

(2013) 03 GUJ CK 0074
In the Gujarat High Court
Case No : Second Appeal No. 69 of 2007

State of Gujarat and Another APPELLANT
Vs
Vinodrai Prabhashaner Vyas RESPONDENT

Date of Decision : 14-03-2013

Acts Referred:

Citation : (2013) LabIC 3468

Hon'ble Judges : N.V. Anjaria, J

Bench : Single Bench

Advocate : Rahul Dave, Asst. Govt. Pleader, for the Appellant; Asit B. Joshi, for the Respondent

Final Decision : Allowed

Judgement

N.V. Anjaria, J.—The respondent herein, who was appointed with the appellant on temporary basis initially on 15th June, 1981 and whose services was extended from time to time by giving orders for 29 days, instituted a Regular Civil Suit No. 177 of 1990 for declaration and permanent injunction seeking reinstatement on Class IV post. The learned Second Joint Civil Judge (S.D.), Junagadh by his judgment and decree dated 05th February, 1991 decreed the suit.

Regular Civil Appeal No. 87 of 1991 preferred against the aforesaid judgment and decree by the original defendant-appellant herein came to be dismissed by learned Additional District Judge, 3rd Fast Track Court, Junagadh on 30th October, 2006. The appellants therefore approached this Court by presenting Second Appeal u/s 100 of the Code of Civil Procedure, 1908.

The operative portion of the judgment and decree passed by the Trial Court and confirmed by the lower Appellate Court reads as under:

The suit of the plaintiff is hereby decreed.

It is hereby declared that the plaintiff is continuous services as a peon in the office of defendants in the pay scale of Rs. 196-232 from 15-6-81 and the

artificial break given by the defendants in service of plaintiff is no break at all in the eyes of law. It is hereby declared that the oral order of defendants terminating the services of the plaintiff from 17-11-83 is illegal, unconstitutional, without any authority and hence it is null and void ab initio. It is also declared that the plaintiff is entitled to reinstate in service in the office of defendants as a peon with effect from 17-11-83 and the plaintiff is entitled to draw his salary and allowances from 17-11-83 till he re-instate in service as a peon in the office of defendants and he is also entitled to get all benefits of his service as earned by his juniors from the date of his reinstatement.

The defendants, their officers, servants, and agents, are hereby permanently restrained from implementation the oral order of dismissal against the plaintiff. They are also prevented from disturbing the plaintiff in performing his usual duty as a peon in the office of defendants.

The defendants are hereby ordered to reinstate the plaintiff in service with full backwages immediately, as if he was never dismissed from the service.

Defendants shall pay the costs of the suit to the plaintiff and shall bear their own.

A decree to be drawn up accordingly.

2. This Court admitted the Second Appeal formulating following substantial questions of law:

1. Whether in view of the provisions contained in Section 16 of the Gujarat Civil Services Tribunal Act, 1972 and Clause (6) of the Schedule thereto, the Civil Court had jurisdiction to entertain and decide the suit?

2. Whether the suit filed by the plaintiff seven years after his discharge from service was within the period of limitation?

3. Whether the plaintiff by virtue of his ad hoc appointment had acquired right to employment under the appellant-State?

2.1 Before addressing the controversy and the questions formulated as above, it will be useful to set out necessary facts. In the civil suit instituted by the original plaintiff, it was his case that with effect from 15th June, 1981, he was appointed as Peon under the office of Assistant Director, Geology and Mines-defendant No. 2 as his name was registered under the Employment Exchange. It was his case that on each occasion he was given the appointment for 29 days the same came to be extended for nearly two years giving such artificial breaks. It was the further case that while giving appointment on 11th April, 1983, he was placed in the scale of Rs. 196-232 with other emoluments, however, with effect from 16th November, 1983, his services came to be orally terminated. It was the case of the plaintiff that at the time of termination it was promised to him along with other employees whose services were also terminated that he would be called back in service, but the said promise was not fulfilled by the defendants even though temporary appointments were made in the year 1985-86. It was further

contended that two other employees viz. Shaileshbhai Rathod and Ashwinbhai Zala whose services were also terminated along with the plaintiff, were re-inducted into service later, but the plaintiff was kept out. It was pleaded that he being S.S.C. passed, held the qualification to be appointed as Peon but was never called for interview. It was the grievance of the plaintiff that though there were posts available, he was not taken back in service. Hence, he had issued notice. It was stated that earlier he has made applications seeking reinstatement and regularization. In the context of the pleadings outlined in brief herein above, various prayers were made in the plaint.

