

(2014) 09 AHC CK 0300

In the Allahabad High Court

Case No : Special Appeal Defective No. 34 of 2014

State of U.P.

APPELLANT

Vs

Ganesh Prasad Pandey

RESPONDENT

Date of Decision : 26-09-2014

Acts Referred:

Companies Act, 1956 — Section 21

Citation : (2014) 09 AHC CK 0300

Hon'ble Judges : Sanjay Misra, J;Amreshwar Pratap Sahi, J

Bench : Division Bench

Advocate : Madhumita Bose and Sandeep Dixit, Advocate for the Respondent

Final Decision : Allowed

Judgement

1. This appeal questions the correctness of the view taken by the learned Single Judge in Writ Petition No. 8133 (S/S) of 2009 dated 18.12.2012 whereby the respondents no. 1 to 17, who are employees of the Animal Husbandry Department, have been extended the benefit of protection of their salary as last drawn by them in the erstwhile department, with a further direction to compute the services rendered by the respondents in the U.P. Poultry and Live Stock Specialities Ltd., Lucknow (in short "UPLIS") for the purpose of their pensionary benefits and fixation of salary awarding them pay protection as observed in the judgment.

2. The appeal has been filed by the State of U.P. and we have heard Sri Sandeep Dixit, learned counsel for the appellants, and Ms. Madhumita Bose for the respondents no. 1 to 17.

3. The respondents are admittedly 17 out of 29 employees of the erstwhile UPLIS, a company registered under the Companies Act, 1956 incorporated in the year 1974 wholly owned by the State Government. It is thus a company registered in terms of Section 21 of the Companies Act, 1956 about which there is no dispute.

4. The State Government took a decision on 29.11.2004 to close the said company. The Government Order issued to that effect is extracted herein under:-

5. Sri Sandeep Dixit, learned counsel for the appellants, submits that the said government order provides that 29 employees, who were then functioning, were to be "adjusted" in the Animal Husbandry Department of the State Government as per the availability of the posts and subject to rules. He then contends that all the respondents were accordingly adjusted after a decision was taken under the Government Order dated 12.1.2005 and the consequential orders of such adjustment were issued on 31.1.2005. This was done in pursuance to the recommendation made by the Director of Animal Husbandry Department dated 10.12.2004 where it was stated that since equivalent posts were not existing or available, therefore, adjustments be made against lower posts. Consequently, the appointments orders were issued adjusting all the respondents and at the same time they were also given the bottom seniority in their respective cadres. This was done in order to avoid any anomaly or any sufferance that may be caused to the existing employees of the cadre in the Animal Husbandry Department.

6. Sri Dixit, learned counsel for the appellants, submits that after the respondents occupied their berths in the Animal Husbandry Department they started claiming pay protection and for counting of their services in the UPLIS. The Director of the Department sent a letter on 16.11.2005 to the Secretary of the Animal Husbandry Department apprising him of the aforesaid demand raised by the said respondents. Sri Dixit submits that this demand was absolutely unjust and without raising any challenge to the terms and conditions of adjustment, and also to the bottom seniority allocated to them in the department. Sri Dixit submits that once having accepted the said terms and conditions of appointment after adjustment, it was not open to the respondents to raise a claim at par with "retrenched and absorbed employees" of the State Government.

7. He has then invited the attention of the Court to the Government Order dated 27.4.2006 whereby the said request of the respondents was specifically refused on the ground that the respondents are not retrenched employees and in the absence of any rules of absorption they were simply adjusted and not absorbed. The word "SAMAYOJAN" used in the aforesaid documents is being described by Sri Dixit as adjustment and not absorption.

8. The employees through Kamta Prasad Soni and others assailed the said Government Order dated 27.4.2006 in Writ Petition No. 5077 of 2007 and an order was passed therein on 23.8.2007 staying the operation of the order dated 27.4.2006 with a direction to decide the claim of the employees. The State Government again declined to extend the said benefit on 23.11.2007 and which appears to have been done during the pendency of the said writ petition.

9. The writ petition itself came to be disposed of on 27.1.2009 by the following

judgment:-

Writ Petition No. 5077 (S/S) of 2007

Kamta Prasad Soni and others.... Petitioners

Versus

State of U.P. and another....Opposite parties

Hon"ble Rajiv Sharma, J.

