them under any other schemes/projects. Both the writ petitions being based on, more or less, same set of facts and the relief prayed for being the same, have been heard together and are being disposed of by this common judgment and order.

2. For determining the issue raised in the writ petitions, the respective pleadings of the parties in the first writ petition, i.e., W.P.(C) No. 10267/03, are discussed below. Be it stated here that learned counsel for the parties have also extensively argued on the basis of the facts in the said writ petition.

3. The petitioner was first appointed as Cooperative Education Instructor under the respondent No. 2 in the year 1979. There is no dispute that he was so appointed under a particular scheme implementation of which was vested with the respondent No. 2. The petitioner served in the aforesaid capacity in different offices. By AnnexureD letter dated 28/29.5.1985, the petitioner was intimated that his services under the scheme being only up to 31.3.1985, there was no question of continuation of his service beyond that. The letter was written to the petitioner in reference to certain programmes furnished by the petitioner in

respect of the scheme for the months of April, May and June 1985.

4. When the matter rested, thus, by inter departmental correspondence/ letter dated 19.6.1985, launching of another scheme called "EducationcumDevelopment Programme for Handloom Cooperatives by NCUI" during seventh five year plan was intimated. Pursuant thereto, the petitioner was offered the post of Cooperative Education Instructor by memo dated 19/20.11.1985. The petitioner joined as such and by his letter dated 22.1.1986 made a request for payment of salary for the intervening period, treating his service to be continuous. The letter dated 22.1.1986 was followed by further letters making request for payment of arrear salary.

5. By AnnexureI letter dated 31.1.1986, the petitioner was informed that since the earlier scheme/programme was only up to 31.3.1985 there was no question of continuation of service of the petitioner beyond that and consequently till his fresh appointment by AnnexureF memorandum dated 19/20.11.1985, payment of salary to the petitioner did not arise.

6. The petitioner served in different offices. However, by AnnexureO Office Memorandum dated 3.2.2003, the services of the petitioner was discontinued with immediate effect. The grounds for such discontinuation of service was the discontinuation of grants in aid by the Central Government for operating the scheme/programme. As a consequence of such discontinuation of the grants in aid, the project/ unit was closed.

7. After discontinuation of the service of the petitioner by the aforesaid order dated 3.2.2003, the petitioner made AnnexureP representation dated 10.2.2003 praying for absorption/continuation of his service under any other scheme/ programme. However, the same did not yield any result.

8. By AnnexureS letter dated 26.5.2003, the petitioner, in reference to his representations, was advised to appear before the selection committee for interview for the post of Cooperative Education Instructor. According to the petitioner although he was selected for the post, but he was not appointed on the ground of his ineligibility due to language problem. However, the recommendation was made by the selection committee to the authorities of the respondent No. 2 to consider the case of the petitioner for absorption in any other programme/scheme where there would be no language problem for the petitioner. It was on that basis, the petitioner approached this court by filing the writ petition which was preceded by his representations dated 12.8.2003 and 29.9.2003 (Annexures T and U) respectively praying for release of his gratuity, etc.

9. The respondents in their counter affidavit have contended that since the petitioners were appointed under particular schemes/programmes, continuation of their services would be dependent on the continuation of the schemes/ programmes. According to them the services of the petitioners had to be discontinued in absence of grants in aid from the Central Government as a

consequence of which the particular programme/unit had to be closed. As regards the payment of salary to the petitioner after discontinuation of his service with effect from 31.3.1985 and his reappointment by memorandum dated 19/20.11.1985, it has been stated by the respondent that since the particular scheme/ programme was not in existence, the services of the petitioner had to be discontinued and consequently there is no question of payment of salary for the intervening period.

10. As regards the plea of the petitioner that although he was found suitable, for appointment by the selection committee he was not appointed, the respondents have stated that the selection committee did not find the petitioner suitable for the job at Shillong due to language problem. It has been stated that there was no scope for absorption/regularization of service of the petitioners and their continuation in service is dependent upon the implementation of the time to time schemes/programmes and their suitability commensurating to the particular scheme/programme. In paragraph 33 of the affidavit, it has been stated that at present only agricultural projects are in existence and Handloom/Handicraft and Industrial projects are not in existence.

