

(2013) 03 AHC CK 0145
In the Allahabad High Court
Case No : Second Appeal No. 824 of 1990

Sampurnanand Sanskrit Vishwavidyalaya, Varanasi and
Another

APPELLANT

Vs

Dharm Chandra Jain

RESPONDENT

Date of Decision : 01-03-2013

Acts Referred:

Specific Relief Act, 1963 — Section 41
Uttar Pradesh State Universities Act, 1973 — Section 69

Citation : (2013) 03 AHC CK 0145

Hon'ble Judges : Sudhir Agarwal, J

Final Decision : Allowed

Judgement

Sudhir Agarwal, J.—Heard Sri V.B. Mishra, Advocate, for appellants and Sri Abhishek Tripathi, Advocate, holding brief of Sri A.K.Gupta, Advocate, for respondent.

2. Substantial questions of law, involved in this appeal, which require adjudication by this Court, are:

(1) Whether plaintiffrespondent's suit was barred by Section 69 of U.P. State Universities Act, 1973 and Section 41 of Specific Relief Act, 1963?

(2) Whether in respect to an adhoc or daily wage employee, an injunction of personal service commanding the employer to take work and not to interfere in the work of employee can be granted?

(3) Whether appointment having been made for a fixed tenure, the lower Appellate Court could have granted an injunction in favour of plaintiffrespondent enabling him to continue in service even beyond the period for which appointment was made?

3. This appeal is pending for the last 22 years and, therefore, as requested and agreed by learned counsels for parties, this Court has proceeded to hear them so as to decide the aforesaid substantial questions of law.

4. Sri V.B. Mishra, learned counsel appearing for defendantappellants stated that Sampurnanand Sanskrit Vishwavidyalaya, Varanasi (hereinafter referred to as "University") known as Varanaseya Sanskrit Vishwavidyalaya came to be governed by U.P. State Universities Act, 1972 (hereinafter referred to as "Act, 1973") with change of title as "Sampurnanand Sanskrit Vishwavidyalaya" vide Section 1 (3) of Act, 1973. Under Section 2 (8), the University was treated to be an existing University.

5. The case set up by plaintiffrespondent (hereinafter referred to as "plaintiff") is that he was engaged as a Technician on daily wage basis at Rs. 15/ per day on 17.11.1979. He alleged that on 28.2.1980, he was appointed as Technical Assistant in Language Science Laboratory in the regular pay scale with approval of the Government and continued to work accordingly. Under the Higher Education and Research Development Scheme, 19741979, as approved by State Government vide order dated 28.2.1981 and 19.3.1981, the Registrar, University directed plaintiff to work as Technical Assistant vide order dated 2.4.1981 for the period from 1.3.1981 to 28.2.1982 in the pay scale of Rs. 325575/-. The plaintiff, however, despite multi fold efforts was not permitted to discharge duties as Technical Assistant by the Head of Department. The plaintiff was entitled to work till 28.2.1982 and prior thereto he could not have been terminated.

6. In the circumstances, vide plaint dated 21.9.1981, he filed suit for permanent injunction restraining defendantappellants from interfering in his functioning as Technical Assistant in Language Science Department and allow him to work till 28.2.1982.

7. The suit was contested by defendantappellants and it was pleaded that firstly there is no department like Language Science Department. The actual Department is Modern Language and Modern Science Department. The plaintiff was engaged on daily wage basis as Technician in the aforesaid Department by order dated 17.11.1979. The aforesaid appointment was for the period from 30.11.1979 to 29.2.1981. Since the plaintiff was not properly working, he was terminated by order dated 12.9.1981 which was duly communicated to him. The post of Technician was a temporary post sanctioned for a limited period by the Government which was initially sanctioned upto 29.2.1980, extended till 28.2.1981 and then upto 28.2.1982. It is alleged that suit is barred by Section 69 of Act, 1973 and Section 41 of Specific Relief Act, 1963 (hereinafter referred to as "Act, 1963").

