
(2011) 05 AHC CK 0070
In the Allahabad High Court
Case No : Special Appeal No. 375 of 2005

Shiv Raj Singh Yadav

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 27-05-2011

Acts Referred:

Constitution of India, 1950 — Article 12, 14, 16, 162, 226

Citation : (2011) 10 ADJ 699 : (2012) 2 AWC 1779

Hon'ble Judges : Sudhir Agarwal, J;Imtiyaz Murtaza, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Hon"ble Sudhir Agarwal, J.—The appeal having been restored to its original number, as requested by learned counsel for the parties we proceed to hear the matter finally so as to decide the appeal on merits under the Rules of the Court.

2. Sri R.K. Ojha submitted that since some other persons, similarly placed to the petitioners-appellant, were regularised giving benefit of the Government Order dated 14.12.1990, the appellant also ought to have been given the same treatment and any other view would amount to discrimination with him. He contended that here is a case where the appellant has been appointed on regular basis later on but he ought to have been given regular appointment/regularisation with effect from the date when other persons were regularised i.e., 4.1.1991 and the view taken by the authority concerned otherwise and also by the Hon"ble Single Judge is illegal and liable to be set aside.

3. We have heard counsel for the parties and perused record as also the authorities cited at the Bar.

4. The appellant was engaged on daily wage basis on 26.1.1974 in U.P. Board of High School and Intermediate (hereinafter referred to as the "Board") and was disengaged on 18.4.1984. An industrial dispute was raised which came to be adjudicated by the Labour Court vide award dated 10.10.1991 holding

termination bad and directions issued for rein statement with effect from the date of termination, and full back wages. The Labour Court also held that appellant's services shall be considered without break. Pursuant to the said award the Board implemented the award, reinstated appellant on 19.5.1993 and also paid his back wages.

5. In the meantime Government Order dated 14.12/1990 was issued a copy whereof is Annexure 2 to the affidavit accompanying stay application. A perusal thereof shows that 160 additional posts of Junior Clerks were created temporarily. Para 5 of the Government Order provided that newly created 160 posts shall be filled in by absorption of daily wage employees working for several years in accordance with Rules.

6. The appellant thereafter was given regular appointment on a Class IV post on 19.5.1995. The appellant challenged this order in writ petition No. 26000 of 1995 which was disposed of vide judgment dated 15.9.1995 permitting him to make representation and the Board was directed to decide the same. The representation was rejected on 16.11.1995 where after the appellant filed writ petition No. 36216 of 1995 which was allowed on 10.9.1996. The order dated 16.11.1995 rejecting appellant's representation was set-aside and the Board was directed to consider his claim in the light of Government Order dated 14.12.1990. Thereafter the Board issued an order dated 17.7.1997 stating that he was already appointed on a Class-III post by order dated 15.12.1996 and may join the said post by 31.7.1997. This order was challenged by appellant in writ petition No. 23805 of 1997 but it was dismissed on 16.7.1999. Thereafter the appellant filed another writ petition No. 53835 of 1999 claiming absorption on Class-III post from retrospective date. This writ petition was disposed of on 24.11.2001 permitting the appellant to join Class-III post within 15 days.

7. The appellant, it appears, joined Class-III post on 29.12.2001. The impugned order dated 3.5.2002 shows that on 12.7.1996 the appellant was transferred from Allahabad to Nainital on administration ground where after he avoided joining and various litigation as detailed above resulted.

8. On a query made from the learned counsel for the appellant as to wherefrom he got a right for regular appointment on the post of Junior Clerk w.e.f. 4.1.1991 when no such direction was issued and none contained in Government Order dated 14.12.1990, the learned counsel for the appellant could not give any reply. Besides, he also could not dispute that the said Government Order talks of absorption of daily wage employees as per Rules. It is also not in dispute that Class-III posts are to be filled in by the Board by direct recruitment only in accordance with the procedure prescribed in statutory rules i.e. Subordinate Offices Ministerial Staff (Direct Recruitment) Rules, 1985 (hereinafter referred to as "1985 Rules"). The parties agree that these Rules govern appointment on a Class III post in the Board.

