

(2014) 11 AHC CK 0138

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 50116 of 2013

State of U.P.

APPELLANT

Vs

Raj Kumar and Others

RESPONDENT

Date of Decision : 21-11-2014

Acts Referred:

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

Uttar Pradesh Industrial Disputes Act, 1947 — Section 6-H, 6H(1), 6-H(1)

Citation : (2014) 11 ADJ 652 : (2015) 1 AWC 981 : (2015) 1 ESC 432 : (2015) 144 FLR 457 : (2015) 1 LLN 610 : (2014) 4 UPLBEC 3311

Hon'ble Judges : Mahesh Chandra Tripathi, J

Bench : Single Bench

Advocate : C.K. Rai, S.C, Advocates for the Appellant; Himanshu Upadhyay, M.P.S. Chauhan, S.C, Advocates for the Respondent

Judgement

Mahesh Chandra Tripathi, J.—Heard Sri Ravi Shanker Prasad, learned Additional Chief Standing Counsel for the petitioner and Sri M.P.S. Chauhan, learned Counsel for the respondent No. 1. By means of the present writ petition, the petitioner (State of U.P. through Executive Engineer, Aligarh Khand, Ganga Canal, District Aligarh) has challenged the impugned order dated 19.4.2012 passed by the Regional Deputy Labour Commissioner, Aligarh-respondent No. 2, by which the claim of respondent No. 1 under Section 6-H of the Industrial Disputes Act (herein after referred as "Act") had been allowed.

2. This Court, while entertaining the present writ petition on 30.9.2013, had passed the following order in favour of the petitioner:--

"Learned Standing Counsel submitted that the application moved under Section 6H(1) of U.P. Industrial Dispute Act was not maintainable. The respondent workman was daily wager, hence the wages could not be calculated considering the salary of the regular employee, hence award is illegal and arbitrary.

Learned Standing Counsel further submitted that in pursuance of the impugned

award, the amount has already been deposited. However, the same has not been released as yet.

Issue notice to the opposite party No. 1 returnable at an early date.

In the meantime till the next date of listing 50% of the amount, if already deposited, shall be released in favour of the respondent workman and remaining 50% shall be kept in Fixed Deposit."

3. Brief facts giving rise to the present writ petition are, that the respondent No. 1 claimed that he was engaged on daily wage basis on the post of Sinchpal in the petitioner-department on 1.8.1998, and continued upto 31.8.1999 and his services were dispensed with on oral termination since 1.9.1999. The respondent No. 1 challenged his termination before Labour Court and the case was registered as Adjudication Case No. 268 of 2005 (Old Adjudication Case No. 165 of 2000). The Labour Court vide award dated 20.8.2007 directed the petitioner to reinstate the workman alongwith compensation of Rs. 5,000/-. It is also apparent from the record, that the said award has been assailed in the Writ Petition No. 31060 of 2008, which was dismissed by this Court vide judgment and order dated 9.7.2008. Against the said dismissal order, the State has preferred Special Leave to Appeal No. 2281 of 2009 (Civil) which was also dismissed by the Hon'ble Apex Court on 7.7.2010. Thereafter, the respondent No. 1 was immediately reinstated in the department. Thereafter, the workman/respondent No. 1 had filed application under Section 6-H(1) of the Industrial Disputes Act, 1945 (herein after referred as Act, 1947) before the Deputy Labour Commissioner, Aligarh, claiming that in pursuance to the judgment and award passed by the Labour Court, he is entitled to get salary to the tune of Rs. 26,688/- from 28.11.2007 to 29.2.2008.

4. Again an application had been filed claiming salary of Rs. 63,566/-. Against the said application detailed objection/written statement had been filed by the petitioner. Thereafter, vide order dated 4.2.2009, the respondent No. 2 directed for payment of Rs. 63,586/- to the respondent No. 1.

5. It appears from the record that the said amount was paid to the respondent No. 1. After receiving the said amount again he had filed an application on 1.7.2009 under Section 6-H(1) read with Rule 33 of the U.P. Industrial Rules, 1957 claiming further salary of Rs. 1,44,237/- for subsequent period. Again a detailed objection has been filed by the petitioner and refuted that the respondent No. 1 was never appointed on the post of Sinchpal and he was not entitled for salary of the said post and further the Labour Court had never directed the petitioner to reinstate him on the post of Sinchpal. While rejecting the claim of the petitioner, the respondent No. 2 vide order dated 15.9.2010 had directed for recovery of Rs. 1,44,237/- which was sent to the District Magistrate, Aligarh for realization. Again respondent No. 1 had moved another application on 10.2.2011 for recovery of Rs. 2,42,045/- from the petitioner under Section 6-H(1) of the Act, 1947. Again the respondent No. 2 directed vide order dated

19.4.2012 for recovery of Rs. 2,42,045/- from the petitioner.

