

(2001) 12 DEL CK 0053

In the Delhi High Court

Case No : C.W.P. No's. 3056, 3058, 3095 and 3096 of 1996

Prem Kumar and Others, Kaustav Chakraborty, Deepika Rathi and Satinder Chaudhary APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 21-12-2001

Acts Referred:

Constitution of India, 1950 — Article 12, 14, 16, 226, 309

Citation : (2002) 2 AD 344 : (2002) 96 DLT 89(1) : (2002) 61 DRJ 880(1)

Hon'ble Judges : S.B. Sinha, C.J.;A.K. Sikri, J

Bench : Division Bench

Advocate : Bishram Singh, for the Appellant; V.P. Singh and G. Joshi, for the Respondent

Final Decision : Dismissed

Judgement

S.B. Sinha, C.J.—These four writ petitions involving common questions of law and fact were taken up for hearing together and are being disposed of by this common judgment.

FACTS

2. The petitioners in these writ petitions, approached this court, inter alia, for issuance of a writ of or in the nature of mandamus directing the respondents to pay unto them all monetary benefits including scale of pay and allowances of regular employees and other benefits including increments, with interest, as also for confirmation in service from their respective dates of joining.

3. The contention of the petitioners in these writ petitions is that they had been appointed on a regular basis in terms of offer of appointment dated 19th March 1991 on a starting basic pay of Rs. 1100/- on the pay scale of 1100-20-1400 in the year 1991 but they had all along been paid a consolidated sum of Rs. 1500/-. The writ petitioners further contended that persons similarly situated had obtained reliefs against the respondents from Madhya Pradesh High Court,

Rajasthan High Court and even a suit filed in High Court of Punjab & Haryana had been decreed and the Special Leave Petitions filed by the respondents herein had been dismissed.

SUBMISSIONS

4. It was submitted that having regard to the terms and conditions of appointment, on their having completed the period of probation, the writ petitioners became entitled, as a matter of right, to be confirmed in their services. It was urged that as a conscious decision had been taken by the management appointing the petitioners, they cannot be permitted to resile there from. Our attention had been drawn to the fact that the respondent use one set of form of offer of appointment for regular appointees and another for the ad hoc appointees. It as contended that in any event, an employee cannot be kept on probation for an unduly log period. Strong reliance in this regard has been placed on Om Prakash Maurya v. UP Cooperative Sugar Factories Federation, Lucknow and Ors. (1986) 3 SCR 86, Ashok V. David Vs. Union of India and others, and Union of India (UOI) and Others Vs. N. Hargopal and Others,

5. The respondent is a "State within the meaning of Article 12 of the Constitution of India and, thus, the learned counsel would contend, should act like a model employer. Reliance, in this connection has been placed on S.K. Verma Vs. Mahesh Chandra and Another,

6. Mr. V.P. Singh, the learned senior counsel appearing on behalf of the respondents ,on the other hand, would submit that the petitioners were appointed through backdoor .Our attention in this connection has bene drawn to the statements made in the counter affidavit, from a perusal whereof it appears that the purported appointments had been made without following the recruitment procedure laid down thereof. it had been contended that the petitioners had been appointed by K.S. Kanwar and R.K. Khanna on their own, as regard whereto even the Finance and Accounts Departments were not involved .

7. At the relevant point of time, it appears, a ban of appointment had been issued but despite the same, appointments of the writ petitioners have been made. In any event ,the respondents would contend that when regular vacancies arose, all the employees who had requisite qualifications, took their chance of being appointed and only when they were unsuccessful, they filed the writ petition. The respondents have also contended that the purported appointment letters remained a secret affair between the petitioners and the officials which were issued in contravention of he recruitment rules and thus, the afore-mentioned illegal activities of he said officers are not binding on the respondents .

8. Only after the retirement of the said officers, the writ petitions have been filed after a period of about 5 years and during the said period, they had, without any demur whatsoever, all along been accepting the wages at a consolidated rate of Rs. 1500/-.The fact that the petitioners were appointed by those two officers who allegedly had conspired between themselves to grant some such illegal

appointments, is not disputed.