9. In 1991 there was no provision under which, without following the process of

recruitment under statutory rules of 1985, any daily wager, who was not initially engaged after following the procedure prescribed under the rules, could have been absorbed ignoring the process of recruitment under 1985 Rules or any other Rule applicable to the employees of the Board. None is shown to the Court.

10. The Government Order specially talks of absorption in accordance with Rules, namely, Rules applicable to the Board which did not permit any -such absorption except the procedure prescribed for direct recruitment under the Rules. As such the question of regularisation of the appellant in accordance with Government Order dated 24.12.1990 did not arise. In fact, learned counsel for the appellant could not place any such provision under which he could have been absorbed without facing the process of recruitment under 1985 Rules. Admittedly procedure of direct recruitment applicable to the Board in 1991 and onwards was governed by 1985 Rules.

11. A Constitution Bench of the Apex Court in Secretary, State of Karnataka and Others Vs. Umadevi and Others, , has held that if initial appointment was illegal the incumbent cannot be regularized since it would be in violation of Articles 14 and 16 of Constitution of India. After review of the entire law on the subject and discussing the matter at length, the Apex Court has held that a sovereign Government or its instrumentality, considering economic situation in the Country and the work got to be done is not precluded from making temporary appointments or engaging workers on daily wages, but whenever a regular vacancy occur, it has to be filled in as per the Constitutional scheme by giving equal opportunity of employment to all concerned persons. The Court has rejected the approach of taking a lenient view and term it as a misplaced equity and sympathy to the handful people, who have approached the Court with a claim of equity ignoring the equity of teeming millions of the country seeking employment and a fair opportunity of competing for employment. The Court, categorically held that adherence to Articles 14 and 16 of the Constitution is a must in the process of public employment and also stressed that adherence to the rule of equality in public employment is a basic feature of our constitution. It held:

43. Thus it is clear that adherence to the rule of equality in public employment is a basic feature of our constitution and since the rule of law is the core of our constitution, a Court would certainly be disabled from passing an order upholding a violation of Article 14 or in ordering the overlooking of the need to comply with the requirements of Article 14 read with Article 16 of the Constitution.....

12. It further held that the High Courts, acting under Article 226 of the Constitution should not ordinarily issue directions for absorption/regularization or permanence unless the recruitment itself was made in a regular manner consistent with the Constitutional scheme. The Apex Court very categorically held:

The High Courts acting under Article 226 of the Constitution, should not ordinarily issue directions for absorption, regularization or permanent continuance unless the recruitment itself was made regularly and in terms of the Constitutional Scheme.

13. The Apex Court also cautioned the Courts that they must be careful in ensuring that they do not interfere unduly with the economic arrangement of the affairs of the State or its instrumentalities or lend themselves as instrument to facilitate the bypassing of the constitutional and statutory mandates.

14. Following Uma Devi (supra), in Surendra Prasad Tewari Vs. Uttar Pradesh Rajya Krishi Utpadan Mandi Parishad and Others, it was held:

35. Equal opportunity is the basic feature of our Constitution. Public employment is repository of the State power. Certain status and powers emanate from public employment.

37. Our constitutional scheme clearly envisages equality of opportunity in public employment. The Founding Fathers of the Constitution intended that no one should be denied opportunity of being considered for public employment on the ground of sex, caste, place of birth, residence and religion. This part of the constitutional scheme clearly reflects strong desire and constitutional philosophy to implement the principle of equality in the true sense in the matter of public employment

38. In view of the clear and unambiguous constitutional scheme, the Courts cannot countenance appointments to public office which have been made against the constitutional scheme. In the backdrop of constitutional philosophy. It would be improper for the Courts to give directions for regularisation of services of the person who is working either as daily-wager, ad employee, probationer, temporary or contractual employee, not appointed following the procedure laid down under Articles 14, 16 and 309 of the Constitution. In our constitutional scheme, there is no room for back door entry in the matter of public employment.

