
(2013) 10 AHC CK 0134
In the Allahabad High Court
Case No : C.M.W.P. No. 42089 of 2009

Mohan Singh

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 08-10-2013

Acts Referred:

Citation : (2013) 101 ALR 765 : (2014) 2 AWC 1838

Hon'ble Judges : Sudhir Agarwal, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Sudhir Agarwal, J.—Heard learned Counsels for parties and perused the record. This is a strange case where a civil post/public office has been allowed to be occupied, on substantive basis, by a person, who was never appointed on/in the said post/office. Moreover this arrangement has continued for long. The simple reason is that it relates to a neck depth involvement of wide spread corruption, permitting all kinds of irregularities, for petty personal gains of the officers of a department, in which, almost all (a few exceptions may be, but not better known) are working to encourage corruption, in well organized manner. In other words, an organized group of corrupt people (s), defeating every purpose of department concerned, not only siphoning off huge public revenue, in the form of salary and allowances, but simultaneously resulting in substantial loss to public in the hand of commercial dealers, and traders, using instruments having inaccurate standards of weights and measure.

2. A few facts which demonstrate and fortify this Court's observations above, may be narrated as under.

3. Petitioner was appointed as Prahri (Chowkidar) in the pay scale of Rs. 165-215/- vide order dated 12.1.1982, issued by Assistant Controller, Department of Weights and Measures, Agra (hereinafter referred to as "A.C., W/M"). The aforesaid appointment was temporary and liable to be terminated at

any point of time. He was transferred from Agra to Fatehabad with the designation of Messenger (Sandesh Vahak) by order dated 13.6.1986 passed by the Controller, Weights and Measures, U.P. Lucknow (respondent No. 2). Both these posts, i.e., Chaukidar and Sandesh Vahak are admittedly Class IV posts.

4. It, however, does not appear as to when and how he came to be posted as Laboratory Assistant (Prayogshala Parichar), but the department's officials, in their own way, helped him inasmuch the Deputy Controller, Weights and Measures, Agra Mandal, Agra (respondent No. 3) issued an order on 18.12.1992 giving next time scale to petitioner, on completion of 10 years of satisfactory service, on the post of Laboratory Assistant (Prayogshala Parichar). The aforesaid benefit was allowed with effect from 16.1.1992 pursuant to Government Order dated 3.6.1989. Thereafter, respondents 2 and 3 proceeded further by issuing another order dated 2.12.2002, whereby petitioner was confirmed as a Class IV employee, on the post of Laboratory Assistant (Prayogshala Parichar), with effect from 16.3.1985. There are several other persons who were also confirmed by the same order, on the post of Messenger and Chowkidar, as the case may be. Respondents 2, 3 and 6 went ahead by treating petitioner's appointment as Laboratory Assistant (Prayogshala Parichar) since 16.1.1982, and, on completion of 14 years of service, granted him first promotional scale of Rs. 2610-3540 with effect from 16.1.1996 vide order dated 31.12.2002. Petitioner then was transferred as Laboratory Assistant from Agra to Sadabad, Mathura vide order dated 24.2.2003. On completion of 19 years of service on the post of Laboratory Assistant, respondents granted him second time scale vide order dated 15.3.2003 with effect from 16.1.2001.

5. Petitioner was transferred from Fatehabad to Mathura as Laboratory Assistant by order dated 28.5.2008. Respondent No. 2 thereafter somehow found that petitioner's post/cadre/designation was altered without any letter of appointment to this effect and there was no sanctity for such change, hence, passed an order dated 7.11.2008, recalling order dated 13.6.1986 and directing that petitioner shall continue to function on the substantive post on which he was appointed, i.e., Chowkidar (Prahri). It is this order which has been assailed in this writ petition.

6. It is also said that a similar order was passed in respect to two other persons, namely, Chandra Prakash and Ramakant Sharma, who challenged the same in a writ petition which was dismissed by Hon'ble Single Judge and there against Special Appeals No. 1693 of 2008 and 1768 of 2008 have been filed wherein an interim order was passed in favour of those persons. It is pleaded that till those appeals are decided, petitioner should be allowed to continue as Laboratory Assistant. The said request however was turned down by respondent No. 2 vide order dated 27.5.2009, and this order also has been challenged in this writ petition.