8. The Trial Court held that suit is barred by Section 69 of Act, 1973 and in respect to issues no. 1, 2 and 3, found that the suit for specific performance of personal service is not maintainable, particularly, when the service of plaintiff was for a fixed tenure. It decided issues no. 1, 2 and 3 against the plaintiff, and, consequently, vide judgment and decree dated 31.10.1983 dismissed the suit.

9. Plaintiff's Civil Appeal No. 423 of 1983, however, has been allowed by lower Appellate Court (hereinafter referred to as "LAC") vide judgment and decree

dated 31.3.1990.

10. LAC has largely relied on Section 31(2) of Act, 1973 and observing that no notice was given to plaintiff, therefore, his termination was not valid. It has also held the suit in question was not barred by Section 69 of Act, 1973.

11. In my view, the approach and understanding of LAC is miserably erroneous and faulty in the case in hand.

12. Section 31 of Act, 1973 is applicable for appointment of Teachers. Chapter VI of Act, 1973 is in respect to appointment and conditions of service of Teacher and Officers and Section 31 appears in this Chapter. The term "teacher" has been defined in Section 2 (19) and reads as under:

"2. Definitions....

(19) "teacher" in relation to the provisions of this Act except Chapter XIA, means a person employed in a University or in an institute or in a constituent or affiliated or associated college of a University for imparting instructions or guiding or conducting research in any subject or course approved by that University and includes a Principal or Director"

13. Learned counsel for plaintiff could not explain as to how working as a Technical Assistant, plaintiff could have come within the term "teacher" as defined in Section 2 (19) of Act, 1973. Neither there is any such pleading by the plaintiff nor this aspect has been looked into by the LAC. A Teacher is appointed by the Executive Council while Registrar exercises power of appointment in respect to all other staff except those mentioned in Statute 2.06 (1) (a) to (e).

14. In exercise of power under Subsection (1) of Section 50 of Act, 1973, the Governor has enacted First Statute of Sampurnanand Sanskrit Vishwavidyalaya published in U.P. Gazette Extraordinary dated 12.10.1978 and by virtue of Statute 1.01(2), it came into force on 26.12.1978. Chapter II deals with Officers and other Functionaries of the University, which include "Registrar".

15. The Registrar is disciplinary and appointing authority of all employees of the University, other than those, specifically mentioned in Statute 2.06 (1) (a) to (e). The relevant Statute 2.06 reads as under:

"2.06 (1) Subject to the provisions of the Act and the Statutes, the Registrar shall have disciplinary control over all employees of the University, other than the following namely

(a) Officers of the University;

(b) Deputy Registrars and Assistant Registrars

(c) teachers of the University, whether in relation to their work as teacher or while holding any remunerative office or in any other capacity, such as examiner or invigilator ;

(d) the Librarian;

(e) employees in the University in the Accounts and Audit Section.

(2) The power to take disciplinary action under clause (1) shall include the power to order dismissal, removal, reduction in rank, reversion, termination or compulsory retirement of an employee referred to in the said clause and shall also include the power to suspend such employee during the pendency, or in contemplation of an inquiry.

(3) No order shall be made under clause (2) except after an inquiry in which the employee has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges:

Provided that where it is proposed after such inquiry, to impose upon him any such penalty, such penalty may be imposed on the basis of evidence adduced during such enquiry it shall not be necessary to give such person any opportunity of making representation on the penalty proposed:

Provided further that this clause shall not apply in the following cases, notwithstanding that the order is based on any charge (including a charge of misconduct or inefficiency), if such order does not disclose on its face that it was passed on such basis:

(a) An order of reversion of an officiating promotee to his substantive rank.

(b) An order of termination of service of a temporary employee.

(c) An order of compulsory retirement of an employee after he attains the age of fifty years.

(d) An order of suspension."

