
(2012) 06 CAL CK 0015
In the Calcutta High Court
Case No : F.M.A. No. 722 of 2011

Tarun Kumar Kayal

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 19-06-2012

Acts Referred:

Constitution of India, 1950 — Article 162, 309
West Bengal Panchayat Act, 1973 — Section 212, 224

Citation : (2013) 2 CHN 18

Hon'ble Judges : Subal Baidya, J;Pratap Kumar Ray, J

Bench : Division Bench

Advocate : Sumitro Dasgupta, for the Appellant; Debabrata Saha Roy and Indranath Mitra, for the Respondent

Final Decision : Dismissed

Judgement

Pratap Kumar Ray, J.—Heard the learned advocates appearing for the parties. Assailing the judgment and order dated 2nd February, 2011 passed by the learned Trial Judge in W.P. 23370 (W) of 2010, this appeal has been preferred. Impugned order reads such:

By this writ petition, the petitioner has challenged the order dated 3rd September, 2010.

The case of the petitioner is that he was appointed as Panchayat Karmee on 5th July, 1992 on casual basis in view of the Circular dated 8th October, 2003. Therefore, he is entitled to be regularized and for such purpose, a representation was made. As such representation was not considered, a writ petition was filed and an order was passed for considering the petitioner's representation. Such representation has been considered and order passed on 3rd September, 2010. The said order dated 3rd September, 2010 is bad as it has failed to appreciate that in 1992 the petitioner was appointed as a Job Assistant and after the 2007 Rules, the petitioner has been working as Panchayat Karmee. Therefore, as a Panchayat Karmee, he is entitled to be regularized. The finding of the hearing

authority is otherwise and therefore, is liable to be set aside.

Counsel for the State respondent submits that no interference is called for with the order dated 3rd September, 2010 as the findings of the hearing authority are in accordance with Rules of 1995 and 2007.

Having considered the submissions of the parties, there is no doubt that the petitioner was appointed on 5th July, 1992 although in paragraph-2 of the writ petition, it has been averred that the petitioner was appointed as Panchayat Karmee, the said cannot be accepted as the West Bengal Panchayat (Recruitment and Conditions of Service of Gram Panchayat Karmee) Rules, 1995 was promulgated in 1995. Therefore, the petitioner prior to 1995 could not have been appointed as a Gram Panchayat Karmee.

From the order dated 3rd September, 2010, it appears that by resolution of 1992, the petitioner was appointed as a Job Worker. Such post of Job Worker is continuing even today as will evident from the West Bengal Panchayat (Recruitment of Gram Panchayat Employees) Rules, 2007. The Recruitment Rules of 2007 also dealt with recruitment of Panchayat Karmee. As the petitioner was appointed as a Job Worker and not as a Panchayat Karmee the representation made in this respect has been rightly rejected and no interference is called for with the order dated 3rd September, 2010. Another reason for not passing any order on this writ petition is that nowhere in the writ petition has it been averred that the post of Job Assistant has been abolished and in its place, Panchayat Karmees are appointed.

In view of the aforesaid, no order is passed on this writ petition and the writ petition is dismissed.

As no affidavit-in-opposition has been filed, the allegation contained in the petition is not admitted.

Urgent certified Photostat copy of this order, if applied for, be given to the parties subject to compliance with all requisite formalities.

2. Learned Trial Judge dismissed the writ application by assigning reason that there was no scope for regularization as writ petitioner admittedly was not an appointee to the post of Panchayat Karmee, since the post was created following the West Bengal Panchayat (Recruitment and Conditions of Service of Gram Panchayat Karmee) Rules, 1995, long after casual appointment of the writ petitioner in the year 1992 by resolution of the Gram Panchayat in the post of Job Worker or other job. The circular letter dated 8th October, 2003 as relied upon by the writ petitioner for relief in the regularization of service was not applied by the learned Trial Judge.