7. It is contended that petitioner is working on the post of Lab Assistant for the last more than 22 years and has also been confirmed on the said post, having

been granted various time scales and promotional scales, and at this stage, to post him as Chowkidar is clearly illegal and bad. It is also said that the impugned order has been passed in violation of principle of natural justice, i.e., without giving any opportunity or show cause notice to the petitioner and, therefore also, it is bad in law.

8. Respondents have filed counter-affidavit wherein it is admitted that petitioner was appointed as Chowkidar by A.C., W/M vide order dated 12.1.1982. It is also not in dispute that he was sought to be transferred as "Messenger" (Sandesh Vahak) in 1986 but then was allowed to function as "Laboratory Assistant" in the year 1989 and continued to work as such since thereafter. The post of "Laboratory Assistant" and "Chowkidar" are all Group-D posts and, therefore, directing petitioner to work as Chowkidar is not a demotion. Respondents have relied on U.P. Group "D" Employees Service Rules, 1985 (hereinafter referred to as "Rules, 1985") to suggest that there is no demotion in directing petitioner to work as "Chowkidar", a post on which he was appointed, instead of "Laboratory Assistant" since both are in the same pay scale and classified as Group D.

9. In rejoinder-affidavit, filed by petitioner, he has contended that Rules, 1985 are not applicable to Laboratory Assistant. The mere fact that the two posts carry same pay scale, is not determinative of status of two posts. The post of "Laboratory Assistant" was separated from Class IV cadre, so far as the department of Weights and Measure is concerned, vide Government Order dated 2.2.1979 (a copy whereof has been filed as Annexure-11 to the writ petition). It is said that respondent No. 2 (Controller, Weights and Measures, U.P. Lucknow) also issued a consequential order dated 23.4.1979 informing all Deputy Controllers that the cadre and post of "Laboratory Assistant" has been separated from Class IV employees cadre. This letter is also on page 36 of writ petition.

10. It is contended that the post of "Laboratory Assistant" is a separate cadre from Class IV, though pay scale prescribed therefor, may be the same as that of Class IV posts. Impugned orders have been challenged contending that after more than two decades respondents had no valid justification to alter the situation and condition of working which has adverse effect and consequences upon the petitioner's status and position.

11. From the above facts and pleadings, certain aspects, which are borne out, undisputed may be summarized as under.

12. The post of Laboratory Assistant is a distinct and separate post/cadre from Class IV cadre of Weights and Measure department. The post of Laboratory Assistant is a Technical Post enjoying better status than that of other Class IV posts, irrespective of similarity in the matter of pay scale. I also find stand of petitioner justified when he contended that Rules, 1985 are not applicable to the post/cadre of Laboratory Assistant. Various categories of Group-D posts have been detailed in Rule 6 of Rules, 1985 and they specifically exclude a Technical Post, as is evident from the following:

(a) Peon, Messenger, Chaukidar, Mali, Farrash, Sweeper, Waterman/Bhisti, Tindal, Thelaman, Record-lifter and every other non-technical post.

(b) Peon-Jamadar

(c) Daftri/Book Binder/Chclostyle Operator

(d) Farrash Jamadar

(e) Sweeper Jamadar

(f) Head Mali

13. This is one aspect of the matter and I am inclined to hold in favour of petitioner that the post/cadre of "Laboratory Assistant" is different and distinct from Group-D posts governed by Rules, 1985. The Rules, however, include the posts of Messenger and Chowkidar, both. This, however, by itself, would not result in arriving at a particular conclusion, whether the orders impugned in this writ petition are justified or not. This Court has to see whether petitioner has a right to the post of "Laboratory Assistant". If that is so, only then it can be said that such right cannot be divested, firstly, without complying the requirement of principles of natural justice, and, secondly if such divesting is after a long time, unless a proper reason and justification is disclosed by the respondents. A vested right of petitioner is a necessary component to challenge the impugned orders and to support his contention that he is entitled to hold the post of "Laboratory Assistant" and cannot be directed to work as "Chowkidar".

