
(2017) 01 AHC CK 0250
In the Allahabad High Court
Case No : Service Single No. 3726 of 1986

Rajeev Kumar

APPELLANT

Vs

Dy. Dir. Harijan And Social Welfare

RESPONDENT

Date of Decision : 09-01-2017

Acts Referred:

Citation : (2017) 2 ADJ 179 : (2017) 2 AllWC 1444

Hon'ble Judges : Rajan Roy, J.

Bench : Single Bench

Advocate : R.C. Bajpai, B.K. Singh, N.C. Mehrotra, Satish Chand "Kasis",
Advocates, for the Petitioner; C.S.C., M.P. Singh, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Rajan Roy, J.—Rejoinder affidavit filed on behalf of the petitioner is taken on record.

2. Heard Shri N. C. Mehrotra, learned counsel for the petitioner and Shri Aditya Narayan, learned standing counsel for the State.

3. The case at hand presents a peculiar factual scenario where the father of the petitioner who was working as Deputy Director, Harijan and Social Welfare, Faizabad Mandal, Faizabad appointed the petitioner as Assistant Superintendent at the State Probation Home at Gonda by way of stop gap arrangement, but, in the pay-scale of Rs.515-15-590-18-626-E.B.-18-680-20-780-E.B.-20-860 against a sanctioned post on ad-hoc and temporary basis with the stipulation that he shall be entitled to all the allowances admissible by the Government including Dearness Allowances vide order dated 21.11.1985 and on 22.05.1986 he passed another order dispensing his services on the ground that he was found absent during inspection of the probation home, which took place on 20.05.1986. Being aggrieved the son i.e. the petitioner approached this Court by means of this writ petition which was filed sometimes in May, 1986 and this Court passed the following order on 29.05.1986:-

"Hon. D.S. Bajpai, J.

Admit. Notice on behalf of opp. party has already been accepted by the Chief Standing Counsel. Till further orders of the Court the operation of the impugned order dated 22nd May, 1986 contained in Annexure- 5 shall remain stayed and the petitioner will continue on the post held by him.

29.5.1986"

4. Ever since then, the petitioner has continued in service in pursuance to the aforesaid stay order and has been paid salary. A supplementary affidavit filed by the petitioner in July, 2016 shows that his claim for regularization on the post in question was considered by a Selection Committee in its meeting held on 03.04.2013, but, the same was deferred on account of pendency of some disciplinary proceedings against him as also the pendency of this writ petition.

5. There are two counter affidavits filed by the opposite party no. 1 on record. It is not out of place to mention that at the relevant time when the petitioner was appointed and thereafter disengaged he was an employee of Harijan and Social Welfare Department i.e. opposite party no. 1 as it existed at that time, but, subsequently in 1995 another department known as the Harijan Welfare Department was carved out and ever since then he is working in the said department, but, as the dispute pertains to the period prior to 1995, therefore, it is the opposite party no. 1 who is the contesting party and has filed both the counter affidavits.

6. On a perusal of the counter affidavit filed by the opposite party no. 1, the Court finds that after the initial appointment of the petitioner by his father in stop gap arrangement he was transferred elsewhere, whereas, there is no such policy of the Government for transferring such appointees. Further more, Paragraph 3 of the counter affidavit states that as per the delegation of powers to the Regional Authorities 3 the Deputy Director was empowered only to make appointments on Class-III "Clerical post", therefore, the petitioner's appointment by his father, who was a Deputy Director on a post which though a Class-III post, but, not a "Clerical Post", was in excess of the authority vested him. Annexure No. 1 is the delegation of power vide Government Order dated 26.07.1978 which supports the averments made in the counter affidavit. The counter affidavit goes on to state that the entire exercise was done by the then Deputy Director i.e. the father of the petitioner, to give undue benefit to his son. It also says that the services of the petitioner were terminated only on account of absence for a day and based thereon the learned counsel for the State submits that this was done to facilitate the passing of a favourable order by this Court and his consequent continuance in service, as, apparently the action would appear to be harsh and unsustainable. On the first date without necessary instructions being received from the opposite parties as in those days of yore instructions were normally not received on the first date itself and petitions were filed in the Court itself and the matter was heard there and then, therefore, he

alleged malafide in the entire exercise.

7. The second affidavit filed by the State in response to the supplementary affidavit to the petitioner also reiterates the earlier stand and says that the order of appointment of the petitioner, issued by his father, was without jurisdiction and a malafide one. To cover the illegal action the petitioner was transferred from District Gonda to District Sultanpur vide his father's order dated 29.03.1986 which should not have been done, as, the power of transfer was not vested in the Deputy Director, Harijan and Social Welfare, Faizabad Region, Faizabad i.e. the petitioner's father. It was done with oblique motive. The manner in which the termination order was passed facilitated the petitioner in taking the ground that the same had been passed without taking recourse under Article 226 of the Constitution of India. The termination order was passed with oblique motive to protect his own wrong conduct. A reference has been made in the said counter affidavit to Para 45 of the judgment reported in (2006) 4 MHLJ 1; State of Karnataka v. Uma Devi III which reads as under:-