3. It is the grievance of the appellant before us that since by an unanimous resolution of Sandeskhali Gram Panchayat, the writ petitioner/appellant was appointed in the post to work as Job Worker or Karmee Sahayak temporarily on payment of nominal salary where he is continuing as casual appointee, the

appellant in terms of the notification No. 3598/PN/O/I/3S-114/2003 dated 8th October, 2003, has accrued right for regularization of his service in a permanent post. The notification as relied upon reads such:

Government of West Bengal Department of Panchayats & R.D. Panchayat Wing
Jessop Building 63, Netaji Subhas Road, Kolkata-700001

No. 3398/PN/O/I/3S-114/2003

Dated: 08.10.2003

NOTIFICATION

Whereas Panchayat bodies that is Zilla Parishads, Panchayat Samities and Gram Panchayats have been allowed to absorb casual workers, in some cases, who have been engaged in perennial type of work for a continuous period of more than three years in the concerned Panchayat bodies and orders in this behalf were issued by this Department, from time to time, in accordance with the principles prescribed by the Labour Department of the State Government in their Memo No. 100-EMP dated 13.03.1996 read with Memo No. 1700-EMP dated 03.08.1997 and Memo No. 1650-EMP dated 28.08.1980 in the matter of absorption of casual workers.

And whereas Hon'ble High Court at Calcutta in W.P. No. 766 (W) of 2002 Sudhir Chandra Mahato vs. State of West Bengal passed an order dated 2.12.2002 directing State Government to issue an appropriate well considered circular by way of notification to regularize the irregular appointments, if any, given by the respective Gram Panchayats, Panchayat Samities and Zilla Parishads in different occasions. It has also been directed that the due consideration will be made in respect of the best parts of the existing circulars and the scheme will be formulated as far as practicable with the guidelines given in the paragraph 25 of the judgment reported in AIR 1992 SC 2130 (supra).

Now, therefore, in exercise of the power conferred by section 212 of the West Bengal Panchayat Act, 1973 (West Bengal XLI of 1973), as subsequently amended, and in supersession of all earlier orders issued in this behalf, I am directed to say that the Governor is pleased hereby to direct that for the purpose of regularizing the irregular appointments, if any, given by the respective Gram Panchayats, Panchayat Samities and Zilla Parishads, as the case may be, the concerned recruiting/appointing authority shall consider the following guiding principles:

(i) the following casual and such other categories like contingent, work-charged, seasonal, etc. of eligible workers, only shall be considered who have been engaged in a perennial nature of work on the strength of a resolution in a meeting of the concerned Panchayat bodies in favour of such engagement and has rendered services for a continuous period of more than three years (for at least two hundred and forty days of work in each such calendar year for three consecutive years) within the last five years before 13.03.1996 and has

commenced his work at an age within the maximum age limit prescribed for such recruitment. Such period of works shall be five years or more in case of seasonal workers and they have been continuing as such till the date of their regularizations.

(ii) Such workers must possess the requisite qualification prescribed for the posts in the respective recruitment rules. Requirement of minimum fifty percent marks in aggregate in the Madhyamik or equivalent examination is not, however, necessary for regularization of casual and such other categories of workers in a Group "C" post in the concerned Panchayat bodies.

(iii) Such irregular appointments can only be regularized on availability of suitable vacancies in the regular establishments of the concerned Panchayat bodies.

(iv) at the time of engagement of casual and such other categories of workers their age should be within the age limit prescribed for the post in the respective recruitment rules. Over age of such workers, if any, at the time of their regularization shall be condoned by the respective appointing authorities themselves.

(v) wages of casual and such other categories of workers must have been paid out of the own fund of the concerned Panchayat bodies and not out of scheme contingencies.

(vi) the service records of casual and such other categories of workers must be satisfactory.

(vii) priority amongst the casual and each other categories of workers for regularization in the establishment shall be given only on the basis of the length of services rendered by them.

(viii) verification of attendants and medical fitness of casual and such other categories of workers are required before regularization.

(ix) regularization of casual and such other categories of workers does not run counter to the prevailing reservation policy of the State Government. If, however, in case of necessity, the order in respect of de-reservation of the post shall be obtained from the competent authority in terms of section 6 of the West Bengal Scheduled Castes and Scheduled Tribes (Reservation of Vacancies in Service and Posts) Act, 1973 read with guidelines for initiation of proposals for de-reservation as forwarded under Memo No. 98(91)-BCW/MRD-156799 dated 07.01.2000 of the Backward Classes Welfare Department of the State Government.