14. When a person is claiming a right to the post, the very first order which has to be seen in this regard is his letter of appointment. In the case in hand, admittedly petitioner was appointed as "Chowkidar" vide appointment order dated 12.1.1982 (a copy whereof has been filed as Annexure-CA-1 to the counter-affidavit). Pursuant to the said letter of appointment, petitioner joined on 16.1.1982 and continued to work as such. In 1986 he was sought to be transferred From Agra II Headquarter to Fatehabad, changing his designation as "Messenger". This letter of transfer dated 13.6.1996 is also on record as Annexure-3 to the writ petition. Thereafter nothing has been placed to show as to who, how and when appointed him as "Laboratory Assistant". As already said, the post of Laboratory Assistant in Weights and Measures department was already excluded from Class IV cadre. Under Rules, 1985 also, which came into force subsequently, i.e., after appointment of the petitioner as Chowkidar, the technical posts were kept out of purview of those Rules. There is no order of appointment or even transfer of petitioner with the designation/post of Laboratory Assistant, issued by the competent authority, at any point of time. It appears that under an oral arrangement petitioner was allowed to work as "Laboratory Assistant", and it was sought to be conferred a kind of legality, firstly, by granting time scale on completion of ten years of service, vide order dated 18.12.1992, wherein designation of petitioner was shown as "Laboratory Assistant". Thereafter by confirming petitioner on the post of Laboratory

Assistant vide order dated 2.12.2002 with effect from 16.3.1985 though neither petitioner was ever appointed on the post of Laboratory Assistant nor on 16.3.1985, he was working on the said post. Respondents 2 and 3 apparently passed wholly illegal orders, confirming petitioner on a post, on which, he was never appointed, and, the date with which he was sought to be confirmed, on that date he was not at all working as Laboratory Assistant. Under whose patronage and influence, all these things were done and real facts and state of affairs were ignored, require investigation separately, but one thing is very clear, that some one or more, in the department of respondents, were patronizing petitioner, by conferring upon him a different status and post on which he was never appointed, in a twisted, distorted and camouflaged manner.

15. Evidently, all subsequent orders, i.e., 18.12.1992, 2.12.2002 and 31.12.2002 etc., have been issued under misimpression and a clear mistake of fact that petitioner was appointed as "Laboratory Assistant" though he was never so appointed. There is no order whereby a competent authority, ever even transferred him to work with a different designation of Laboratory Assistant. Something which was allowed at local level orally has been sought to be given cloak of legality by issuing subsequent orders, showing petitioner's designation as Laboratory Assistant, though it was never so. The subsequent action, founded on a mistake of fact, treating something which never existed, renders the things and subsequent actions, non est. When the petitioner was never appointed on the post of "Laboratory Assistant" by a competent authority in accordance with law, or even by issuing a letter of appointment, petitioner, obviously, has/had no right to claim his position, status and entitlement to work as "Laboratory Assistant". He was appointed as Class IV employee, i.e., Chowkidar, and, therefore, his substantive right to continue in service is only on the post of Chowkidar, on which he was appointed.

16. Moreover, even different posts of Group-D, as mentioned in Rule 6 of Rules, 1985, are not interchangeable. This would be evident from a bare reading of some other Rules in Rules, 1985. For example, Rule 10 prescribes academic qualification. While no educational qualification as such is prescribed for the post of Chowkidar, Farrash, Sweeper, Waterman (Bhishti) etc. except that a preference will be given to a person who is educated and at least read and write Hindi in Devnagri script, but for the post of Peon, Messenger or Cyclostyle Operator, minimum academic qualification of Class 5th passed is prescribed. Similarly for the post of Mali one must possess requisite knowledge pertaining to the work of Mali. The different posts contemplate a different constitution of work. There is nothing in Rules, 1985 which permits interchangeability of all the different categories, merely because they are Group-D posts and governed by the same set of rules, i.e., Rules, 1985. This assumption on the part of respondents is patently erroneous and illegal. It has no legal or otherwise foundation. The respondent No. 2, therefore, could not have changed designation of petitioner from Chowkidar to Messenger by order dated 13.6.1986. Therefore, it cannot be said that respondent No. 2 has erred in law in recalling his illegal

order (s), but that by itself would not be a determining factor in the present writ petition for the reason that petitioner here at is claiming right to continue as "Laboratory Assistant", though this Court has already found that he was never appointed on the said post. In absence of such appointment, the question of grant of higher pay scale, promotional scale and confirmation also would/could not have arisen. Any order, if already passed under a patent mistake of fact, that petitioner has been appointed as "Laboratory Assistant", though he was not, subsequent orders founded on a non-existence fact, would also be non-existent and void ab initio.

17. There is another aspect of the matter. This Court cannot ignore the fault on the part of respondents in taking work of "Laboratory Assistant" from petitioner and also by showing his designation as "Laboratory Assistant" to confer various benefits upon him. This action on the part of respondents clearly shows an active collusion on the part of some superior Officer in respondents' department with petitioner. In absence of any other justification, I am also inclined to hold that this collusion was not only without authority and per se illegal, but was actuated by reasons other than bona fide which travel in the realm of "malice in law".