6. It also transpires from the record that meanwhile, the respondent No. 1 (workman) had filed Writ Petition No. 24040 of 2011 for a mandamus commanding the petitioner to regularize his services on the post of Sinchpal and for disbursement of the arrears of salary in pursuance to the award of the Labour Court dated 20.8.2007. The said writ petition has been disposed of by this Court vide order dated 26.4.2011 with directions that the appropriate application for regularization of the petitioner may be decided by the department.

7. In compliance of the order passed by this Court, the claim of the workman had been decided by the Executive Engineer vide order dated 25.5.2011 (annexure-14) with observation that in compliance of the award dated 20.8.2008, the respondent has already been reinstated and payments were also made but his services could not be regularized in pursuance to the direction dated 16.3.2007 issued by this Court in Writ Petition No. 45482 of 2004 with further observation that the services of the persons, who had come in the department by the back door entry, could not be regularized, as the same is in violation to the Article 14 and 16 of the Constitution of India. It also appears from the record that the order passed by the Executive Engineer dated 25.5.2011 has attained finality and the same has not been challenged by the workman.

8. Sri R.S. Prasad, learned Additional Chief Standing Counsel submits that the order impugned dated 19.4.2012 is wholly illegal and arbitrary and the calculation has been made in violation to the order passed by the Labour Court dated 20.8.2007. He further submits that while passing the award, the Labour Court had clearly held that since the workman was working on daily wage basis and during the relevant period, he had not worked as such, he was not entitled for any back wages. He further submits that for his regularization on the post of Sinchpal, the respondent No. 1-workman had earlier filed Writ Petition No. 24040 of 2011 which was simply disposed of with a direction to the Executive Engineer of the department concerned to consider his application, and vide order dated 25.5.2011, the Executive Engineer had rejected the claim of the workman for regularization and while rejecting his claim, the Executive Engineer of the department had observed that the workman was engaged by back door entry and his regularization in the department would be in violation of Article 14 and 16 of the Constitution of India. As Article 14 is an integral part of our system, each and every State action is to be tested on the touchstone of equality. Any appointment made in violation of mandate of Articles 14 and 16 of the Constitution is not only irregular but also illegal and can not be sustained in view of the judgments rendered by Hon"ble Apex Court in Delhi Development Horticulture Employees' Union Vs. Delhi Administration, Delhi and others, ; State of Haryana and others Vs. Piara Singh and others etc. etc., ; Prabhat Kumar Sharma and others Vs. State of U.P. and others, ; J.A.S. Inter College, Khurja, Uttar Pradesh and others Vs. State of Uttar Pradesh and others, ; M.P. Housing

Board and Another Vs. Manoj Shrivastava, ; Branch Manager, M.P. State Agro Industries Development Corpn. Ltd. and Another Vs. Shri S.C. Pandey, ; and State of Madhya Pradesh and Others Vs. Ku. Sandhya Tomar and Another, .

9. He further submits that once his claim for regularization has been turned down by the department and the same has not been assailed, then it has attained finality. Therefore, the respondent No. 1 is not entitled for salary on the post of Sinchpal in regular capacity. He further makes submission that the respondent No. 1 himself has made a statement before the Labour Court that he was engaged on the post of Sinchpal since 1.8.1998, on daily wage basis and his services were dispensed w.e.f. 1.9.1999, the workman continued to work as daily wager, which is also reflected from the operative portion of the award. The Presiding Officer has also made categorical averment that the respondent had worked as daily wager in the department.

10. He submits that while passing the impugned order, the respondent No. 2 has erred in directing for calculation of the arrears on the basis of salary, which itself is in violation of the award which was passed keeping in mind that the workman was working on daily wage basis and he could only be reinstated in same capacity in the department and calculations were liable to be made as daily wager, otherwise it would be in teeth of Constitution Bench judgment of the Apex Court in Secretary, State of Karnataka and Others Vs. Umadevi and Others, .