16. Statute 2.07 provides remedy of appeal to an employee of the University aggrieved by an order referable to Statute 2.06 and reads as under:

"2.07. An employee of the University aggrieved by an order referred to in Statute 2.06 may prefer an appeal (through the Registrar) to the Disciplinary Committee constituted under Statute 8.01 within fifteen days from the date of service of such order on him. The decision of the Committee on such appeal shall be final."

17. It could not be disputed by learned counsel for plaintiff that the categories referred to in Statute 2.06 (1) (a) to (e) are not applicable to the plaintiff. Therefore, it is clear that the plaintiff is an employee under the disciplinary control of Registrar of the University being not an employee of the kind referred to in Clause (a) to (e) of Statute 2.06 (1) of the First Statute of the Universities.

18. The power of Registrar is subject to the provisions of the Act and the Statute. The learned counsel for plaintiff could not refer to any provision under Act, 1973 which restricts power of Registrar or circumscribes it with supervisory control of any other authority, like, Executive Council etc.

19. Section 31 of Act, 1973, as already discussed above, is only applicable to Teachers and, therefore, has no application to the plaintiff. The LAC has completely misdirected itself by referring and relying on Section 31 of Act, 1973 for the purpose of considering validity of termination order dated 12.9.1982 assailed by plaintiff in the suit in question.

20. Further, Statute 2.06 (3) third proviso makes it clear that power of termination of service of a temporary employee is not restricted in any manner. It was well within the jurisdiction and authority of Registrar of the University to terminate plaintiff who was a temporary employee provided it is otherwise not invalid for any other reason.

21. The power having been exercised by Registrar under the Statute of University, exfacie Section 69 of Act, 1973 is attracted. The suit, thus, was barred under the aforesaid provision. The LAC in taking an otherwise view has clearly erred in law. The question no. 1, therefore, insofar as it is in respect to Section 69 of Act, 1973, is answered in favour of defendantappellant holding that the suit in question was barred by Section 69 of Act, 1973. There is an absolute bar under Section 69 in respect to the civil suit against University or any officer thereof in respect to any thing done or purported or intended to be done in pursuance of the Act or the Rules or the Statute or the Ordinance made thereunder.

22. Now coming to the applicability of Section 41 of Act, 1963, though the Trial Court has decided issue against defendantappellant and LAC has not gone into this aspect, but in the light of Statute 2.07, it is evident that against termination order passed by Registrar, the plaintiff had a statutory remedy of appeal before the Disciplinary Committee. Therefore, bar under Section 41 (h) of Act, 1963 is clearly attracted in the case in hand. No substantive argument could be advanced by learned counsel for appellantrespondent as to how Section 41 (h) of Act, 1963 would not be attracted in the case in hand in view of Statute 2.07 of the First Statute of University.

23. In view thereof, Question No. 1 is answered in its entirety in favour of defendantappellant.

24. Now I would consider questions no. 2 and 3 both together. The case set up by plaintiff himself is that he was appointed initially by order dated 30.11.1979 as Technical Assistant and appointment was to continue till 29.2.1980. Thereafter the aforesaid period of appointment was extended upto 28.2.1981 and by order dated 29.3.1981 issued by Registrar, the plaintiff entitled to continue upto 28.2.1982. In para 8 and 9 of the plaint, he has categorically stated that his appointment being time bound made upto 28.2.1982, he could not have been terminated before 28.2.1982. Having said so plaintiff, however, pleaded that he is entitled to continue to work as Technical Assistant so long as the sanctioned post continues and is available. However, the relief sought by the plaintiff reads as under:

"A. That a decree may please be passed in favour of the plaintiff forbidding the defendants from creating any sort of interference in Defendant No. 1 working as Technical Assistant in the Department of Linguistics until services are terminated as per due process and law and not restraining the plaintiff from working as such Batyun Mublig Rs. 200.

B. That entire cost of the litigation for decree borne by the plaintiff be directed to be paid by the defendants.

C. That it may please be decreed that the so called order No. 72899181, dated 12.09.81, whereby the services of the plaintiff are stated to have been terminated, is wrong, invalid and ineffective; that it will have no prejudicial effect on the interests of the plaintiff and that he is entitled to pay, dearness allowance and other facilities as earlier."