18. The Apex Court has summarised "malice in law" in Smt. S.R. Venkataraman Vs. Union of India (UOI) and Another, as under:

It is equally true that there will be an error of fact when a public body is prompted by a mistaken belief in the existence of a non-existing fact or circumstance. This is so clearly unreasonable that what is done under such a mistaken belief might almost be said to have been done in bad faith; and in actual experience, and as things go, these may well be said to run into one another." (Para. 8)

(Emphasis added)

19. The Apex Court further in para. 9 of the judgment in S.R. Venkataraman (supra) observed:

9. The influence of extraneous matters will be undoubted where the authority making the order has admitted their influence. It will therefore be a gross abuse of legal power to punish a person or destroy her service career in a manner not warranted by law by putting a rule which makes a useful provision for the premature retirement of Government servants only in the "public interest", to a purpose wholly unwarranted by it, and to arrive at quite a contradictory result. An administrative order which is based on reasons of fact which do not exist must, therefore, be held to be infected with an abuse of power.

(Emphasis added)

20. In Mukesh Kumar Agrawal Vs. State of U.P. and Others, the Apex Court said:

We also intend to emphasize that the distinction between a malice of fact and malice in law must be borne out from records; whereas in a case involving malice

in law which if established may lead to an inference that the statutory authorities had acted without jurisdiction.

21. In *Somesh Tiwari Vs. Union of India (UOI) and Others*, dealing with the question of validity of an order of transfer on the ground of malice in law, the Apex Court in para. 16 of the judgment observed as under:

16..... Mala fide is of two kinds--one malice in fact and the second malice in law. The order in question would attract the principle of malice in law as it was not based on any factor germane for passing an order of transfer and based on an irrelevant ground i.e., on the allegations made against the appellant in the anonymous complaint. It is one thing to say that the employer is entitled to pass an order of transfer in administrative exigencies but it is another thing to say that the order of transfer is passed by way of or in lieu of punishment.

22. In *H.M.T. Ltd. rep. by its Deputy General Manager (HRM) and Another Vs. Mudappa and Others*, the Apex Court in paras. 18 and 19 defined malice in law by referring to "Words and Phrases Legally Defined, 3rd Edn., London Butterworths, 1989" as under:

The legal meaning of malice is "ill-will or spite towards a party and any indirect or improper motive in taking an action". This is sometimes described as "malice in fact". "Legal malice" or "malice in law" means "something done without lawful excuse". In other words, "it is an act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite. It is a deliberate act in disregard of the rights of others."

19. It was observed that where malice was attributed to the State, it could not be a case of malice in fact, or personal ill-will or spite on the part of the State. It could only be malice in law, i.e., legal mala fide.

23. In brief, malice in law is when a power is exercised for an unauthorized purpose or on a fact which is claimed to exist but in fact, is non-existent or for the purpose for which it is not meant though apparently it is shown that the same is being exercised for the purpose the power is supposed to be exercised. (See *The Manager, Government Branch Press and Another Vs. D.B. Belliappa*, ; *Punjab State Electricity Board Ltd. Vs. Zora Singh and Others*, ; *K.K. Bhalla Vs. State of M.P. and Others*, ; *P. Mohanan Pillai Vs. State of Kerala and Others*, ; *M.P. State Co-op. Dairy Fedn. Ltd. and Another Vs. Rajnesh Kumar Jamindar and Others*, ; *Swarn Singh Chand v. Punjab State Electricity Board and others* (2009) 7 SCALE 822 and *Sri Yerneni Raja Ramchander @ Rajababu Vs. State of A.P. and Others*, .

24. The involvement of the departmental officials, therefore, in this regard needs a proper inquiry and disciplinary action. Respondent No. 1 is directed to hold an appropriate enquiry against the erring officers and treating it a severe misconduct pass appropriate orders in accordance with law, punishing guilty persons. The aforesaid enquiry shall be concluded within four months from the date of receipt of a copy of this judgment and the action taken report and

compliance report/affidavits shall be filed immediately thereafter. Only for this purpose, this case shall be listed in the week commencing 11.2.2014.

25. For all other purposes, in view of discussion made above, since the petitioner is not entitled for any relief, the writ petition is dismissed. The Registrar General is directed to send a copy of this order forthwith for communication to respondent No. 1 and compliance. A copy of this order shall also be made available to learned Standing Counsel for information to concerned respondents and compliance.