2.2 By filing Written Statement the defendants contested the suit by contending inter alia that the plaintiff was not entitled to any regular appointment, that he was offered temporary and ad hoc appointment for 29 days depending upon the need in the office; that there was no vacant post. It was contended that the plaintiff was neither entitled to continuous service, nor was entitled to be reinstated.

2.3 The Trial Court especially by considering the orders of appointment (Exh. 35, 36 and 38) came to conclusion that the plaintiff could be said to be working continuously on the post without break. It held that the breaks were artificial and the plaintiff was entitled for declaration that he was in continuous service.

3. Learned Assistant Government Pleader Mr. Rahul Dave for the State raised various contentions, main amongst them were that the suit was instituted in the year 1990 in respect of the alleged termination that took place in the year 1983 and therefore, the suit was barred by limitation. The another contention was that the appointment of the plaintiff being purely temporary, he had no right to claim continuity of service. He relied on the decision of the Apex Court in Secretary, State of Karnataka and Others Vs. Umadevi and Others, . It was submitted that in oral judgment dated 25th February, 2013 in Second Appeal No. 82 of 1998, learned single Judge held similarly.

3.1 Learned advocate for the respondent Mr. Hasit B. Joshi submitted that the plaintiff was given several appointment orders and on all the occasions, his services came to be extended before orally terminating with effect from 17th November, 1983. He submitted that he was placed in the scale of Rs. 196-232. On the said two counts, it was submitted that the post held by the plaintiff was of permanent nature where there was a need of work and that the plaintiff had acquired right to continue. He submitted that when both the Courts have concurrently found that the breaks were artificial, and that actually there was no break, same was finding fact. He emphatically submitted that no substantial question of law was arising in the appeal.

3.2 Learned advocate for the respondent further submitted that it was not permissible for the appellant to raise the question of limitation because such an issue was never framed and was not considered by the Courts below. According to him it could not be said to be arising from decisions of the Court below. In the

next he submitted that in any case the issue of limitation being a mixed question of law and fact was not a substantial question, and that such a question could not be raised for the first time in this appeal. In support of this contention, learned advocate for the respondent relied on paragraph 6.1 of the decision of Supreme Court in Union of India (UOI) and Others Vs. V.N. Singh, . He further relied on decision in Baljinder Singh Vs. Rattan Singh, by referring to paragraph 25 therein. Another decision relied on by learned advocate was in Banarsi Das Vs. Seth Kanshi Ram and Others, .

3.3 Learned advocate for the respondent next submitted that in the facts and circumstances of the case, the respondent had earned right to continue in the employment. It was submitted that whether the employee was ad hoc or permanent, once it is found that his services were arbitrarily terminated by giving artificial break, Articles 14 and 16 of the Constitution would attract to protect his rights in the public employment. He submitted that the decree passed by the Trial Court was justified in the facts of the case.

4. As far as the first question as to whether the Civil Court had jurisdiction to entertain and decide the suit in view of the provisions of Gujarat Civil Services Tribunal Act, 1972, as was rightly pointed out by the learned advocate for the respondent, the said question stands concluded by decision of this High Court in State of Gujarat v. Manglaben Maganlal Vaja being Second Appeal No. 56 of 1999 decided on 24th September, 1999. Dealing with the same question, after considering the provisions of the Gujarat Civil Services Tribunal Act, it was held that in view of definition of "specified civil servants" in Section 2(h) of the Act as amended by Gujarat Act 22 of 1980 with effect from 05th January, 1981, the provisions of the Act would apply to the officers of Civil Services of the State or of the Panchayat only and not to the employees or the servants holding non-gazetted post. It was observed thus,