11. The respondents have also raised the question of maintainability of the writ petition on the ground that the agency in question, i.e., the respondent No. 2, is not an instrumentality or agency of the Government of India. According to them, the respondent No. 2 being a Cooperative Society registered under Multi State Cooperative Societies Act, 1984, it has no administrative or financial control of the Government of India and the same is run by its own laws which clearly indicate that the society is not at all governmental in nature. Thus, according to the respondents, NCUI, i.e., the respondent No, 2, being not the State or its instrumentality as defined in article 12 of the Constitution of India, is not amenable to the writ jurisdiction.

12. During the pendency of the writ petitions certain interim orders were passed directing consideration of the case of the petitioners under any other scheme/ project considering their past experience. The petitioner in W.P.(C) No. 10267/03 has once again been appointed on temporary and contractual basis for a period of one year. However, till completion of hearing of the writ petitions he was continuing in his service. On the other hand, the petitioner in the second writ petition, being W.P.(C) No. 7654/04, was not so appointed and in the meantime, he has attained the age of superannuation on 30.4.2007. As indicated above, his service was dispensed with due to closer of the particular scheme/project. According to the respondents although he was also considered for further appointment, but unfortunately he Could not qualify in the selection.

13. I have heard Mr. B.P. Borah, learned senior counsel assisted by Mr. J. Borah, learned counsel for the petitioners as well as Mr. K.K. Phukan along with Mr. B.K. Borah, learned counsel for the respondents. While Mr. Borah, learned counsel for the petitioners emphasized on the long length of service of the petitioners requiring their absorption/ regularization and/or continuation in service, Mr.

Phukan, learned counsel for the respondents submitted that since the services of the petitioners were not against any regular establishment and were appointed only against a particular scheme/project, their continuation in service was dependent on continuation of the scheme/project.

14. I have considered the submissions made by the learned counsel for the parties as well as the materials on record. There is no dispute that the petitioners were appointed under particular schemes for which the fund was provided by the Central Government. The petitioners have accepted that position. This is precisely the reasons as to why the petitioners have not prayed for regularization of their services but have only prayed for their absorption and/or to taking back in any project in which the vacancies exist.

15. If the petitioners were appointed against any particular scheme implementation of which was vested with the respondent No. 2, providing it with grants in aid by the Central Government, with discontinuation of the grants in aid, the respondent No. 2 had no option than to dispense with the services of the petitioners. By the very nature of appointment of the petitioners, same was contractual, continuation of which was dependent on continuation of the scheme/project. The petitioners having worked in particular scheme/project also cannot claim any right for absorption/appointment in another scheme under the respondent No. 2.

16. It has rightly been contended by the respondents in their affidavit that, the appointment/absorption of the petitioners in another scheme is always dependent on their suitability for the same. Even assuming that the petitioner in the first writ petition was selected by the selection committee for appointment under the particular scheme at Shillong, it cannot be said that the appointing authority was not justified in not offering appointment to the petitioner on the ground of his ineligibility due to language problem. However, it is the stand of the respondents that the petitioner in fact was not found suitable due to language problem.

17. As has been held by the Apex Court in the case of *State of Gujarat v. E.J. Kampavat*, AIR 1992 SC1685, the contractual employees whose appointment are coterminous with a particular office cannot claim continuation in service and such employees do not become temporary Govt. servant. In *MD, UP Land Development Corporation and Another v. Amar Singh and Others*, (2003) 5 SCC 388, rejecting the claim for regularization of services of the project employees, the Apex Court held that when the particular project under which the employees had been working came to a closure, the said employees would not get any vested right so as to claim regularization of their services with regular pay and scale. Once the project comes to an end, the services of the employees also come to an end.

18. As in the said cases, the petitioners in the instant case were also appointed under particular scheme/project. Their services automatically stood terminated

with the closure of the scheme/project. In such a situation, no mandamus can be issued directing the respondents to absorb the petitioners in any other scheme and/or to continue their services irrespective of their suitability for such absorption in another project/scheme.