11. He further makes submission that if the claim set out by the workman is allowed in this way, then it will be in violation of the judgment of Hon'ble Supreme Court in Uma Devi (supra) and placed his reliance to paragraph 54 of the Constitution Bench decision of the Apex Court in the case of Secretary, State of Karnataka and Others Vs. Umadevi and Others, , which reads as follows:

"54. It is also clarified that those decisions which run counter to the principle settled in this decision, or in which directions running counter to what we have held herein, will stand denuded of their status as precedents."

In view of the aforesaid observation of the Constitution Bench of the Apex Court, any decisions or directions given by the Courts, which are contrary to the principles laid down by the Apex Court in the case of Secretary, State of Karnataka v. Uma Devi (supra) will stand denuded on their status as precedent.

In view of the above, at this stage, it would be appropriate to refer, the principles laid down by the Apex Court in the case of Secretary, State of Karnataka v. Uma Devi (supra). Relevant paragraphs of the judgment of the Apex Court are being reproduced below:

"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. 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. High Courts acting under Article 226 of the Constitution of India, 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. Merely because, an employee had continued under cover of an order of Court, which we have described as "litigious employment" in the earlier part of the judgment, he would not be entitled to any right to be absorbed or made permanent in the service. In fact, in such cases, the High Court may not be justified in issuing interim directions, since, after all, if ultimately the employee approaching it is found entitled to relief, it may be possible for it to mould the relief in such a manner that ultimately no prejudice will be caused to him, whereas an interim direction to continue his employment would hold up the regular procedure for selection or impose on the State the burden of paying an employee who is really not required. The Courts must be careful in ensuring that they do not interfere unduly with the economic arrangement of its affairs by the State or its instrumentalities or lend themselves the instruments to facilitate the bypassing of the constitutional and statutory mandates.

45. While directing that appointments, temporary or casual, be regularized or made permanent, Courts are swayed by the fact that the concerned person 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 eyes open. It may be true that he is not in a position to bargain -- not at arms 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 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 of India.

47. When a person enters a temporary employment or gets engagement as a contractual or casual worker and the engagement is not based on a proper selection as recognized by the relevant rules or procedure, he is aware of the consequences of the appointment being temporary, casual or contractual in nature. Such a person cannot invoke the theory of legitimate expectation for being confirmed in the post when an appointment to the post could be made only by following a proper procedure for selection and in concerned cases, in consultation with the Public Service Commission. Therefore, the theory of legitimate expectation cannot be successfully advanced by temporary, contractual or casual employees. It cannot also be held that the State has held out any promise while engaging these persons either to continue them where they are or to make them permanent. The State cannot constitutionally make such a promise. It is also obvious that the theory cannot be invoked to seek a positive relief of being made permanent in the post.

48. It was then contended that the rights of the employees thus appointed, under Articles 14 and 16 of the Constitution, are violated. It is stated that the State has treated the employees unfairly by employing them on less than minimum wages and extracting work from them for a pretty long period in comparison with those directly recruited who are getting more wages or salaries

for doing similar work. The employees before us were engaged on daily wages in the concerned department on a wage that was made known to them. There is no case that the wage agreed upon was not being paid. Those who are working on daily wages formed a class by themselves, they cannot claim that they are discriminated as against those who have been regularly recruited on the basis of the relevant rules. No right can be founded on an employment on daily wages to claim that such employee should be treated on a par with a regularly recruited candidate, and made permanent in employment, even assuming that the principle could be invoked for claiming equal wages for equal work. There is no fundamental right in those who have been employed on daily wages or temporarily or on contractual basis, to claim that they have a right to be absorbed in service. As has been held by this Court, they cannot be said to be holders of a post, since, a regular appointment could be made only by making appointments consistent with the requirements of Articles 14 and 16 of the Constitution. The right to be treated equally with the other employees employed on daily wages, cannot be extended to a claim for equal treatment with those who were regularly employed. That would be treating unequals as equals. It cannot also be relied on to claim a right to be absorbed in service even though they have never been selected in terms of the relevant recruitment rules. The arguments based on Articles 14 and 16 of the Constitution are therefore overruled.

49. It is contended that the State action in not regularizing the employees was not fair within the framework of the rule of law. The rule of law compels the State to make appointments as envisaged by the Constitution and in the manner we have indicated earlier. In most of these cases, no doubt, the employees had worked for some length of time but this has also been brought about by the pendency of proceedings in Tribunals and Courts initiated at the instance of the employees. Moreover, accepting an argument of this nature would mean that the State would be permitted to perpetuate an illegality in the matter of public employment and that would be a negation of the constitutional scheme adopted by us, the people of India. It is therefore not possible to accept the argument that, there must be a direction to make permanent all the persons employed on daily wages. When the Court is approached for relief by way of a writ, the Court has necessarily to ask itself whether the person before it had any legal right to be enforced. Considered in the light of the very clear constitutional scheme, it cannot be said that the employees have been able to establish a legal right to be made permanent even though they have never been appointed in terms of the relevant rules or in adherence of Articles 14 and 16 of the Constitution.