(English Translation by the Court)

25. Admittedly plaintiff's appointment was a time bound appointment. Assuming that he could not have been terminated prior thereto, still, the fact remains, that competent authority having made appointment, according to the admitted case of plaintiff only till 28.2.1982, no relief in whatsoever manner could have been granted to the plaintiff enabling him to continue on and after 29.2.1982. Such a relief, however, granted by LAC is wholly illegal inasmuch no person can claim to continue to serve beyond the tenure for which he is appointed.

26. The nature of tenure appointment and consequences resulting by efflux of time, i.e., cession of tenure has been considered by Apex Court in Director, Institute of Management, Development U.P. Versus Pushpa Srivasava (Smt.) 1992 (4) SCC 33. The Court observed:

"The appointment was purely ad hoc and on a contractual basis for a limited period. Therefore, by expiry of the period... the right to remain in the post comes to an end."

27. It is, thus, clear that an appointment made for a limited period come to an end by efflux of time. It does not require even an express order of termination since the appointment ceases with the expiry of time for which appointment is made and, thereafter it cannot be said that tenure appointee has any right either to continue or to hold the post and to claim salary.

28. Moreover, in the case in hand, though appointment has been made by the Registrar in exercise of its power under the Statute but it has not been pleaded anywhere that the appointment of petitioner was made by following any procedure prescribed in law. It is, in effect, in the nature of a contractual appointment entered into by statutory authority and a private individual like petitioner. In such a case, the relief of reinstatement is doubtful to be attracted. The nature of contractual appointment and its effect has been considered by this Court, referring to various authorities of Apex Court also on the subject in Vivek Kumar Mishra and others Versus State of U.P. and others 2008 (4) ESC 2811 and

this Court observed:

".....even otherwise, enforcement of contract of personal service in a writ jurisdiction is not permissible except of certain limited circumstances. The petitioners' appointment was not in a Department of Government and instead they were engaged by a Society constituted for the purposes of implementation of a scheme launched for a fixed period. This Court is not delving into the investigation as to whether the "Society" answers the description of "State" under Article 12 of the Constitution and I proceed with the assumption that the "Society" is a "State" under Article 12 but that by itself would not mean that the petitioners can be said to be a Government servant or holding a post governed by status. The scheme launched by the Government of India is under an executive order. It does not have the status of a statute or statutory order. The nature of the engagement of the petitioner, therefore, is not to be governed by status but is like an ordinary contract of service between a master and servant. In *Roshan Lal Tandon Vs. Union of India and others* AIR 1967 SC 1889 drawing distinction between the employment under a contract and status, it was held that there is no vested contractual right in regard to the terms of service where the employment is one of the status. The origin of Government service is contractual. There is an offer and acceptance in every case. But once appointed to the 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 a Government servant is more one of status than of contract. The hallmark of status is the attachment to a legal relationship of rights and duties imposed by public law and not by mere agreement of the parties. The relationship between the Government and the 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. In the language of jurisprudence, status is a condition of membership of a group of which powers and duties are exclusively determined by law and not by agreement between the parties concerned. Thus, in the cases where the appointment and conditions of service are governed by statute, the relationship is that of status and not mere a contract. However, in other cases, it is purely a contract of service resulting in a relationship of ordinary master and servant. In the present case, it cannot be said that the petitioners employment is that of a status since it is not governed by the statutory provisions in any manner. It is purely and simply an ordinary contract of service between master and servant. In such cases, where the contract of service is not governed by the statutory provisions, it is wellsettled that contract of service cannot be sought to be enforced by seeking reinstatement or continuance in employment since such a relief is barred under the Specific Relief Act. In *Executive Committee of U.P. State Warehousing Corporation, Lucknow Vs. C.K. Tyagi* AIR 1970 SC 1244 considering the question as to when such a relief is granted the Apex Court observed :