Heard Mr. Ashwani Kumar, learned counsel for the petitioners and Mr. Anil Saran, learned Standing Counsel.

Learned counsel for the petitioners submits that the petitioners were appointed in the Uttar Pradesh Poultry & Livestock Specialists Limited, Lucknow during the period 1976 to 1993. On 10.7.1998, the Government issued the order for providing service benefits for the purpose of pension in case of those employees of autonomous body, etc. seeking absorption in the State/Central Government. On 19.5.2004, the Finance Secretary issued order for providing the benefit of the Last Pay Drawn in case of those Corporation/autonomous employees, if absorbed in the State Government Service. State Government took a decision to close down the UPLIS and absorb 29 regular employees in the U.P. Animal Husbandry Department. On 31.1.2005, the opposite party No. 2 issued orders of appointment of the petitioners in the Animal Husbandry and the petitioners joined on the respective posts. The opposite party No. 2 informed the Government that after absorption of 29 employees, neither their pay has been protected nor the service benefits rendered by them in UPLIS has been extended. By means of the impugned order dated 27.4.2006 the claim of the petitioners has been denied on the ground that the petitioners have not been absorbed under the provisions of Absorption Rules, 1991 as the petitioners have not been declared to be the "retrenched employees."

Being aggrieved, the petitioners are assailing the order dated 27.4.2006 whereby their claim has been denied.

A counter-affidavit has been filed stating therein that as the petitioners have not been absorbed in accordance with the Absorption Rules, 1991, they are not entitled for the service benefits which they have rendered in the earlier department, to which learned counsel for the petitioners submits that the impugned order passed by the competent authority reflects that all the petitioners have been absorbed in the Animal Husbandry Department and no fresh appointment has been offered and as such, the services rendered by them in the earlier department have to be counted in accordance with the provisions of Government Orders from time to time.

I find force in the arguments advanced by the learned counsel for the petitioners and as such, the plea raised by the learned Standing Counsel is rejected.

Accordingly, the opposite parties are directed to re-consider case of the petitioners, in accordance with the Government Orders issued from time to time counting the services rendered by him in the earlier department and if there is no legal impediment, consequential benefits shall also be provided to the owners.

With the above observations and directions, the writ petition is finally disposed of.

27.1.2009

10. Pursuant to the directions given in the said judgment, the State Government again rejected the claim of the respondents vide order dated 11.11.2009. The said order records that the UPLIS was a registered government company and undertaking, which has been closed and, therefore, it was not an autonomous institution with more than 50% aid from the State Government. The company did not receive any grant-in-aid, rather it was a company incorporated by the State Government and was fully owned by it. It was, therefore, not governed by any statutory rule of absorption and the Government Orders dated 10.7.1998 and 28.12.2001 do not include within its fold such companies. Consequently, no relief was admissible to the respondents nor the said G.O.'s were applicable or attracted.

11. It is the aforesaid order that has been challenged in Writ Petition No. 8133 of 2009 giving rise to the present special appeal.

12. The learned Single Judge while proceeding to allow the writ petition has held that if the word "autonomous body" means an institution funded with more than 50% of the infrastructure reimbursed by the State Government, then an undertaking established by the State Government itself is liable to be acknowledged at par as such, and its employees are entitled for getting their services counted rendered in such company in terms of the Government Orders dated 10.7.1998 and 28.12.2001. The judgment under appeal being a short one is extracted herein under:-

Reserved

Writ Petition No. 8133 (S/S) of 2009

Ganesh Prasad Pandey and others - Petitioners

Vs.

State of U.P. through Principal Secretary/Secretary Animal Husbandry Department, U.P. Government, Civil Secretariat, Lucknow and another - Opp. Parties

Hon"ble Shri Narayan Shukla, J.

Heard Ms. Madhumita Bose, learned counsel for the petitioners and Sri Rohit Verma, learned Standing Counsel.

The petitioners have challenged the order dated 11th November, 2009, passed

by the State Government, Animal Husbandry Department whereby the State Government has denied to count their services rendered in the erstwhile department, i.e. U.P. Poultry and Livestock Specialities (in short UPLIS) with the services rendered in the Animal Husbandry Department on the event of their absorption for the purpose of pensionary benefits.