19. As regards the plea of the petitioner in W.P.(C) No. 10,267/03 that payment of salary of the intervening period from discontinuation of service with effect from 31.3.1985 till the fresh appointment was made on 19.11.1985, no direction can be issued for payment of salary. The petitioner was duly intimated about discontinuation of the project with effect from 31.3.1985. By letter dated 28.5.1985 (AnnexureD), the petitioner was intimated that the advance programme submitted by him for the months of April, May and June 1985 were uncalled for as the particular project against which the petition had been working was only up to 31.3.1985. Had it been case of continuation of service of the petitioner beyond 31.3.1985, there would not have been any occasion for his fresh appointment by AnnexureF memorandum dated 19.11.1985. Moreover, the plea of nonpayment of salary during the intervening period has been raised by the petitioner long after 18 years and that too incidentally while filing the writ petition in 2003 making a grievance against dispensation of his service by order dated 3.2.2003.

20. Little discussion on the plea of the respondents in their counter affidavit about maintainability of the writ petition on the ground that the respondent No. 2 is not in authority within the meaning of article 12 of the Constitution of India. Materials placed before this court are scanty and the learned counsel for the parties also did not seriously argue that aspect of the matter.

21. An authority must be an authority sui juris to fall within the meaning of the expression "other authorities" under article 12. A juridical entity, though an authority, may also satisfy the test of being an instrumentality or agency of the state in which event, such authority may be held to be an instrumentality or agency of the state but not the vice versa.

22. Simply by holding a legal entity to be an instrumentality or agency of the state, it does not necessarily become an authority within the meaning of "other authorities" in article 12. To be an authority, the entity should have been created by a statute or under a statute and functioning with liability and obligations to public. Further, the statute creating the entity should have vested that entity with power to make law or issue binding directions amounting to law within the meaning of article 13(2) governing its relationship with other people or the affairs of other people their rights, duties, liabilities or other legal relations. If created under statute, then there must exist some other statute conferring on the entity such powers. In either case, it should have been entrusted with such functions as are governmental or closely associated therewith by being of public importance or being fundamental to the life of the people and hence governmental. Such authority would be the state, for, one who enjoys the powers or privileges of the state must also be subjected to limitations and obligations of

the state. It is this strong statutory flavour and clear indicia of power constitutional or statutory, and its potential or capability to act to the detriment of Fundamental Rights of the people, which makes it an authority; though in a given case, depending on the facts and circumstances, an authority may also be found to be an instrumentality or agency of the state and to that extent they may overlap.

23. Tests 1, 2 and 4 in *Ajay Hasia v. Khalid Mujib Sehrabardi*, (1981) 1 SCC 722 enable determination of governmental ownership or control. Tests 3, 5 and 6 are functional tests.

24. The tests laid down in *Ajay Hasia*'s case (*supra*) are relevant for the purpose of determining whether an entity is an instrumentality or agency of the state. Neither all the tests are required to be answered in positive nor a positive answer to one or two tests would suffice. It will depend upon a combination of one or more of the relevant factors depending upon the essentiality and overwhelming nature of such factors in identifying the real source of governing power, if need be by removing the mask or piercing the veil disguising the entity concerned. When an entity has an independent legal existence, before it is held to be the state, the person alleging it to be so must satisfy the court of brooding presence of government or deep and pervasive control of the government so as to hold it to be an instrumentality or agency of the state.

25. For the foregoing reasons and discussions, I do not find any infirmity in the impugned order dated 3.2.2003 (AnnexureO) by which the services of the petitioners have been dispensed with. The petitioner in the first writ petition has already been appointed in another project/ scheme and it is expected that the petitioner would continue his service till such time the project/scheme remains in operation. As regards the petitioner in the second writ petition, there is no question of his appointment as he has already attained the age of superannuation as noted above.

26. Subject to the above observations, the writ petitions are dismissed. However, there shall be no order as to costs.