"Under the common law the Court will not ordinarily force an employer to retain

the services of an employee whom he no longer wishes to employ. But this rule is subject to certain wellrecognised exceptions. It is open to the Courts in an appropriate case to declare that a public servant who is dismissed from service in contravention of Article 311 continues to remain in service, even though by doing so the State is in effect forced to continue to employ the servant whom it does not desire to employ. Similarly under the Industrial Law, jurisdiction of the Labour and Industrial Tribunals to compel the employer to employ a worker whom he does not desire to employ, is recognised. The Courts are also investigated with the power to declare invalid the act of a statutory body, if by doing the act the body has acted in breach of a mandatory obligation imposed by statute....."

Again in para 25 of the judgment, the Court held :

"The position in law is that no declaration to enforce a contract of personal service will be normally granted. But there are certain wellrecognized exceptions to this rule and they are: To grant such a declaration in appropriate cases regarding (1) a public servant, who has been dismissed from service in contravention of Article 311. (2) Reinstatement of a dismissed worker under Industrial law by Labour or Industrial Tribunals. (3). A statutory body when it has acted in breach of a mandatory obligation, imposed by statute".

29. The above view has been reiterated in Executive Committee of Vaish Degree College, Shamli and others Vs. Lakshmi Narain and others AIR 1976 SC 888 (paras 9, 10, 13 and 17); Smt. J. Tiwari Vs. Smt. Jawala Devi Vidya Mandir and others, AIR 1981 SC 122 (paras 4 and 5); Life Insurance Corporation of India Vs. Escorts Ltd., and others AIR 1986 SC 1370. (paras 101, 102). Similar view has been taken by this Court also in A.K. Home Chaudhary Vs. National Textile Corporation U.P. Ltd., Kanpur 1984 UPLBEC 81 and B.M. Varma Vs. State of U.P. and others 2004 (4) AWC 2866.

30. The question whether appointment of plaintiff is of contractual nature or not need not be decided finally and no final opinion need be expressed on this issue for the reason that even otherwise, I am clearly of the view that appointment being for a fixed tenure, the plaintiff could not have been granted any relief so as to continue beyond the period for which the appointment has been made i.e. upto 28.2.1982 and that was the relief sought by plaintiff. The mention of words "unless he is terminated in accordance with law" in prayer no. (1) in the plaint includes the termination which comes into effect by efflux of time and for which purpose no express order of termination is required to be issued in law, has held by Apex Court in Director, Institute of Management, Development U.P. Versus Pushpa Srivasava (supra).

31. Moreover, no injunction can be granted to enforce a contract of personal service since it is always open to an employer to take work or not from his employee and the employee has no corresponding obligation or legal right to discharge duties, but the only right he has is to claim salary for the period

relationship of employer and employee continued and the employee is available for rendering service irrespective of the fact whether the employer actually takes work or not.

32. The LAC's judgment is dated 31.3.1990, on which date, obviously plaintiff had no basis or foundation of appointment continuing. His tenure ended on 28.2.1982. Without looking into this aspect of the matter, LAC in granting an absolute indefinite relief enabling the plaintiff to continue even after 28.2.1982 has acted wholly illegally and the impugned appellate judgment, therefore, is patently erroneous. In fact, such an injunction granted by LAC, in my view, is invalid being in the teeth of Section 41 (e) of Act, 1963. It has been held that in common law, Court will not force an employer to retain the service of an employee whom he no longer wishes to employ except of certain well recognized exceptions.

33. In view of the above, questions no. 2 and 3 have to be answered in favour of defendantappellant and I do so accordingly.

34. In the result, the appeal is allowed. Impugned appellate judgment dated 31.3.1990 in Civil Appeal No. 423 of 1983 is hereby set aside. Trial Court's judgment dated 31.10.1983 is restored and confirmed. Accordingly, plaintiff's Suit No. 639 of 1981 stands dismissed.

35. However, there shall be no order as to costs.