

(2018) 01 CAL CK 0124

In the Calcutta High Court

Case No : 242 of 2014?With?A S T A 187 of 2014

Prasanta Kumar Das & Ors.

APPELLANT

Vs

The State of West Bengal & Ors.

RESPONDENT

Date of Decision : 29-01-2018

Acts Referred:

[Constitution of India](#), [Article 14](#), [Article 12](#), [Article 16](#) - Appointment of Commission to inquire into and report on the administration of autonomous districts and autonomous

Citation : (2018) 01 CAL CK 0124

Hon'ble Judges : I.P.Mukerji, Md. Mumtaz Khan

Bench : Division Bench

Advocate : Kamallesh Bhattacharjee, Anirban Saha, Saiful Islam, Rezaul Hossain, Sadhan Kumar Halder, Hasanurazaman

Judgement

1. This case has a long history. This history has to be narrated for proper appreciation of the matters in dispute. It concerns the Raiganj Municipality. Out of thirteen appellants eleven were appointed as Assistant Teachers by the Municipality in the year 1985. The other two were appointed as a work assistant and burning ghat chowkidar. These appointments were made between March 1983 and 1985.

2. The Government of West Bengal superseded the Board of the Municipality in or about 1985. The sub-divisional officer Raiganj Municipality took charge as the administrator. He terminated the service of all the appellants. The reason why they were terminated was that all of them were appointed against un-sanctioned posts. In other words, there was no vacant post against which any could be appointed. Hence, their appointment was irregular.

3. Several writ applications were filed by them. An interim order was made by this court on 23rd December, 1985. By operation of the interim order all the appellants continued to work.

4. On the other hand, the appellants' version is that all of them were appointed against existing vacant posts. The municipality needed their services for these posts and employed them, as there was dearth of staff. Their services were utilised. Therefore the engagement of the appellants could not have been illegal but at the most irregular. They are entitled to regularisation, by virtue of their long and continuous service.

5. By its order dated 28th November, 1986 this court allowed the writ application and quashed the order of termination of the administrator dated 6th December, 1985.

6. It is true that from time to time the Chairman of Raiganj Municipality requested the Director of Local Bodies for regularising the appointment of the appellants. It also appears from the records that the Chief Secretary of Government of West Bengal was in favour of absorption. Ultimately, on 18th December, 2012 the appellants made an application to the Director of Local Bodies, for this purpose.

7. Fourteen appellants preferred a writ application in this court WP No. 5842 (W) of 2013 Biplab Kumar Saha & Ors. v. The State of West Bengal & Ors. claiming directions upon the state government to take steps so that the municipality was able to absorb them. On 26th June, 2013 this court passed an order directing the Director of Local Bodies to consider the case of the appellants. It appears that this matter was referred to a man who neither had the power nor the inclination to do anything effective in the matter. First of all, by his decision dated 26th August, 2013 he stated that he did not have the power to create new posts under the municipality. These powers lay with the State Government under Section 53 (4) of the West Bengal Municipal Act, 1993. Secondly, he opined that the appellants were appointed against non-sanctioned posts. Their salary was at all times paid by the municipality out of their own funds. He said he had no power to absorb the appellants by creating new posts. In that case he ought not to have commented at all on the nature of their recruitment. He was asked to decide both issues and not to decide one issue and leave the other issue aside.

8. Now, the present writ was filed by these thirteen appellants challenging the decision dated 26th August, 2013. It is very interesting to note that this decision was forwarded by a letter dated 7th August, 2013. Therefore, when the letter forwarding the decision was signed the decision had not been made or signed. It was signed some three weeks later on 26th August, 2013.

9. Justice Sambuddha Chakraborty by a judgement and order made on 8th May, 2014 dismissed the writ application. The grounds justifying such dismissal were as follows:- a. The appellants were not appointed against any sanctioned posts.

b. They were appointed on the basis of a resolution taken by the board of councillors on a certain scale of pay fixed by it, in as much as there was no rule at that point of time governing the recruitment process.

c. Employees who had not been appointed through a regular appointment procedure or against sanctioned posts had no right to be absorbed or regularised.

d. There was no infirmity in impugned order of the director.

10. At this point of time it is necessary to have a look at the law on the subject. It is very discouraging to note that the more we have tried to interpret the law laid down in the case of Uma Devi (3) reported in 2006 (4) SCC 1 the more we have tended to mis-interpret it or the application of the principles laid down in that case.

11. It is essential that there must be some statutory or administrative rule governing recruitment in a particular body which can be called a "state" under Article 12 of the Constitution. That rule or set of rules should inter alia provide for the nature of posts, the number of posts of a particular nature and so on. A greater number of appointments than what is sanctioned under the rules cannot be made. It would be grossly illegal. No appointment other than that to a vacant sanctioned post can be made; that would also be illegal. Certain categories of appointment are described as irregular. For example if there are vacant sanctioned posts and they can be filled up by appointment after taking the approval of a particular authority. They are filled up without the approval of that authority. In this type of a case the appointment is not altogether illegal but is irregular. Uma Devi has said with regard to irregular appointments that if any employee has been irregularly appointed but has continued to serve the organisation for a long time rendering continuous service, than his case for regularisation may be considered. We are referred to State of Jammu and Kashmir and Others v. District Bar Association, Bandipora reported in (2017) 9 SCC 410 where more or less the principles of Uma Devi (3) are reiterated.