52. Normally, what is sought for by such temporary employees when they approach the Court, is the issue of a writ of mandamus directing the employer, the State or its instrumentalities, to absorb them in permanent service or to allow them to continue. In this context, the question arises whether a mandamus could be issued in favour of such persons. At this juncture, it will be proper to refer to the decision of the Constitution Bench of this Court in *Rai Shivendra*

Bahadur Vs. The Governing Body of the Nalanda College, . That case arose out of a refusal to promote the writ petitioner therein as the Principal of a college. This Court held that in order that a mandamus may issue to compel the authorities to do something, it must be shown that the statute imposes a legal duty on the authority and the aggrieved party had a legal right under the statute or rule to enforce it. This classical position continues and a mandamus could not be issued in favour of the employees directing the government to make them permanent since the employees cannot show that they have an enforceable legal right to be permanently absorbed or that the State has a legal duty to make them permanent."

12. Learned Counsel for the respondent No. 1 submits that the present writ petition cannot be sustained as the petitioner had preferred an appeal which was also rejected by the Hon"ble Apex Court, therefore, the award itself has attained finality and the workman is entitled for regular payment.

13. I have heard the rival submissions of the learned Counsel for the parties and also perused the record.

14. It is apparent from the record that while passing the award dated 20.8.2007, learned Labour Court has categorically observed that the workman was working in the department in capacity of daily wager and in this background has directed for reinstatement along with Rs. 5,000/- cost. It is also admitted situation that in pursuance to the award, the amount has also been paid to the workman and time to time application under Section 6-H(1) had also been allowed and recovery has been made. It has also been averred in the writ petition that the workman had also filed writ petition No. 24040 of 2011 for a direction to the respondents to regularize the services of the workman on the post of Sinchpal (Tubewell Operator) and for a further direction to the respondents to disburse the arrears of salary of Rs. 1,44,237/- due for the period from 1.8.2008 to 31.7.2009 in pursuance to the award dated 20.8.2007.

15. The said writ petition was disposed of vide order dated 26.4.2011 with direction to the Executive Engineer to decide the claim of the workman for regularization and finally the Executive Engineer vide order dated 25.5.2011, has rejected the claim of the workman for regularization on the ground that demand of regularization could not be accepted as the same is in violation of Article 14 and 16 of the Constitution of India. Once the claim for regularization of workman on the post of tube well operator has been denied by the petitioner and the same has attained finality, therefore, the benefit of regular salary on the said post cannot be accepted, and the same would be in violation of the principle laid down in the decision of the Apex Court in Case of Secretary, State of Karnataka v. Uma Devi (supra). Therefore, at this stage, this Court has only to look into the matter as to whether the award dated 20.8.2007 had been complied by the department and further the present impugned order passed under Section 6-H(1) can be sustained or not? It is admitted situation that the award has attained finality up to Hon"ble Apex Court and it has also been brought on record that in pursuance

to the award dated 20.8.2007 the workman has joined the department. Therefore, while deciding the application under Section 6-H(1), the respondent No. 1 travelled beyond the mandate of the award passed by the Labour Court and the arrears could only be fixed as per the award and in the garb of award no regular salary could be released, otherwise indirectly his regularization on the said post would take place, which was not under the purview of Section 6-H(1) proceeding and the same had been denied by the petitioner.

16. Therefore, I am of the considered opinion that the impugned order cannot be sustained and the respondent No. 1 is entitled to be paid in pursuance to the award dated 20.8.2007, and status of the respondent No. 1 would remain as daily wager specially in the background that for regularization of his claim, the petitioner had already rejected the claim way back on 25.5.2011 and the same has not been assailed by the workman, therefore, it had attained finality.

17. Therefore, in view of above, the order impugned is set aside. However, in the interest of justice, this Court, while granting interim order, had observed that till the next date of listing, 50% of the amount, if already deposited, shall be released in favour of the respondent-workman and remaining 50% shall be kept in Fixed Deposit. If 50% of the amount has already been released in favour of the workman, the same would be adjusted against the admitted amount and the remaining 50%, which was directed to be kept in fixed deposit, may be returned back to the petitioner. In the result, the writ petition is allowed.