9. It had been contended that even the Employment Exchange had not been notified as regard existence of the vacancies in terms of the provisions of the Employment Exchange (Compulsory Notification of Vacancies) Act, 1959 nor even an advertisement was issued notifying the vacancies in the newspapers, as a result whereof, the respondent which is a public sector undertaking, was deprived of selecting the best candidates.

QUESTION

10. The question which arises for consideration in these petitions is as to whether the services of the petitioners can be directed to be regularized?

FINDINGS

11. It is not in dispute that the respondent had, from time to time, made rules governing the conditions of service of its employees. Para 1.5 of the Recruitment Rules is as follows.

1.5.1 SOURCES OF RECRUITMENT

Recruitment to various posts will normally be made from the following sources:-

- (a) Employment Exchange as per the provisions of the Employment Exchange (Compulsory Notification of Vacancies) Act, 1959.
- (b) Zila Sainik Boards Director General Resettlement.
- (c) Direct Recruitment by Advertisement.
- (d) Company's own trainees who have satisfactorily completed their training.
- (e) Employees on deputation from Government and other Public Sector Undertakings.
- (f) By transfer, selection and/or promotion from amongst the existing employees of the Company.
- (g) On contract for a specified period.
- (h) By transfer from other Public Sector Undertakings.
- (i) Apprentices recruited under the Apprentices Act, 1961.
- (j) Persons as declared "surplus employees" of the Company or of other Public Sector Undertakings.
- (k) Ousters or their dependants whose lands have been acquired for construction of the factories of National Fertilizers Limited as per prescribed procedure.

Para 1.7.1 of the said Rules provides for reservation in posts and preference in appointment. Para 1.7.2. thereof provides for appointment in posts in Group's "and "D" in the manner as laid down therein.

12. From a perusal of the statements made in para 3 of the writ petitioners as also the offer of appointment as contained in Annexure P/7 of the writ petition, it is manifest that the petitioners had been appointed pursuant to the application made by them. It is not a case of the writ petitioners that prior to their appointment, any advertisement had been issued in the newspaper or the Employment Exchange was notified as regards the existence of vacancies. The respondent being a "State" within the Article 12 of the Constitution of India, was in the matter of recruitment, bound to comply with the constitutional requirements, as adumbrated in Articles 14 and 16 of the Constitution of India. It is now a well settled principle of law that when an employer frames any recruitment rules, it is bound to comply therewith. The officers of a State cannot make any appointment in violation of such recruitment rules. Any appointment made in violation of the recruitment rules as also in Articles 14 and 16 of the Constitution of India, would be nullities. Although in terms of Article 16 of the Constitution of India, nobody has any right of appointment, all persons who were eligible. Therefore, had a right to be considered. Even no document had been produced by the petitioner to show that such appointments had been made in terms of the recruitment rules or prior thereto any advertisement had been issued. There is nothing on record to show on what basis the writ petitioners filed their applications for recruitment. No reason has also been assigned as to why the recruitment rules could not be complied with.

13. It is well known that he who comes by backdoor must go by that door (see State of U.P. and others Vs. U.P. State Law Officers Association and others,

14. As noticed hereinbefore, the respondents had framed recruitment rules. Had any appointment on a regular basis been contemplated, the recruitment rules would have been followed. It further appears that a circular letter dated 19th April 1989 was issued which reads as under:

"Manager (Pers.), C.O.

General Manager (Mktg.), NFL, New Delhi

NFL/Pers. 1(21)/1321

Dated. 19.4.1989

It has been decided that with immediate effect the strength of the Marketing Division be pegged to the number of individuals in position in the Marketing Division as on 31.3.89. It has also been decided that no further recruitment be made in the Marketing Division in any category of post. However, as and when, if any post is required to be filled up in any category due to exigencies of work, the approval of D(F)/MD be obtained and the paper routed through the Corporate Office Personnel Department.

This may please be noted and receipt of this communication acknowledged.

Sd/-

(Karan Singh).

Manager(Pers.)

15. Appointments of the petitioners were made despite such ban on appointments. The offer appointment, as contained in Ex.P/6 says that the appointments had been made for a period of six months on a purely temporary basis.