12. Take the case at hand. It is an admitted position that at the time the appellants were inducted into service there were no rules for recruitment of the municipality. Hence, there were as such no sanctioned posts or the requirement of taking permission from any authority to fill up any post. None can deny that the municipality needed additional hands to discharge their functions. By a board resolution of the councillors the appellants were employed. They were granted a scale of pay and were paid accordingly out of the municipal fund. The municipality as well as the public at large enjoyed their services for several years.

13. Now, formal rules have come into place. No employment can be regularised unless they are made to sanctioned posts. Does that kind of a rule apply to the case at hand? In my opinion this case is different from the one considered in Uma Devi. It is not a case where there were appointments against un-sanctioned posts or appointments beyond the sanctioned limit without taking the approval of the competent authority. There was neither any rule nor any sanctioned posts. Rules and sanctioned posts came later. Now, in this kind of a situation is it just and proper that those persons who had been recruited following a more or less formal procedure should be denied regularisation?

14. Which types of appointments are to be classified as "irregular" and which as illegal is not always a very easy question to answer. In the case of *State of Jammu and Kashmir and Others v. District Bar Association, Bandipora* reported in (2017) 9 SCC 410, the Supreme Court has given a very helpful guidance to identify these types of appointments. Mr. Justice Chandrachud delivering the judgement of the court remarked:- "There may be varied circumstances in which an ad hoc or temporary appointment may be made. The power of the employer to make a temporary appointment, if the exigencies of the situation so demand, cannot be disputed. The exercise of power however stands vitiated if it is found that the exercise undertaken (a) was not in the exigencies of administration; or (b) where the procedure adopted was violative of Articles 14 and 16 of the Constitution; and/or (c) where the recruitment process was overridden by the vice of nepotism, bias or mala fides."

15. Now, if an appointment is based on requirement to the point of exigency and made cleanly, the appointment could be called as irregular one. Otherwise it would be an illegal one. The judgement of *Uma Devi* has also recognised this type of irregular appointments. It has given these appointees, a right to seek regularisation while criticising the illegal appointments against non-vacant and un-sanctioned posts and asking the administration to purge the system of this kind of illegal appointees. The following passages from the judgement in the case of *Uma Devi* are very important: "33.*****By and large what emerges is that regular recruitment should be insisted upon, only in a contingency can an ad hoc appointment be made in a permanent vacancy, but the same should soon be followed by a regular recruitment and that appointments to non-available posts should not be taken note of for regularisation."

53. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in *S.V. NARAYANAPPA* (supra), *R.N. NANJUNDAPPA* (supra), and *B.N. NAGARAJAN* (supra), and referred to in paragraph 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of courts or of tribunals. The question of regularization of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases above referred to and in the light of this judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularize as a onetime measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date. We also clarify that regularization, if any already made, but not subjudice, need not be reopened based on this judgment, but there should be no further by-passing of the constitutional requirement and regularizing or making

permanent, those not duly appointed as per the constitutional scheme."

16. In those circumstances, in my opinion, the appellants' appointments are not the result of any illegality. The municipality had no rules regarding employment. It was very badly short of staff, particularly in the educational institutions run by it. The appointments of the appellants were made considering the "exigencies of administration" as identified in the Jammu and Kashmir Bar Association case. We do not for a moment believe that any fraud, nepotism or mala fides were involved. Neither was there any infraction of Articles 14 and 16 of the Constitution. The said judgements say that in such a situation framing of an appropriate scheme of regularisation in an appropriate situation is justified. In such a situation the right of the appointees to be regularised in service was recognised by the Supreme Court.

17. In such a situation the Director of Local Bodies West Bengal ought not to have folded his hands and said that he did not have the power to create the posts. He ought to have appreciated the long service of the appellants", its continuity, the right of each one of them to be absorbed in permanent service. Instead of saying that it was the government which could create new posts he should have referred the matter to the appropriate functionary, so that he could take a decision to regularise the services of the appellants. Leave of this court for this purpose may have been taken, before making such a referral.

18. In that view of the matter we direct the Principal Secretary in charge of the local bodies to forthwith create a sufficient number of posts to absorb the thirteen appellants. The Principal Secretary finance is to accord financial concurrence. The appointments of the appellants be given approval and regularised from a date to be decided by the government. The impugned order dated 7th August, 2013 is quashed.

19. The impugned judgement and order dated 8th May, 2014 is set aside.

20. The above appeal is allowed and application disposed of to the above extent.

21. Certified photocopy of this Judgment and order, if applied for, be supplied to the parties upon compliance with all requisite formalities.