(x) All vacancies, inter alia, in the post in the Panchayat bodies shall normally be filled up by such candidates as may be sponsored by an employment exchange in accordance with the relevant recruitment rules. If in exigencies of administration and ad hoc or temporary employment are made by the Panchayat bodies after 13.03.1996, efforts shall be given always to replace such an adhoc temporary

employee by a regularly selected employee as early as possible. Employees appointed on ad hoc or temporary basis after 13.03.1996 who are otherwise eligible and have worked for at least three years shall, however, be allowed to compete along with other candidates sponsored by an employment exchange in the selection tests to be held by the selection committee for regular selection or appointment to the post. If such an adhoc or temporary employee does not qualify himself in the selection test for the purpose, he must give way to the regular selected candidate. The concerned recruiting/appointing authority shall not withhold or keep in abeyance of appointment of the regularly selected candidate for the sake of adhoc or temporary employee.

(xi) an ad hoc or temporary employee should not be replaced by another adhoc or temporary employee, such employee must be replaced only by a regularly selected candidate. Prior to the replacement of Casual workers orders contained in this Department Notification No. 3597-EN dated 08.10.2003 shall, however, be kept in mind of the recruiting/appointing authority.

(xii) if an when casual and such other categories of worker as regularized he/she should be placed immediately below the last regularly appointed employees that category class or service as the case may be of the concerned establishments.

(xiii) after due observance of all principles laid down hereinabove, the recruitment/appointing authority of the concerned Panchayat bodies, shall forward its recommendation to the respective Panchayat bodies for taking immediate resolution for consideration and the effect of regularization, if any, of such worker shall take place from the date on which the resolution of the concerned Panchayat bodies has been adopted.

By order of the Governor, M.N. Ray Secretary to the Govt. of West Bengal.

4. This appeal has been opposed by the State-respondents relying upon the West Bengal Panchayat (Gram Panchayat Administration) Rules, 1981 (hereinafter referred to as "said Rules, 1981"). It is the contention of the State-respondents that under Rule 36, Gram Panchayat was entitled to appoint any person only in a sanctioned post and there was no scope for appointment of any person in a post not sanctioned and approved by the Director of Panchayats and Rural Development. It is further contended that under sub-rule (5) proviso of said Rule 36, which became effective by Notification No. 3536/PN/O/I/3R-I/2000 dated 30th August, 2001, there is no scope for regularization of appointment, which was made illegally, on breach of recruitment rule. Rule 36 sub-rule (1) including its proviso and sub-rule (5) with its proviso reads such:

36. Appointment of officers and employees by Gram Panchayat and conditions of service of such officers and employees.--(1) A Gram Panchayat may, with the prior approval of the [Director of Panchayats and Rural Development,] create such posts of officers and employees as may be necessary for carrying out the work of the Gram Panchayat, and may make appointments to such posts:

Provided that no post shall be abolished or no revision of the scale of pay of shall be made by the Gram Panchayat without the prior approval of the Director of Panchayats and Rural Development:

Provided further that if any Gram Panchayat or the Pradhan creates any post without prior approval of the Director of Panchayats and Rural Development, the Gram Panchayat or any other person appointed by the Gram Panchayat against such post, shall not make any claim for contribution of the State Government for payment of salary or wages or any part of it against that post and that on such creation of post by the Gram Panchayat without prior approval of the Director of Panchayats and Rural Development, the State Government may consider discontinuation of any contribution or grant towards establishment cost relating to the said Gram Panchayat.

(2)

(5) Any appointment of an officer or employee under sub-rule (1) shall be made in accordance with the policy laid down by the State Government from time to time:

Provided that if any Gram Panchayat or the Pradhan on behalf of the Gram Panchayat makes any appointment in violation of the policy or rules or orders for recruitment in pursuance of that policy, such appointment shall be void ab initio and the Gram Panchayat or the person so appointed by the Gram Panchayat in violation of the policy, rules or orders, shall not have any claim for regularization of such appointment or for any fund for salary against such appointment.