15. Elaborating the procedure of regular appointment, in Union Public Service Commission Vs. Girish Jayanti Lal Vaghela and Others, the Court observed that regular appointment to a post under the State or Union cannot be made without issuing advertisement in the prescribed manner, which would include inviting of applications from employment exchange where eligible candidates get their names registered. Any regular appointment made on a post under the State or Union without issuing advertisement inviting applications from eligible candidates and without holding a proper selection where all eligible candidates get a fair chance to compete would violate the guarantee enshrined under Article 16 of the Constitution. This view has been referred and approved in Uma Devi (supra) and reiterated in National Fertilizers Ltd. and Others Vs. Somvir Singh, observing that the "State" within the meaning of Article 12 of the Constitution is bound to comply with the constitutional mandate under Articles 14 and 16.

16. Again a question cropped up as to whether by issuing executive order, or certain guidelines, a regularization is permissible where recruitment is not consistent with Article 16, and, replying the same in *Accounts Officer (A & I) APSRTC and others v. P Chandra Sekhara Rao and others*, 2006(7) SCC 488, it was held that no regularization is permissible even in exercise of powers conferred under Article 162 of the Constitution if the appointment has been made in contravention of the statutory rules or Article 16 of the Constitution. Earlier even in *State of Haryana and others Vs. Piara Singh and others etc. etc.*, the Apex Court declining to accept the contention that general directions can be issued by the Court for regularization observed as under: The Court cannot obviously help those who cannot get regularized under these details, for their failure to satisfy the conditions prescribed therein. Issuing general declaration of indulgence is no part of our jurisdiction.

17. This Court in Writ Petition No. 62806 of 2005 (*Qazi Amaramullah v. District Magistrate, Deoria and others*), decided on 1.3.2007 while considering almost similar arguments and also the law laid down by the Apex Court in *Uma Devi (Supra)* etc. said as under:

In view of the above discussed authoritative pronouncements, it is too late in the day to uphold the general direction of framing a scheme for regularization and to regularize the employees engaged on daily basis or on contract or temporary but without complying the requirement of Article 16 of the Constitution and the procedure for regular appointment.

Thus in the absence of any statutory provision and also in view of the admitted factual position that the petitioner's initial recruitment was not in accordance with the constitutional scheme enshrined under Article 16 of the Constitution, it cannot be said that the petitioner is entitled for regularization/ absorption. Moreover, the letter dated 28.6.2004 issued by respondent No. 2 would not be of any help to the petitioner inasmuch as the Court of law cannot issue a mandamus commanding the respondents to do something which is illegal and unconstitutional. Therefore, no mandamus can be issue to the respondents as prayed for. The writ petition is, therefore, dismissed. No order as to costs.

18. Following the law laid down in *State of West Bengal and Others Vs. Banibrata Ghosh and Others*, , *CSIR and Others Vs. Ramesh Chandra Agrawal and Another*, and *General Manager, Uttaranchal Jal Sansthan Vs. Laxmi Devi and Others*, and *State of Rajasthan and Others Vs. Daya Lal and Others*, also the Apex Court has held that regularization if not permitted under the statute is not permissible particularly when the initial appointment was not after following the procedure prescribed in law.

19. In respect to the employees of Election Commission who had also worked in similar manner for certain period from time to time whenever the election work was undertaken the matter came to be considered by a Division Bench in *State of U.P. and others v. Sanjay Kumar Pandey and others*, 2004(4) ESC 2470:2005

ALJ 1006. The Division Bench consisting of Hon''ble M. Katju (as His Lordship then was) and Hon''ble Umeshwar Pandey, J.J. held that no regularisation or absorption contrary to rules can be claimed. It followed an earlier Division Bench decision in *State of U.P. v. Rajendra Prasad*, 2004 (54) ALR 85.