.... it is true that when the said Act came into being the words used were the servants of the State Government and or Panchayat holding non-gazetted post by virtue of the amendment made in the Act vide Guj. Act 22 of 1980. The words "officers" and the "servants" of the State Government and the Panchayat came to be substituted and, therefore, it has become abundantly clear that so far as the provisions of the Act are concerned, it shall not be made applicable to the servants who are holding non-gazetted post and there cannot be any two opinion that the plaintiffs are holding non-gazetted post. In view of this, it is unequivocal clear that the provisions of the said Act not applicable to the plaintiffs and, therefore, there is no embargo under State Election Commission 16 of the Act with respect to the jurisdiction of the Civil Court so far as the case of the present plaintiffs are concerned.

4.1 in view of above, the Civil Court had jurisdiction to entertain and decide the suit of the plaintiff.

5. Focusing the second question regarding the limitation and the contention of

learned advocate for the respondent with regard thereto, it can hardly be said that the issue of limitation was not arising. The action of oral termination complained against was dated 17th November, 1983 whereas the suit was instituted in 1990. That means that the termination and the consequences thereof was sought to be challenged after a gap of seven years. In the facts of the case, Article 113 of the Limitation Act, 1963 governed the suit, under which the period prescribed is three years from the date of accrual of cause of action.

5.1 In *State of Punjab and Others Vs. Gurdev Singh*, , the Supreme Court held that for declaration that order of dismissal from service of an employee was ultra vires, unconstitutional, against the principles of natural justice and he continued to be in service, was subject to limitation period prescribed under Article 113. As regards scope and applicability of Article 113, it was observed to prescribe a time limit of three years. According to the third column in Article 113, time commences to run when the right to sue accrues. The words "right to sue" ordinarily mean the right to seek relief by means of legal proceedings. Generally, the right to sue accrues only when the cause of action arises, that is, the right to prosecute to obtain relief by legal means. The suit must be instituted when the right asserted in the suit is infringed or when there is a clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted.

5.2 The Court further deserved that when respondents (in that case) were dismissed from service, may be illegally, the order of dismissal clearly infringed their right to continue in the service and they were precluded from attending the office from the date of their dismissal. They were not paid salary from that date. It was held that when they wanted to challenge dismissal, they ought to approach the Court within three years period from the date of dismissal as prescribed under Article 113. The cause of action accrued on that date.

5.3 in the aforesaid view, the suit of the suit which was instituted after seven years from the date of dismissal, was clearly time barred and was not maintainable on that count. From the plaint it would be seen that the relief prayed for was in several limbs. In the prayers made, the plaintiff sought reinstatement and regularization of his service, further sought permanent injunction against filling up of his post and to accord him the seniority and give all other benefits. On a closure consideration of all the relief clauses, it was evident that all of them oriented from and had genesis in and reference to had action of termination of services. The cause of action to seek relief in respect of those prayers arose at the time when oral termination was effected. They were the relief which had no independent existence. Having regard the pleadings in the plaint, they were interwoven and interconnected with his termination. Therefore, in respect of all the relief prayed, the period of limitation was three years from the date of termination.

5.4 The contention of the learned advocate for the defendant that the issue of limitation could not be considered as substantial question of law because the same was not considered by the Courts below and was framed for the first time

at the time of admission of the present Appeal, was devoid of any substance.

5.5 The phrase "Substantial questions of law" occurring u/s 100 of CPC has been explained by the Apex Court in several cases in *Kashmir Singh Vs. Harnam Singh and Another*, it was observed that

To be "substantial" a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law "involving in the case" there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by Court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter.

It was further observed,

.....A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the Court below has decided the matter, either ignoring or acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates the settled position of law.....

5.6 Merely because an issue was not considered by the Courts below, it cannot be contended that it cannot become substantial question of law in Second Appeal. If the question is one arising from the pleadings of the parties in the proceedings, and from the discussion in the judgments of the Court below which is of significance to become a substantial question, the same can be framed even for the first time while deciding the Second Appeal u/s 100, CPC. Such a question arises from what is held by the Courts on the facts and evidence on record, hence the same can be a mixed question of law and facts or a pure question of law. A substantial question of law is one which goes to the root of controversy. That it was not argued or that the same was not raised or that not pleaded is of no consequence if it such question arises from the facts pleadings and on legal dimension of the matter. Arises as a substantial question of law.