On closure of UPLIS, the State Government took a decision to absorb 29 regular employees of UPLIS in the U.P. Animal Husbandry Department but without protecting their salary as last drawn and without counting their services rendered in the UPLIS for the purpose of pensionary benefits. Therefore, they approached this Court through W.P. No. 5077 (S/S) of 2007. This Court by means of order dated 27.1.2009 directed the respondents to re-consider the petitioners' case in accordance with the Government Orders issued from time to time, counting the services rendered by them in the earlier department and provide consequential benefits, if there is no legal impediment.

Pursuant to the order of this Court, the State Government took a fresh decision. The order impugned is the result of the decision. In consideration, the State Government has referred two Government Orders dated 10th July, 1998 as well as 28.12.2001 in which it is provided that the services of the employees of Undertakings/Corporations shall not be counted rather only the services of the employees of autonomous bodies shall be counted for the purposes of pension.

The State Government has explained the term

"autonomous body" in the manner that it is that which is funded wholly or more than 50% of its expenditures are reimbursed by the State Government's grant. It is further provided that in the autonomous bodies the body of the equivalent status shall be included but the financial institutions/Banks of the State Government shall not be included.

In its decision, the Government has observed that UPLIS is a registered Company and it is an undertaking established by the State Government in which the Government has invested its fund. Therefore, it is a Government undertaking. Thus, the State Government has accepted its own undertaking wholly funded by its. Therefore, I am of the view that the service rendered by the petitioners in the UPLIS which is a Government undertaking and is liable to be acknowledged for the purpose of their pensionary benefits.

Upon perusal of the record, it is obvious that it is a case of absorption on the event of closure of UPLIS. Therefore, the petitioners are entitled to get protected their salary as last drawn by them in the erstwhile department.

Under the circumstances, the order impugned dated 11.11.2009 (Annexure No. 1) is hereby quashed. A writ of mandamus is issued to the respondents to acknowledge petitioners' services rendered in the UPLIS for the purpose of their pensionary benefits and further fix their salary by protecting their salary as last drawn by them in the UPLIS.

Accordingly the writ petition is allowed.

18.12.2012"

13. Sri Sandeep Dixit, learned counsel for the appellants, contends that the learned Single Judge in the previous petition no. 5077 of 2007 has proceeded to accept the arguments of the other side, incorrectly construing the meaning of the words SAMAYOJAN as absorption while delivering the judgment on 27.1.2009, inasmuch as, the appellants had never accepted the status of the respondents as retrenched and absorbed employees.

14. His submission is that the Uttar Pradesh Absorption of Retrenched Employees of Government or Public Corporations in Government Service Rules, 1991 defines a retrenched employee as one who was appointed on or before 1.10.1986 in accordance with rules and the procedure prescribed in any Government or Public Corporation on a post, and on account of closure thereof or retrenchment of employees, shall be treated as a retrenched employee, provided a certificate to that effect is issued in this regard. The aforesaid Rule 2(C) has been placed before the Court to advance the said submission and is also on record.

15. Sri Dixit submits that the respondents had to forego their employment UPLIS after its closure on 29.11.2004 and the aforesaid rules of 1991 had already been rescinded before that by the Uttar Pradesh Absorption of Retrenched Employees of Government or Public Corporations in Government Service (Recession of Rules), 2003 vide notification dated 8.4.2003. He, therefore, submits that firstly the respondents did not fall within the definition of any such retrenched and absorbed employees entitled for any such benefit, nor the rules were in existence so as to extend any such benefit to the respondents. Consequently, there was no occasion for reading the word "SAMAYOJAN" as absorption. He submits that the word absorption in Devnagari is "Amelan" or "Samvilayan".

16. The contention, therefore, is that while proceeding to pass the order on 11.11.2011, the State Government has not avoided the judgment dated 27.1.2009, and rather in compliance thereof has taken the correct position for refusing benefits as claimed by the respondents.