20. Moreover, even if we assume that the Government Order dated 14.12.1990 confers some right upon the appellant, we are clearly of the view that it will not help him for the reason that the process of recruitment provided by statute cannot be ignored, omitted or flouted on the basis of an executive order. A Government Order would have no effect so long as statutory rules providing for recruitment are not amended. It is not the case of appellant that even till date any amendment in the statutory Rules has been made entitling the petitioner to claim regularization. An executive order cannot prevail over the statutory rules. Mere executive decision cannot authorize the authorities concerned to do something which is not otherwise permitted under statutory rules. It is well settled that an executive order cannot prevail over statutory rules. In *Indra Sawhney and others v. Union of India and others*, 1992 (Supp) 3 SCC 217, the Apex Court held that though the executive orders can be issued to fill up the gaps in the rules if the rules are silent on the subject but the executive orders cannot be issued which are inconsistent with the statutory rules already framed. In *Laxman Dundappa Dhamanekar and Another Vs. Management of Vishwa Bharata Seva Samiti and Another*, also the same view was taken. In *K. Kuppusamy and Another Vs. State of T.N. and Others*, the Court said that statutory rules cannot be overridden by executive orders or executive practice and merely because the Government has taken a decision to amend the rules, it does not mean that the rule stood obligated. So long as rules are not amended in accordance with the procedure prescribed under law the same would continue to apply and would have to be observed in words and spirit. In *Chandraprakash Madhavrao Dadwa and Others Vs. Union of India and Others*, also the Apex Court expressed the same view holding that the executive orders cannot conflict and override the statutory rules.

21. Now coming to the second aspect of the matter that some persons have been regularised, therefore, the appellant should also be given the same treatment, we find that in absence of any provision entitling a person like the appellant to claim regularisation without following the process of recruitment under the relevant Rules, namely, 1985 Rules, regularisation, if any, is not permissible in law. In the circumstances, no mandamus can be issued to the respondents to commit an illegality simply because it has been committed in some other case(s) also. Articles 14 and 16 do not contemplate any concept of equality for claiming parity with illegal acts.

22. Once it is established that the petitioner had no legal right of regularisation, merely because some irregularities and illegalities have been observed by the respondents in some other cases with respect to regularisation, that would not confer any right upon the petitioner to claim parity. The right of equality under

Article 14 and 16 of the Constitution is a positive concept and not a negative one. (See Post Master General, Kolkata and Others Vs. Tutu Das (Dutta), ; Punjab National Bank by Chairman and Another Vs. Astamija Dash, ; Punjab State Electricity Board and Others Vs. Gurmail Singh, ; M/s. Laxmi Rattan Cotton Mills Ltd. v. State of U.P and others, 2009 (1) SCC 565; Panchi Devi Vs. State of Rajasthan and Others, ; State of Bihar Vs. Upendra Narayan Singh and Others, ; State of Uttaranchal Vs. Alok Sharma and Others, ; State of Punjab and Another Vs. Surjit Singh and Others, ; State of Madhya Pradesh and Others Vs. Ramesh Chandra Bajpai, ; Shanti Sports Club and Another Vs. Union of India (UOI) and Others, ; Ghulam Rasool Lone Vs. State of Jammu & Kashmir and Another, .

23. It is well settled that two wrongs will not make one right. (See State of Bihar and Others Vs. Kameshwar Prasad Singh and Another, ; Union of India (UOI) and Another Vs. International Trading Co. and Another, ; Lalit Mohan Pandey Vs. Pooran Singh and Others, ; Anand Buttons Ltd. Vs. State of Haryana and Others, ; and Kastha Niwarak Grahnirman Sahakari Sanstha Maryadit, Indore Vs. President, Indore Development Authority, .

24. Learned counsel for appellant could not place any authority persuading us to take a different view than what is expressed above.

25. Since in this case, the appellant at a later point of time has been absorbed by the respondent Board and that order is not under challenge before this Court, we are making it clear that whatever has been said above may not be treated adverse to the appellant so as to have any otherwise effect on his absorption on the post of Junior Clerk made subsequently by the Board and this judgment shall not affect absorption of the appellant, already made in any manner. We are protecting the interest of appellant to this extent only for the reason that we do not propose to widen the scope of writ petition beyond the reliefs sought therein and, therefore, do not intend to cause any prejudice to the appellant or something which has not been challenged.

26. Considering the above discussion and subject to observation made above, we do not find any reason to interfere with the judgment of the Hon''ble Single Judge impugned in this appeal.

27. Special Appeal lacks merit.

28. Dismissed.

29. Costs made easy.