5. On a bare reading of said provisions it appears that without any sanctioned post there was no scope for appointment of any candidate by the Gram Panchayat. Gram Panchayat is a body corporate framed and constituted in terms of the statute and not a private body. As such, limitation of exercise of statutory power in terms of its principle is squarely applicable. It is a settled legal proposition of law that a private body may act as per his wish all things as are not prohibited by any statute but a statutory body always have to act within the framework and parameters of the statutes relating to its action identified and it cannot travel beyond that. Reliance is placed to the judgments passed in the cases Maniruddin Bepari Vs. The Chairman of the Municipal Commissioners, Dacca Municipality, , Shri K. Ramadas Shenoy Vs. The Chief Officers, Town Municipal Council, Udipi and Others, Bhavnagar University Vs. Palitana Sugar Mill Pvt. Ltd. and Others, , Ramchandra Keshav Adke (Dead) by Lrs. and Others Vs. Govind Joti Chavare and Others, J.N. Ganatra Vs. Morvi Municipality, Morvi, , Meera Sahni Vs. Lt. Governor of Delhi and Others, , Union of India (UOI) and Another Vs. International Trading Co. and Another, and Dr. Ram Deen Maurya Vs. State of U.P. and Others, In all those cases the principle as formulated and settled by the Court of Chancery Division in the case Taylor vs. Taylor, reported in (1875) 1 Ch. D. 426, which subsequently followed by the Privy Council in the case Nazir Ahmed vs. King Emperor, reported in 1936 Privy Council 253. In the

book of Statutory Interpretation by Crawford, wherein at page 334, this principle has been discussed under the heading "Express Mention and Implied Exclusion (Expressio Unius Est Exclusio Alterius", which reads such:

Express Mention and Implied Exclusion (Expressio Unius Est Exclusio Alterius.-...if a statute enumerates the things upon which it is to operate, everything else must necessarily, and by implication, be excluded from its operation and effect...if the statute directs that certain acts shall be done in a specified manner, or by certain person, their performance in any other manner than that specified, or by any other person than one of those named, is impliedly prohibited.

6. Hence, a Gram Panchayat created under statute, namely, West Bengal Panchayat Act, 1973 (hereinafter referred to as "said Act") had no jurisdiction/power to take resolution on 5th July, 1992, appointing the writ petitioner in a post, which was not sanctioned and approved and not created following the said Rules, 1981.

7. Having regard to the breach committed by different Panchayats, ultimately, said Rules, 1981, got incorporation of a proviso under sub-rule (5) of Rule 36 not only restraining such type of appointment but declaring that such appointments would be void ab initio and there would be no regularization of appointment or release of any fund for salary from Government exchequer. The second proviso under sub-rule (1) of Rule 36 also was incorporated by notification dated 30th August, 2001 putting total embargo that if without prior approval of the Director of Panchayats and Rural Development any post is created and anybody is appointed thereto, he would not be entitled to claim contribution of State Government for payment of salary and wages against that post.

8. The West Bengal Panchayat (Gram Panchayat Administration) Rules, 1981 was framed in exercise of the power conferred by section 224 of the said Act. On reflection of the said Rules, 1981, particularly, proviso of sub-rule (5) of Rule 36, a question involves whether notification dated 8th October, 2003 as relied upon by the learned advocate for the appellant has any legal force. It appears that said notification was issued u/s 212 of the said Act, which reads such:

212. Directions by State Government.--In the discharge of their functions the Gram Panchayat, the Panchayat Samiti and the Zilla Parishad shall be guided by such instructions or directions as may be given to them by the State Government from time to time in conformity with the provisions of this Act.

9. The said Rules, 1981 stipulating the rules for appointment of any employee and its restriction thereof, was promulgated in exercise of power conferred by section 224 of the said Act, which reads such:

224. Power to make rules.--(1) The State Government may, after previous publication, make rules for carrying out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power,

such rules may provide for all or any of the matters which under any provision of this Act, are required to be prescribed or to be provided for by rules.

(3) All rules made under this Act shall be published in the Official Gazette, and shall, unless some later date is appointed by the State Government, come into force on the date of such publication.

(4) All rules made under this Act shall be laid for not less than fourteen days before the State Legislature as soon as possible after they are made and shall be subject to such modification as the State Legislature may make during the session in which they are so laid. Any modification of the said rules made by the State Legislature shall be published in the Official Gazette, and shall, unless some later date is appointed by the State Government, come into force on the date of such publication.