16. In *State of Madhya Pradesh and Another Vs. Dharam Bir*, the apex court has clearly held that if an ad hoc appointment continued for about a decade, the nature of appointment would not change in the absence of any statutory rules. The apex court held that :

23. It is not disputed that the respondent was promoted to the post of Principal, Class II for a short period of six months or till the availability of candidates duly selected by the Commission, whichever was earlier. It is also not in dispute and the Tribunal itself has found it as a fact that the respondent was placed on the post of Principal only in an ad hoc capacity. Consequently, the post, having not been filled up on a regular basis in accordance with the Rules, was rightly treated by the appellant to be vacant. That being so, the respondent had only ad hoc status which he would continue to hold till it was altered by the appointing authority.

24. Government service is essentially a matter of status rather than a contract. A Constitution Bench of this Court in *Roshan Lal Tandon v. Union of India* had observed as under:

"It is true that the origin of government service is contractual. There is an offer and acceptance in every case. But once appointed to his post or office the government servant acquires a status and his rights and obligations are no longer determined by consent of both parties, but by statute or statutory rules which may be framed and altered unilaterally by the Government. In other words, the legal position of government servant is more one of status than a contract. The hallmark of status is the attachment to a legal relationship of rights and duties imposed by the public law and not by mere agreement of the parties. The emolument of the government servant and his terms of service are governed by statute or statutory rules which may be unilaterally altered by the Government without the consent of the employee. It is true that Article 311 imposes Constitutional restrictions upon the power of removal granted to the President and the Governor under Article 310. But it is obvious that the relationship between the Government and its servant is not like an ordinary contract of service between a master and servant. The legal relationship is something entirely different, something in the nature of status. It is much more than a purely contractual relationship voluntarily entered into between the parties. The duties of status are fixed by the law and in the enforcement of these duties society has an interest. In the language of jurisprudence status is a condition of membership of group of which powers and duties are exclusively determined by law and not by agreement between the parties concerned."

17. In *Municipal Corporation, Bilaspur and Another Vs. Veer Singh Rajput and Others*, it has been clearly held that where serious irregularities in the matter of appointment had been discovered and if the same had been made on political consideration, no relief can be granted by courts. The apex court observed:

3".. The appointments, however are irregular and made on political considerations. There are clear government directions for reduction of establishment expenditure and a prohibition on the filling of vacant posts or creating new posts including regularization of daily-waged employees. The order of the High Court for regularization of such employees is not warranted. It is in the title of these administrative directions and cannot be sustained..."

18. Yet again, in *Nazira Begum Lashkar and Ors. v. State of Assam and Ors.* JT2000 Supp SC 417, it was noticed:

14. "...The decisions cited by Mr. Parikh, in support of his contention not only do not support his contention but on the other hand appear to us to be against his contention. In *Ashwani Kumar and Others Vs. State of Bihar and Others*, this Court in no uncertain terms held that as the appointments had been made illegally and contrary to all recognized recruitment procedures and were highly arbitrary, the same were not binding on the State of Bihar. This Court further went on to hold in the aforesaid case that the initial appointments having been contrary to the statutory rules, the continuance of such appointees must be held to be totally unauthorized and no right would accrue to the incumbent on that score. The Court had also held that it cannot be said that principles of natural justice were violated or full opportunity was not given to the employees concerned to have their say in the matter before their appointments were recalled and terminated."

19. In any event, as the petitioners themselves took a chance by taking part in the recruitment process and having not succeeded therein, now cannot be permitted to turn around and contend that they had regularly been appointed. From the fact that they had never made any complaint until the retirement of the above-mentioned two officers, is itself a pointer to show that they were aware that their appointments were illegal. Had they contended that their appointments have been made on a regular basis, they would not have applied for appointments on regular posts and compete with the other candidates. It is evident from the statements made from the counter-affidavit that some of the writ petitioners did not apply. Therefore, as they did not have the requisite qualifications.