17. He then submits that the respondents have knowingly accepted the terms and conditions of their adjustment, as already indicated above, which were never challenged by them. He has then invited the attention of the Court to the Government Order dated 10.7.1998 and 20.12.2001. He has particularly laid stress on Clause 2 of the Government Order dated 28.12.2001 to contend that UPLIS was a totally government undertaking and was not a self financed or autonomous institution in respect whereof the government order was issued. He contends that a government undertaking company is thus not covered by the aforesaid government orders. Resultantly, he pleads that the judgment of the learned Single Judge goes wide off the mark to extend benefits to the respondents founded on an incorrect appraisal of the status of the respondents and their erstwhile employer company.

18. He has then urged that the claim of the respondents was only with regard to counting of their services in their previous organisation for giving them the benefit of pension, whereas the learned Single Judge has travelled beyond the relief claimed to extend them such benefits of pay protection of the last pay drawn by them and also additional reliefs over and above what had been claimed in the writ petition. He, therefore, submits that the judgment of the learned Single Judge cannot be sustained on the aforesaid grounds as well.

19. Sri Dixit has further invited the attention of the Court to the Uttar Pradesh Absorption of Retrenchment Employees of Government or Public Corporations in Government Service (Recession of Rules) Act, 2009 to urge that the State Government did not leave the matter upto the rules only, and brought about a legislative act declaring that the 1991 Rules will be deemed to have been rescinded, but the benefits to such employees who had availed of the same between 9.5.1991 to 8.4.2003 (the period during which the rules were in operation, shall be saved). He, therefore, submits that with the promulgation of the Act no claim whatsoever of absorption under law was admissible.

20. Ms. Madhumita Bose, learned counsel for all the respondents, has countered the submissions and has urged that the answering respondents are not claiming any benefit of either absorption or any consequential benefits under the 1991 and 2003 Rules or under the 2009 Act. She submits that the appellant-State had accepted the answering respondents as absorbed employees which is described in the parawise comments dated 27.9.2007 and the counter affidavit filed by the appellants on 26.11.2007 in Writ Petition No. 5077 of 2007. She has further invited the attention of the Court to similar such affidavits in the shape of a supplementary counter affidavit dated 7.8.2008 and the comments of the department to urge that in the Hindi version the word "SAMAYOJAN" has been used in the affidavit and in the affidavit which was in English filed by Javed Islam, Chief Technical Officer, the word "absorbed" has been clearly mentioned to describe the inclusion of the respondents in the Animal Husbandry Department on 12.1.2005. She, therefore, submits that the contention of Sri Dixit, learned counsel for the appellants, that the respondents have been only adjusted and not absorbed is absolutely against their own admission. She contends that it is for this reason that the High Court earlier in the judgment dated 27.1.2009 specifically accepted this argument on behalf of the answering respondents and held that the answering respondents are absorbed employees and not merely adjusted employees as urged by the appellants.

21. She then contends that the respondents under the relevant government order have been absorbed and their previous services under UPLIS have to be counted and which has been rightly accepted by the learned Single Judge under the impugned judgment. She submits that the conclusions drawn by the learned Single Judge on both occasions, namely, on 27.1.2009 and in the impugned judgment dated 18.12.2012 are perfectly justified and do not suffer from any infirmity. There is no adverse law so as to deny such benefits to the respondents

and the attempt made by the appellants to refuse such benefits is arbitrary and contrary to the status conferred on the respondents upon absorption. She, therefore, prays that the appeal be dismissed and the judgment of the learned Single Judge be upheld.

22. Having heard the learned counsel for the parties and having considered the submissions raised, the first issue is with regard to the status of the respondents as employees of a company. From the facts as brought on record, it is undisputed that UPLIS was registered as a company under the Companies Act, 1956 and was a Government undertaking. The respondents were employees of such an undertaking which continued till its closure in 2004, which fact is undisputed by the respondents. Thus, the respondents are nowhere in any way entitled to such benefits that are available to retrenched employees on absorption as visualized under the 1991, 2003 Rules read with 2009 Act aforesaid as the rules had already been rescinded in 2003 before the unit closed in 2004. As a matter of fact, the said rules and the act are not applicable on the facts and controversy involved herein and thus there is no occasion to consider any benefits that are available to such retrenched employees under the aforesaid rules and act. Learned counsel for the respondents Ms. Bose could not dispute the said position, rather she contends that this was not even the argument raised before the learned Single Judge.