10. On a comparative reading of section 212 and section 224 as quoted above it appears that those sections have their activity field in different areas, section 224 is the power to make rules for carrying out the purpose of said Act, which is inclusive of giving appointment to the employees to perform the duties and responsibilities of the Panchayat, whereas section 212 deals with the direction of the State Government with reference to discharge of function of Gram Panchayat or Panchayat Samiti and/or Zilla Parishad.

11. When a rule making authority being empowered under the statute has framed a rule with categorical restriction of giving appointment to a post not sanctioned/approved by the Director of Panchayats and Rural Development and when there is a total embargo of regularization specifically stipulated in that provision, namely, proviso of sub-rule (5) of Rule 36 under the said Rules, 1981, we are of the view that there was no scope to modify the said rule by administrative instruction as purportedly intended to be done in exercise of power u/s 212 of the said Act for the reason that even by exercising constitutional power to issue executive/administrative instruction taking resort of Article 162 of the Constitution of India, there was no scope to vary or modify any rules framed in terms of the provision of a statute by the competent legislatures.

12. Article 162 of the Constitution of India is exercisable in a field where there is no legislation but once there legislation, in that area by administrative order or executive instruction under Article 162 of the Constitution of India contrary to such legislation if anything is done same becomes absolutely void ab initio. This point has been answered by the Apex Court dealing with said specific question, which is applicable in disposing of this appeal, by a Bench constituted by three Members of the Apex Court in the case B.N. Nagarajan and Others Vs. State of Karnataka and Others, wherein in para 5 the Court held "when rules framed under Article 309 of the Constitution of India are in force, no regularization is permissible under exercise of the executive powers of the Government under Article 162 thereof in contravention of the rules". In the case Punjab State Warehousing Corp., Chandigarh Vs. Manmohan Singh and Another, the Court

answered the question whether any statutory rule could be modified or altered by an executive instruction far less by way of a circular letter. Paragraph 12 of the said report reads such:

Furthermore, when the terms and conditions of the services of an employee are governed by the rules made under a statute or the proviso appended to Article 309 of the Constitution of India laying down the mode and manner in which the recruitment would be given effect to, even no order under Article 162 of the Constitution of India can be made by way of alterations or amendments of the said rules. A fortiori if the recruitment rules could not be amended even by issuing a notification under Article 162 of the Constitution of India the same cannot be done by way of a circular letter.

13. B.N Nagarajan (supra) was relied in the Constitution Bench judgment passed in the case Secretary, Secretary, State of Karnataka and Others Vs. Umadevi and Others, Similar view expressed by the Apex Court in the case A. Umarani Vs. Registrar, Cooperative Societies and Others, a judgment of three Judges" Bench. Para 45 of the said report reads such:

No regularization is, thus, permissible in exercise of the statutory power conferred under Article 162 of the Constitution if the appointments have been made in contravention of the statutory rules.

14. Having regard to the aforesaid legal position, hence, when under the said Rules, 1981, when there is a specific provision being proviso under sub-rule (5) of Rule 36 by declaring such type of appointment in a non-sanctioned post and without following recruitment rules as void ab initio and mandating by using negative term that there should not be any regularization of service, we are of the view that circular letter/notification dated 8th October, 2003 as relied upon, being a notification issued by the Hon"ble Governor in exercise of power u/s 212 of the said Act, has no legal sanction of its applicability. The same being contrary to the aforesaid proviso of sub-rule (5) of Rule 36 of the said Rules, 1981, accordingly, has no effective force to regularize illegal appointment of present writ petitioner. Considering the aforesaid legal position the writ petitioner/appellant accordingly accrued no right for regularization of his service in a permanent post. Besides such, we are relying upon the judgment of Umadevi (supra) to hold that there is no scope to regularize any illegal appointment on breach of the rule. In the instant case, admittedly appointment was illegal per se as the concerned Gram Panchayat had no power and jurisdiction to appoint any candidate in a post neither created nor sanctioned and approved by the competent authority i.e. the State Government.

Having regard to the aforesaid findings and observations there is no merit in the appeal.

Appeal, accordingly, stands dismissed.

There will, however, be no order as to costs.

Subal Baidya, J.

I agree.