"45. While directing that appointments, temporary or casual, be regularized or made permanent, the courts are swayed by the fact that the person concerned has worked for some time and in some cases for a considerable length of time. It is not as if the person who accepts an engagement either temporary or casual in nature, is not aware of the nature of his employment. He accepts the employment with open eyes. It may be true that he is not in a position to bargain - nothing at arms length - since he might have been searching for some employment so as to eke out his livelihood and accepts whatever he gets. But on that ground alone, it would not be appropriate to jettison the constitutional scheme of appointment and to take the view that a person who has temporarily or casually got employed should be directed to be continued permanently. By doing so, it will be creating another mode of public appointment which is not permissible. If the court were to void a contractual employment of this nature on the ground that the parties were not having equal bargaining power, that too would not enable the court to grant any relief to that employee. A total embargo on such casual or temporary employment is not possible, given the exigencies of administration and if imposed, would only mean that some people who at least get employment temporarily, contractually or casually, would not be getting even that employment when securing of such employment brings at least some succor to them. After all, innumerable citizens of our vast country are in search of employment and one is not compelled to accept a casual or temporary employment if one is not inclined to go in for such an employment. It is in that context that one has to proceed on the basis that the employment was accepted fully knowing the nature of it and the consequences flowing from it. In other words, even while accepting the employment, the person concerned knows the nature of his employment. It is not an appointment to a post in the real sense of the term. The claim acquired by him in the post in which he is temporarily employed or the interest in that post cannot be considered to be of such a magnitude as to enable the giving up of the procedure established, for making

regular appointments to available posts in the services of the State. The argument that since one has been working for some time in the post, it will not be just to discontinue him, even though he was aware of the nature of the employment when he first took it up, is not (sic) one that would enable the jettisoning of the procedure established by law for public employment and would have to fail when tested on the touchstone of constitutionality and equality of opportunity enshrined in Article 14 of the Constitution of India."

8. The claim of the petitioner for regularization has been replied in para 6 of the said affidavit in the sense saying that as long as the writ petition is pending the claim can not be considered, however, at the same time referring to the decision of the Supreme Court reported in (1998) 8 MHLJ 529; State of U.P. and Ors. v. Raj Karan Singh. The relevant extract of which is as follows:-

"Besides, merely, because a person continues under the interim orders of the Court, such continuance on the post cannot and, in this case, does not confer on him any right for continuance, it does not enhance his case for regularization. It is only an interim arrangement pending decision by the Court and cannot disturb the position in law or equities, as on the date of the petition."

9. To the same affect is the legal position propounded by the Supreme Court in the case of Uma Devi (supra) wherein it has been held that the period during which a person has continued in service on the strength of an interim order shall not be taken into consideration for purposes of calculating the requisite period for his eligibility for regularization of his services, as referred therein.

10. Shri N.C. Mehrotra, learned counsel for the petitioner contended that his father who was the Deputy Director did not participate in the selection process. In fact, as many as 13 candidates had participated in the selection as would be borne out from the documents annexed as Annexure No. RA-1 to the petitioner's rejoinder affidavit and the petitioner being the most meritorious was selected thereby his name was recommended for appointment and the appointment order was issued, albeit by his father.

11. On being asked as to whether any advertisement was issued prior to such appointment Shri Mehrotra could not place before the Court any advertisement, but, stated that it is not known. He contended that the post on which the petitioner was appointed, being a Class-III post, his father was competent to appoint, therefore, this ground is not available to the opposite parties.

12. Having heard learned counsel for the parties and perused the records, the Court finds that as per the delegation of powers dated 26.07.1978 the Deputy Director of the region was empowered to make appointments on Class-III Clerical Post, whereas, the post of Assistant Superintendent of the Probation Home was not a Clerical Post. Further more, any appointment being purely of a stop gap nature there was no provision under which such an appointee could have transferred to another district as was done in the case of the petitioner, that too, by his own father. Therefore, the contention of the opposite parties that this

was done to cover up his illegal act has substance. The Court also finds substance in the contention of the opposite parties that petitioner's disengagement vide impugned order dated 22.05.1986, which was also passed by the petitioner's father, was either to cover up his illegal actions or to facilitate interference by this Court, which in fact did take place subsequently by passing of an interim order on 29.05.1986 in the terms already quoted herein above.

13. Continuance in service on the basis of an interim order does not confer any right for further continuance, unless it is established that the initial appointment was valid in law nor to regularization of his services. Such illegal appointments do not even attract the provisions of Article 311 of the Constitution of India or the principles of natural justice as held by the Supreme Court in the case of *R. Vishwanath Pillai v. State of Kerala* reported in (2004) 2 MHLJ 105.

14. In these circumstances as narrated above, though the appointment was illegal, but, on account of passing of the said interim order the petitioner has continued in service. There is no relief claimed in this writ petition for regularization of the same, but, by means of a supplementary affidavit he has staked his claim to the said benefit.

15. For the reasons aforesaid, it is not a case where the initial appointment of the petitioner or his continuance in service on the basis of interim order passed by this Court should be protected any further. This Court can not be a party to the fraud which was committed by the petitioner's father and got perpetrated, albeit unknowingly, by the interim order passed herein. It is the obligation of the Court to rectify its error in this regard.

16. Considering the facts and reasons already recorded herein above as also the judicial pronouncements referred in the counter affidavit and noted herein above, this is not a fit case for exercising extraordinary jurisdiction in favour of the petitioner even at this belated stage. As it is, the petitioner has unabatedly reaped undue benefits of an illegal act of his father in the past 30 years. It is high time it came to an end. The writ petition is, thus, dismissed.