

(2016) 04 GUJ CK 0108

In the Gujarat High Court

Case No : Special Civil Application No. 4144 of 2011

Rameshbhai Jesangbhai Solanki

APPELLANT

Vs

Medical Officer & 1 Another

RESPONDENT

Date of Decision : 28-04-2016

Acts Referred:

Citation : (2016) 151 FLR 133 : (2017) LabLR 110 : (2016) 3 LLJ 149

Hon'ble Judges : K.M. Thaker, J.

Bench : Single Bench

Advocate : Mr. Ramnandan Singh, Advocate, for the Appellant; Mr. HS Munshaw, Advocate, for the Respondent

Final Decision : Disposed Off

Judgement

K.M. Thaker, J.(Oral) - Heard Mr. R.N. Singh learned advocate for the petitioner and Mr. H.S. Munshaw learned advocate for the respondent.

2. The petitioner has challenged the award dated 15.10.2010, passed by the Labour Court, Vadodara in Reference (LCV) No. 188/2005, whereby, the learned Labour Court, having considered the facts and circumstances of the case, more particularly, the facts and circumstances related to the appointment of the petitioner and while rejecting respondent's claim for reinstatement, directed the respondent to consider the case of the petitioner for allotment of work as and when available so as to consider the reasons and justification in light of which the learned Labour Court granted the relief vide the award dated 15.10.2010, and also with a view to considering the objections of the petitioner, it is necessary to take into account the factual back-ground.

3. It has emerged from the record and submissions by the learned advocate for the petitioner and the learned advocate for the respondent that the regular appointee of the respondent Primary Health Centre retired on reaching his prescribed age of superannuation.

3.1 The Primary Health Centre was awaiting appointment and posting of the

regular appointee.

3.2 In the meanwhile, with a view to ensure that regular work may not be affected, the Head of the Primary Health Center sent proposal to the competent authority requesting for permission to engage, on causal and ad hoc basis, and as a stop-gap arrangement till the regular appointee is posted, a person on part time basis, so that the routine and regular exigencies of work may be attended to.

3.3 Such a request was submitted by the Head of the respondent Primary Health Centre vide his communication dated 27.7.1994.

3.4 The competent authority granted such permission in favour of one R. J. Solanki vide order dated 29.4.1994.

3.5 In the said order, it was specifically mentioned that the person to be appointed is permitted by way of stop-gap arrangement and casual and part time basis, he may be engaged, and he will continue, only until regular appointee is available and posted at the concerned Primary Health Centre and as soon as the regular appointee is posted, the engagement on ad hoc basis shall automatically come to an end.

3.6 The said order also specified by specific condition that the person shall be appointed on part time basis on fixed salary of Rs. 400/-.

A copy of the order was forwarded to the concerned person, as well.

3.7 Accordingly, by virtue of and pursuant to the said order dated 29.9.1994 the petitioner came to be engaged by the respondent Primary Health Centre, on ad hoc and part time basis and by way of stop-gap arrangement, that is, until the regular appointee is posted.

3.8 The petitioner worked as such on part time basis and as stop-gap arrangement until regular appointee was posted.

3.9 Thereafter, when the regular appointee came to be posted, the petitioner was relieved by the respondent Primary Health Centre.

4. Despite the specific condition in the order dated 29.9.1994, under which, the petitioner was appointed, and despite the fact that he had accepted said condition, the petitioner raised an Industrial Dispute claiming that his service was terminated illegally and arbitrarily. The dispute was referred to for adjudication to the Labour Court, Vadodara vide Order of Reference dated 25.2.2005.

5. During the proceedings before the Labour Court, the petitioner filed his statement of claim and alleged that his service was terminated illegally. He has also alleged that he had to work from 8.00am to 12.00noon and 4.00pm to 8.00pm, and that, initially he was paid Rs. 400/-, and thereafter, his salary was Rs. 900/- p.m., and at the time when he was relieved, he was paid Rs. 1350/-. He also alleged that when his service was discontinued the procedure prescribed

by law was not followed.