20. Recently a Division Bench of the Andhra Pradesh High Court, of which one of us was a Member, in *Superintending Engineer, HCC-I, CPWD, Hyd. Vs. Tekmalla Raja Sekhar and Others*, noticed various decisions of different High Courts and held as under:

14. In *Secretary, A.P. Social Welfare Residential Educational Institutions Society v. P.Venkata Kumari*: 2001(1) ALT 366. [Para 14] a Division Bench of this Court

has clearly held that regularization is not a mode of appointment and in absence of any statutory rules the Part-time employees, ad hoc employees and NMRs did not derive any legal right whatsoever to continue in service and no such direction can be issued inasmuch as for the purpose of obtaining a writ of or in the nature of mandamus the petitioner must establish existence of a legal right in himself and a corresponding legal duty in the respondents.

15. It was further held in no uncertain terms that the Court cannot direct creation of more posts.

16. Recently in *State of West Bengal v. KrishnaKumar Majumdar*, it was held:

...An appointment on regular post must be made in terms of the Recruitment Rules having regard to the principles adumbrated under Articles 14 and 16 of the Constitution of India. In the instant case, as indicated hereinbefore, neither any appointment has been made by the writ petitioner that such appointment has been made in accordance with the Recruitment Rules or in consonance with the principle laid down under Articles 14 and 16 of the Constitution of India. Such appointment, Therefore, cannot be encouraged. Furthermore, a finding of fact has been arrived at by the competent authority that the writ petitioners were appointed on contractual basis and that too for a period of 2 years at one point of time

17. Even in *State of Haryana v. Piara Singh* the apex Court has clearly held that when an employee is appointed on ad hoc basis the same itself is pointer to the effect that no regular post is available. The said principle should be applied also in relation to NMR. It has been held in the said case thus:

Ordinarily speaking, the creation and abolition of post is the prerogative of the Executive. It is the Executive again that lays down the conditions of service subject, of course, to a law made by the appropriate Legislature. This power to prescribe the conditions of service can be exercised either by making Rules under the proviso to Article 309 of the Constitution or (in the absence of such Rules) by issuing Rules/instructions in exercise of its executive power. The Court comes into the picture only to ensure observance of fundamental rights, statutory provisions, Rules and other instructions, if any, governing the conditions of service. The main concern of the Court in such matters is to ensure the Rule of law and to see that the executive act fairly and gives a fair deal to its employees consistent with the requirements of Articles 14 and 16.

18. We may notice that it has clearly been held that even the definition of worker under the Factories Act can only be read for the said purposes only. It is for the appropriate Government to decide whether employment of contract labour should be prohibited or only regulated. The Court or the Tribunal has no say therein. [See *Sujan Benerjee v. Union of India*, *Ranjit Kumar Chanda v. State of West Bengal*] In *Union of India v. Shri Rajinder Singh* it has been held:

An employee must be appointed upon compliance of the provisions of the

Recruitment Rules .When a particular status is conferred upon an employee ,the same cannot be changed unless there exists any statutory provisions thereof.

A regular appointment can only be made in terms of the Recruitment Rules and subject to the candidate's possessing the requisite qualification and also subject to existence of any sanctioned post.

An employee is borne in the cadre only when he is appointment upon fulfilling the requirement therefor in a sanctioned post.

19. Referring to W.B. Essential Commodities Supply Corporation v. MD Sarif, Director of Public Instructions W.B. v. Krishna Prasad Ghosh and Anr. and Swapan Kumar Benerjee v. Union of India, it has been held in Union of India v. Registrar:

The question as to whether the petitioners had fulfilled the essential conditions for regularization or not is essentially a question of fact. In law, nobody is entitled to claim regularization unless there exists any statutory provision in this regard. Only because a person has worked for more than 240 days, the same by itself would not be a ground for direction to regularize the service of the concerned employee.

21. The decisions of Madhya Pradesh, High Court, Rajasthan High Court and the decree passed by a civil court, do not create a binding precedent. In those cases, the parties proceeded on the basis as to whether the employee should have been confirmed upon expiry of the period of probation. The question of confirmation of an employee on the expiry of the period of probation or within a reasonable period arises, provided an appointment is made on a regular basis. When the appointment itself is illegal, the same was a nullity and thus the question of confirmation of their services on expiry of the period of probation would not arise. We, with utmost respect do not subscribe to the said view .It may be that SLP against the said decisions have been dismissed by the Supreme Court but by reason thereof, no binding precedent has been created. No right, for less, an enforceable right is accrued to the concerned employees which is enforceable by the High Court in exercise of its jurisdiction under Article 226 of the Constitution of India. It is trite that a writ of mandamus can be issued only when the petitioners plead and establish legal right in themselves and a corresponding duty in the respondents.