6. Coming to the last question, the appellant are bound to succeed with regard to that also. The facts on record unequivocally indicated that the appointment of the plaintiff was purely ad hoc and temporary. It was a clear case of defendants-appellants in the Written Statement that he was not regularly selected employee and his employment was not after following the procedure for recruitment. The details of the temporary appointment for 29 days were given in the Written Statement which showed that the plaintiff did not work continuously. From the record it was further seen that contentions were taken by filing additional Written Statement (Exh. 17) that as per Government Resolution dated 23rd August,

1982, rules for recruitment to the Class IV post were determined and in accordance therewith, the recruitment was required to be made. It was stated that the employee Shri P.S. Bundela with respect to whom the plaintiff had raised grievance and alleged discrimination was declared surplus and therefore, was posted under the office of Assistant Director, Geology at Junagadh.

7. It was evident from the nature of the appointment of the respondent and the appointment orders on record of the case that he was purely a temporary appointee. It is categorically settled that a temporary or ad hoc appointee has no right to post. The reliefs of declaration in respect of various prayers made in the plaint, granted by the Trial Court was against well-settled provisions. The Supreme Court in *Uma Devi (3)* (supra) has brought out the law on the rights of temporary and ad hoc employees. The relevant observations may be noticed:

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. Therefore, consistent with the scheme for public employment, this Court while laying down the law, has necessarily to hold that unless the appointment is in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointee. If it is a contractual appointment, the appointment comes to an end at the end of the contract, if it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued. Similarly, a temporary employee could not claim to be made permanent on the expiry of his term of appointment. It has also to be clarified that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. It is not open to the Court to prevent regular recruitment at the instance of temporary employees whose period of employment has come to an end or of ad hoc employees who by the very nature of their appointment, do not acquire any right.

While directing that appointments, temporary or casual, be regularised 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 - not at arm's 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.

7.1 In *State of Bihar Vs. Upendra Narayan Singh and Others*, , in *Madhyamik Siksha Parishad, U.P. Vs. Anil Kumar Mishra and others etc.*, as also in *Indian Drugs & Pharmaceuticals Limited v. Workmen, Indian Drugs & Pharmaceuticals Limited* ((2007) 1 SCC 408) : (2006 AIR SCW 5994), the above principles were followed and reiterated. In *Indian Drugs & Pharmaceuticals Limited* (supra), the Court observed that the term "temporary employee" is a general category which has under it several sub-categories, such as casual employee, daily rated employee, ad hoc employee, etc. It was stated that a temporary employee has no right to the post, or to be continued in service, to get absorption, far less of being regularised and getting regular pay. It was emphasised that unless the appointments are made in accordance with rules, the temporary employees do not have any right to claim benefit of permanency on the establishment. The Court cannot direct continuation in service to a non-regular appointee. The argument that since the employee is working for long time is no ground to continue him further once his nature of employment was temporary and his entry in service was by jettisoning the procedure established by law/employment.

7.2 In more recent judgment of *Brij Mohan Lal Vs. Union of India (UOI)* and

Others, , the Apex Court held as under:

Thus it follows that for a person to have a right to the post, the post itself has to be a permanent post duly sanctioned in the cadre. The person should be permanently appointed to that post. Normally, it is only under these circumstances that such an employee gets a right to the post, but even when a temporary employee is appointed against a permanent post, he could get a right to the post provided he had at least acquired the status of a quasi permanent employee under the relevant Rules. Where neither the post is sanctioned nor is permanent and, in fact, the entire arrangement is ad hoc or is for an uncertain duration, it cannot create any rights and obligations in favour of the appointees, akin to those of permanent employees. (Para 80)

8. In view of above also, the Trial Court could not have passed decree giving declaration that the plaintiff was entitled to continuous service and was further entitled to reinstatement on the post of Peon and to draw salary and allowances of the post of Peon. For the reasons and discussions above, the appeal stands allowed.