6. The respondent opposed the reference by filing written statement. In the written statement, the respondent disputed and denied the allegations made in the reference. The respondent placed on record the correct and complete facts. The respondent has also placed on record the copy of the proposal which was forwarded by the head of the Primary Health Centre to the competent authority and the order pursuant to which the petitioner was appointed and it was submitted before the Labour Court that the petitioner was engaged only on stop-gap arrangement and ad hoc and on temporary basis. It was also claimed by the respondent that the petitioner was not qualified and/or not selected after following prescribed procedure for selection and recruitment and he was engaged only with a view to meet exigencies of the work until regular appointee is posted.

7. After the stage of pleadings was completed, Labour Court recorded the evidence, and thereafter, Labour Court heard the submissions on behalf of the petitioner claimant and the respondent.

8. Subsequently, after considering the material on record and the submissions made by the learned advocates for the petitioner claimant and the respondent and after taking into account the decision of the Hon"ble Apex Court in the case of Secretary, State of Karnataka v. Umadevi and Ors., reported in AIR 2006 1806, and the decision of this court in the case of Amreli Municipality v. Gujarat Pradesh Municipal Employees Union, reported in 2004(3) GLR 1841, the Labour Court passed the award dated 15.10.2010 holding by way of findings of fact that (a) since the petitioner was engaged only as stop-gap arrangement and on ad hoc and part time basis, with a view to meet exigencies of work, until regular appointee was posted and (b) merely because the regular appointee came to be posted after long time, the petitioner did not acquire any right to appointment or right to the post or right to continue in service; (c) the Labour Court also found that the petitioner's appointment, from initial stage, was back-door entry.

8.1 The said findings of fact are based on evidence available on record. The learned Labour Court also reached to the conclusion that such appointment cannot be continued.

8.2 Having reached to such conclusion, the Labour Court declined the request for reinstatement, instead, the Court directed the respondent to consider the case of the petitioner for allotting work if and when such opportunity and need for engaging any person on such ad hoc basis arise.

9. The petitioner is aggrieved by the said award.

9.1 Mr. R.N. Singh learned advocate for the petitioner has submitted that the respondent continued the petitioner in service for at least ten years, and therefore, his services cannot be terminated without following procedure prescribed by law. He also submitted that the respondent did not extend benefit of provident fund and the respondent have not paid gratuity to the petitioner. Mr.

Singh learned advocate for the petitioner relied on the decision of the Hon'ble Apex Court in the case of Bhavnagar Municipal Corporation and ors., v. Jadeja Govubha Chhanubha and Anr., reported in (2014) 16 SCC 130 and the decision in the case of Divisional Manager, New India Assurance Company Ltd. v. A. Sankaralingam, reported in (2008) 10 SCC 698 and submitted that even in the case of part-time employee, the respondent should have followed the procedure prescribed by law.

10. Mr. Munshaw learned advocate for the respondent reiterated the factual background related to the appointment of the petitioner and submitted that the petitioner was engaged only on stop-gap arrangement until regular appointee was posted.

10.1 He submitted that in view of the certain developments including pending litigation against process of requirement on account of which the selection and recruitment of regular appointee was delayed, regular appointee could be posted in 2005, and therefore, the petitioner was continued in service until new regular appointee was posted.

10.2 He also submitted that the termination of the petitioner's service took place on account of posting of regular appointee.

10.3 He submitted that in view of the facts of the case, the petitioner has no right to continue in the employment and the respondent was not under obligation to comply with the provisions under section 25(F) of the Act in view of the fact that the petitioner's appointment was made on fixed term basis, that is, until the regular appointee was posted.

11. I have considered the submissions made by the learned advocates for the parties and the material on record.

12. Undisputedly, the petitioner was engaged on ad hoc basis and as a stop-gap arrangement, that is, until the regularly selected employee is posted. The vacancy had arisen on account of retirement of an employee and the petitioner was engaged on such stop-gap basis with a view to meet with exigencies of work. In view of the decision in the case of Maisuria Mahendra Bhagwandas and Others v. State of Gujarat and Others, reported in 1990(1) G.L.H. 494, wherein, this court has held that person appointed on stop-gap arrangement, that is, until regular appointees are posted, has no right to the post or to continue in service, and they have to make room for the regular appointee as soon he is posted, the claim and contention of the learned advocate for the petitioner are not sustainable. In the said decision, the Court observed that:

"9. It is, however, clear that when the Public Service Commission is requested to select. It is the duty of the Commission with the help of experts in the particular subject to hold interview and to find out and select the candidates having requisite qualifications and experience fit to be recommended to the Government for appointment for the said post. While observing as above, the Supreme Court

in the case of *M.C. Bindral v. R.C. Singh* further observed that under Article 320(3)(a) and (b), it is the duty of Public Service Commission to consider and to get itself satisfied as to which of the candidates has fulfilled the requisite qualifications specified in the advertisement. It is also observed that it is the constitutional requirement envisaged in Article 320 that the Commission will have to perform the duty of recommending the candidate fulfilling all the requisite qualifications for the post to the Government for being considered for appointment to the post concerned. It is of course, a well settled legal position that the duty to consult the Commission in the matter of appointment to civil posts by the Government is not mandatory but directory and as such the absence of consultation with the State Public Commission does not render any appointment made by the Government in civil posts invalid or illegal.

10. It is clear that while issuing the appointment and/or posting orders, the authorities as well as the petitioners were conscious of this fact, and therefore, specific mention was made in the appointment orders of the petitioners and the petitioners also accepted the posts with that conditions. It is also clear that for want of GPSC selected candidates the petitioners were appointed on purely temporary and ad hoc basis, with specific conditions that they will have to vacate the post, on availability of the GPSC selectees. The petitioners, therefore, now cannot make any grievance against their termination as the GPSC selectees are now available and are required to be posted.

11. The right of such ad hoc or irregular appointees to continue in the service, is no more *res Integra* so far as this Court is concerned Division Benches of this Court, at least in two judgments, viz., in *Bhartiben Nanubhai Balsara v. State of Gujarat* and Ors. 1989 (1) GLR 659 and in *Association of Assistant Engineers, Gandhinagar and Ors. v. State of Gujarat* and Ors. 1988 GLT 395, (Special Civil Application Nos. 5993, 6017, 6018 and 6530 of 1986) have settled the legal position regarding the right of ad hoc appointees. In *Association of Asstt. Engineers (supra)*, the facts were practically similar to the facts and contentions of the instant matters. The Assistant Engineers were appointed by Irrigation Department without GPSC being consulted, on purely ad hoc basis for the period of one year till the candidates selected by the GPSC were available, which were earlier. The terms and conditions of appointment were practically similar to one under consideration. The posts of the Assistant Engineers were within the purview of consultation of the GPSC. Subsequently, the GPSC held interviews and selected the candidates and some of the petitioners of that case were also included in the Select List/Waiting List. Certain Assistant Engineers raised dispute and asserted their right to continue and to hold the post as they had been appointed and had served the department for particular period. Their contentions were repelled by the Division Bench of this Court observing that it was only because of want of GPSC selected candidates that purely temporary and ad hoc appointments were permitted till regularly selected candidates became available and the GPSC selected candidates being available, the ad hoc appointees were being asked to make room for them, and "to permit their continuance in service

would not only be in violation of the term contained in paragraph 4 of the letter of appointment but would also amount to a breach of the requirements of Article 320 of the Constitution and no Court of law can permit such infraction". The ratio of the judgment is that such irregular appointees, without being selected by the competent authority, had no right to continue in service, nor can they be protected by the Court of law.

12. In *Bhartiben's* case (*supra*), the Division Bench of this Court was considering the case of Clerks and Typists, who were appointed by the different Heads of Departments who were otherwise competent to appoint, but without adhering to the relevant provisions of the recruitment rules. Such irregular appointees were in service for several years. They were appointed as the selectees by the Selection Committee under rules that were not available. Subsequently the selection was made under the provisions of the relevant rules and the selectees were being appointed as clerks/typists. The irregularly appointed clerks/typists asserted right to continue in the service. This Court considering the provisions of Articles 14 and 16 of the Constitution of India, relevant rules and also several decisions of the Supreme Court, held that the irregularly appointed clerks/typists had no right to continue in service and they should vacate for the regularly appointed clerks and typists. The Division Bench of this Court observed that purpose, object and intent of the statutory recruitment and appointment Rules enacted in exercise of powers under Article 309 Constitution of India, is (1) to afford equal opportunity for public employment or appointment to the eligible similarly situated competing persons, (2) to draw the best available elements out of the competing candidates, (3) to reserve post for scheduled castes, scheduled tribes, socially and economically backward classes, physically handicapped and ex-service men, and (4) to provide impartial selection by the Selection Committee consisting of certain district heads of the Departments. An employment or appointment to the public service *de hors* or in violation of the recruitment or appointment Rules, will not only offend Articles 14 and 16 of the Constitution of India, but also frustrate the very purpose of enacting the Rules, leading to frustration and disappointment to eligible meritorious youths. Such a practise is illegal irregular and deserves to be discouraged and prevented. The statutory Rules are required to be followed scrupulously for the purpose of selection of candidates and for appointments. Any appointment to any post *de hors* the Rules or without being selected as per statutory Rules should be held as irregular and invalid. Referring to the provisions of Articles 14 and 16 of the Constitution of India, it is observed that the said provisions guarantee the fundamental right of equality before law and equality of opportunity for all citizens in all matters relating to employment or appointment to any office under the State. Article 16 is only an incident of the general concept of equality enshrined in Article 14 of the Constitution in the matters of appointment and employment to the public office. Equality guaranteed by Article 16 of the opportunity to apply for the appointment to the post under the State and to be considered on merits. Any employment or appointment to the public office under