23. The respondents under a special government order came to be inducted in the Animal Husbandry Department which the appellants describe as "adjustment" and the respondents describe it as "absorption". The contention of Ms. Bose, learned counsel for the respondents, that as a matter of fact absorption and adjustment are synonyms, even if accepted, the same would not alter the conclusion that the respondents were extended the benefit of being accommodated in the Animal Husbandry Department as a special case and not under any existing statutory rule.

24. This appears to have been done in an extraordinary situation when the retrenchment and absorption Rules, referred to hereinabove, had already been done away with for any such benefits in respect of a public undertakings. Consequently, there was no statutory benefit that was available to the respondents under any rule or law for the time being in force. It was only through an executive instruction in the shape of a government order that gave the special benefit of employment to the respondents as employees under the Animal Husbandry Department. This was to save them from victimization or exploitation with no other benefits of counting their past services for any other purposes. The aforesaid foundation, therefore, having no statutory basis, the argument of Ms. Bose that the respondents were entitled to such benefits cannot be countenanced.

25. Her submission that the words "absorption" have been used in the previous affidavit as pointed out above, would, in our opinion, would be a description of the engagement of the respondents as explained hereinabove and not an

absorption in the sense of any employees who have been extended benefits under any rules for the time being in force. The State Government appears to have been generous in extending employment to the respondents after the closure of the company but they have refused to be over-generous by providing any further benefits of their past services in the company.

26. We cannot find any fault with such a decision being taken which falls within the realm of a policy decision taken by the Government to save the employment of the respondents from being completely done away with. Any claim of surviving lien has not been acknowledged while reengaging the respondents in the Animal Husbandry Department. In the absence of any continuing lien being conferred, the respondents were not entitled for any pay protection or counting of services for pensionary benefits. The respondents themselves accepted this position including their placement at the bottom of the seniority list which was a conscious act on their behalf.

27. It is true that the State Government is in a dominant position and the respondents had nothing more to gain than to accept the offer but such acceptance has been embraced by the respondents voluntarily and it is not their case that they did this under some compulsion. With the aforesaid background it can be safely said that the respondents had accepted their status as a fresh employment in the Animal Husbandry Department which in effect was an adjustment under the circumstances indicated above.

28. Once the status of the respondents is held to be of employees of an erstwhile government undertaking, then a statutory rule would be required for counting such services for the purpose of computing pension. Learned counsel for the respondents has been unable to point out or produce any rule with any statutory effect so as to oblige the appellants to obey the same. Consequently, a mandamus cannot be issued by this Court for compliance of any term and condition of employment that does not have any statutory basis.

29. The learned Single Judge, therefore, committed an error in drawing support from the Government Orders dated 10.7.1998 and 21.12.2001 which, in our opinion, do not come to the aid of the respondents at all. The conclusion drawn by the learned Single Judge and the reasoning adopted is unsustainable as it is unsupported by any legal principle or factual document that may oblige the State Government to extend any such benefit.

30. The respondents have not even raised a plea of discrimination as against any other sets of employment or similarly situate persons so as to adjudicate any such competing claim. Thus, in the absence of any violation of a right or a fundamental right the extension of benefits of pay protection and other benefits as extended by the learned Single Judge was beyond a legal scope and not admissible as prayed for.

31. There is one argument of Ms. Madhumita Bose which deserves mention, namely, that the earlier judgment dated 27.1.2009 that was inter-parties is

virtually sought to be reopened by the State Government while passing the order that was under challenge before the learned Single Judge. She further submits that the correctness or otherwise of the said judgment having treated the respondents as absorbed employees cannot be reassessed and the benefits should be extended. We are unable to agree to this proposition as well, for the reasons already indicated above. The learned Single Judge while delivering the judgment on 27.1.2009 had directed only the reconsideration of the claim of the respondents provided there is no other legal impediment and then to award consequential benefits. We have already enumerated the legal impediments hereinabove and, therefore, the mere observation that the arguments advanced by the counsel for the respondents had some force, the same would not amount to a declaration of law with regard to the status of the respondents. Similarly, the use of an incorrect word in the affidavit, namely, the word absorption, does not bring about any change in the status of the respondents as explained hereinabove.

32. For all the foregoing reasons, we find that the judgment of the learned Single Judge cannot be sustained and the appeal is therefore allowed and the judgment dated 18.12.2012 is set aside.

33. No order as to costs.