22. In Superintending Engineer, CPWD, Hyderabad v. Tekmalla RajShekhar and Ors. (supra), the Andhra Pradesh High Court also held that a decisions an authority for what it decides and not what can be deduced there from. It was further noticed as under:

22. In Salmond on Jurisprudence 12th Edition, page29, it is stated-

One of the essential features of the doctrine of precedent in the common law is that rules of law are developed in the very process of application. This means that they are created by Judges and not by teachers and other academic lawyers. However, learned they may be. It also ends that they are created by

Judges only when acting as Judges i.e., when deciding cases and not for example when giving lectures or other addresser; statements made by Judges in their extra-judicial capacity, like other extra judicial opinions, are without binding authority. For fundamental notion is that the law should result from being applied to live issues raised between actual parties and argued on both sides.

In the course of his judgment, however, a Judge may let fall various observations not precisely relevant to the issue before him. He may for instance illustrate his general reasoning by reference to hypothetical situation and the law which he considers to apply to them. Here of course, since the issue is not one that arises between the parties, full argument by Counsel will be lacking, so that it would be unwise to accord the observation equal weight with that given to this actual decision. Or again, having decided the case on one point, the Judge may feel it unnecessary to pronounce on the other points raised by the parties, but he may nevertheless want to indicate how he would have decided these points if necessary. Here again we are not given the Judge's final decision on a live issue, so that once more it would be unwise to endow it with as much authority as the actual decision. These observations by the way, obiter dicta are without binding authority, but are nonetheless important, not only do they help to rationalize the law but they serve to suggest solutions to problems not yet decided by Courts. Indeed dicta of the House of Lords or of Judges who were masters of their fields, like Lord Blackburn, may often in practice enjoy greater prestige than often in practice enjoy greater prestige than the rationale of lesser Judges.

23. In *C.I.T. v. Sun Engineering Works (P) Limited*, A.S. Anand, J (as the learned Judge then was) stated the law in the following terms:

It is neither desirable nor permissible to pick out a word or a sentence from the judgment of this Court, divorced from the context of the question under consideration and treat it to be the complete "law" declared by this Court. The judgment must be read as a whole and the observations from the Judgment have to be considered in the light of the questions which were before this Court...."

24. In *Jayasen v. Sujit Kr. Sarkar* it was held-

"It is now well-known that a decision in an authority for what it decides and not what can logically be deduced there from. It is also well-known that even a slight distinction in fact or an additional fact may make a lot of difference in decision making process (See *Quinn v. Leathain* [1990 AER 1 *Krishena Kumar and Others Vs. Union of India and others, Commissioner of Income Tax Vs. M/s. Sun Engineering Works (P.) Ltd., , The Regional Manager and Another Vs. Pawan Kumar Dubey, and Anand Commercial Agencies Vs. The Commercial Tax Officer VI Circle, Hyderabad and Others,*

25. It is also a settled law that a decision is not an authority on a point which was not argued [See *Mitta Engineering Works (P) Ltd. v. Collector of Central Excise*]

23. It may be true that in a given case, equity may be claimed on the basis of the reliefs granted by a court of law. But it must also be remembered that Article 14 is a positive concept. No person derives any right on the basis of an illegality committed by others, an order of which has been passed contrary to the provisions of law as also Constitution cannot confer a right upon any person whatsoever. We, Therefore, are of the opinion that the decisions of the apex court whereupon the learned counsel for the petitioner have relied upon, as regards right of an employee of being confirmed in the service on the expiry of period of probation or on the expiry of a reasonable period, cannot be said to have any application whatsoever in the instant case.

24. For the reasons afore-mentioned, we do not find any merit in these writ petitions which are accordingly dismissed but in the facts and circumstances, there would be no orders as to costs.