the State will offend guarantee of equal opportunity if the appointment or employment is made in violation of the provisions of Articles 14 and 16 of the Constitution of India. Admittedly, in the instant case the appointments were not made by the competent authority under the relevant Rules for selection by the GPSC, and therefore, the petitioners have no right to continue to hold the office and should vacate for those who are selected by the GPSC and appointed by the Government."

12.1 It is noticed that the Labour Court has taken into account the observations made by the Hon"ble Apex Court in the case of Secretary, State of Karnataka v. Umadevi and Ors., reported in AIR 2006 1806, and also taken into account the observation by the Full Bench of this Court in the case of in the case of Secretary, State of Karnataka v. Umadevi and Ors., reported in AIR 2006 1806, in light of the said decisions, the claim of the petitioner for being reinstatement is not sustainable and cannot be accepted.

12.2 The decision by learned Labour Court is in consonance with legal position and does not suffer from any infirmity and does not warrant interference.

13. The grievance made by the learned advocate for the petitioner with regard to the provident fund and/or gratuity is not sustainable and cannot be entertained in present case.

14. It is a fact of the present case that when petitioner was in service, he never raised grievance or demand for benefit of provident fund. The dispute as to whether the petitioner was entitled for the said benefit in view of the nature of his appointment cannot be looked into in present proceedings which arise from award of Labour Court because the said issue was never subject matter of the dispute before the Labour court and was not subject matter of the order of reference. For claim of gratuity the claimant should approach specially constituted authority under Payment of Gratuity Act.

15. Though, the petitioner raised dispute in 2005, seeking reinstatement, the petitioner does not appear to have raised any demand or claim under the provisions of Payment of Gratuity Act before the authority from 2005 and until 2016.

Further, in view of the said fact, the said issue was not subject matter before the Labour Court and is not subject matter of the order in question. Therefore, it cannot be said or decided in the present proceedings.

16. So far as claim of the petitioner for reinstatement and back-wages are concerned, in view of the above referred decisions in the case of Secretary, State of Karnataka v. Umadevi and Ors., reported in AIR 2006 1806 and in the case of Secretary, State of Karnataka v. Umadevi and Ors., reported in AIR 2006 1806, the said claim is unsustainable.

17. The learned Labour Court has recorded findings of fact that the petitioner was engaged as stop-gap arrangement and on ad hoc basis until regular

appointee is posted, and that the petitioner was engaged without following any procedure for selection and recruitment, and his appointment was illegal and therefore the claim of the petitioner cannot be granted. The said findings of fact recorded by the Labour Court are based on evidence available on record and they are supported by cogent, satisfactory and sufficient reasons. The petitioner's claim is rightly rejected. The Labour Court has not committed any error in rejecting the petitioner's claim for reinstatement with back-wages, and the award does not suffer from any infirmity. The Labour Court has not committed any error of law or jurisdiction. The petitioner has failed to make out any case against the impugned award.

18. However, since the petitioner was continued in service until the regular appointee was posted and also in the interregnum, it would be appropriate that the petitioner may be paid compensation. The Court is of the view that if direction to pay Rs. 5000/- as lump-sum compensation is passed, it shall serve interest of justice. Therefore, it is directed that the respondent shall pay to the petitioner, by way of lump-sum compensation, Rs. 5000/-.

19. With the aforesaid direction, this petition is disposed of. Rule is discharged.