(2013) 08 DEL CK 0098

In the Delhi High Court

Case No : LPA 197 of 2013

Union of India and Another APPELLANT

Vs

Satish Joshi RESPONDENT

Date of Decision : 14-08-2013

Acts Referred:

Constitution of India, 1950 — Article 14, 226, 311, 311(2)

Citation : (2013) 137 DRJ 548 : (2013) 5 ILR Delhi 3504

Hon'ble Judges : Badar Durrez Ahmed, Acting C.J.;Vibhu Bakhru, J

Bench : Division Bench

Advocate : Rakesh Munjal, Ms. Anita Pandey and Mr. Rakesh Tiwari, for the Appellant;

Judgement

Vibhu Bakhru, J.—This is an appeal preferred by the Government of India through Joint Secretary, Ministry of Steel and National Project Coordinator, Project Management Cell, UNDP/GEF Project. The present appeal is directed against the order dated 20.03.2013 passed by a learned Single Judge of this Court in Writ Petition being W.P.(C) 3215/2012 preferred by the respondent. The controversy in the present matter relates to the employment of the respondent as Manager (Finance and Administration) with a project being undertaken by the Ministry of Steel, Government of India in Collaboration with United Nations Development Programme (UNDP). The brief outline of facts relevant for considering the controversy in the present matter are stated as under. The Ministry of Steel, Government of India in collaboration with United Nations Development Programme and Global Environmental Facility (GEF) initiated a project titled "Removal of Barriers to Energy Efficiency Improvement in the Steel Re-rolling sector in India". The said project is funded by an International Grant from Global Environment Fund (GEF) and Steel Development Fund. The Project was initiated in September 2004 and was initially for a duration of five years but the same has been extended from time to time and the Project is now scheduled to end on 31.12.2013.

2. The appellants had advertised for a post of Manager (Finance and Administration) which was published in a daily "Times of India" on 02.07.2008. The advertisement indicated the qualification criteria for candidates to be a qualified Chartered Accountant with 10-15 years experience. The advertisement disclosed that the duration of the employment contract would be as under:-

Duration of Contract: One year with provision of extension if the project period gets extended beyond September, 2009.

3. The respondent fulfilled the qualification criteria and after an interview was selected for the said post. An appointment letter dated 05.08.2008 was issued to the respondent which is quoted below:-

UNDP/GEF/302/06/1919

5th August, 2008

Mr. Satish Joshi

237 A, Pocket J & K

Dilshad Garden

Delhi-110095

Sub: UNDP/GEF Project (Steel)

Appointment Letter for the post of Manager (Finance & Administration)

Dear Sir,

This has reference to your application for the above post and subsequent interview held in Ministry of Steel on 30th July, 2008 by the Appointment Sub-committee of Project Advisory Committee (PAC).

We are pleased to inform you that you have been selected for the above post and the terms & conditions of appointment are as follows:-

You will be required to sign a General Service Agreement at the time of your joining. Please confirm the acceptance of this offer by return mail and inform us the likely date of your joining, which should be latest by 1st September, 2008.

Thanking you,

Yours faithfully

Sd/-

G. Mishra

National Project Coordinator (I/c)

4. In terms of the appointment, the respondent and appellant no. 2 executed an agreement which contained the relevant terms of employment. The relevant

extract from the said agreement is quoted below:-

GENERAL SERVICE AGREEMENT

Memorandum of Agreement Made This 1st day of September, 2008 between Project Management Cell (PMC), UNDP/GEF Project (Steel), Ministry of Steel (MOS), Project on "Energy Efficiency Improvement in Steel Rerolling Sector in India-IND/03/G31, currently at 301-306, Aurobindo Place, Hauz Khas, New Delhi-110016, hereinafter referred to as "PMC" and Mr. Satish Joshi, 237-A, Pocket J & K, Dilshad Garden, Delhi-110095 hereinafter referred to as the "Manager (Finance & Administration), (National Project Personnel (NPP)".

WHEREAS PMC desires to engage the service of the NPP on the terms and conditions hereinafter set forth, and

WHEREAS the NPP is ready and willing to accept this engagement of service with PMC on the terms and conditions the parties hereto agree as follows:

1. NATURE OF SERVICES

As per Terms of Reference (TOR)-Annexure-I

2. DURATION OF AGREEMENT

The GSA shall be effective from the 1st day of September, 2008 till September, 2009. The GSA shall be in force except subject to the provision of Article 8 below. The agreement shall be extended for the desired period subject to performance, requirement and extension of the project period beyond September, 2009.

xxxxx xxxxx xxxxx

5. STATUS OF THE NPP

The NPP shall be considered as being an Expert on Mission for the purposes of providing services as per the terms of this agreement. The NPP shall not be considered in any respect as being a staff member of UNDP/Ministry of Steel.

xxxxx xxxxx xxxxx

8. TERMINATION

a. Either party may terminate this agreement at any time by giving one month notice in writing of its intention to do so. PMC has also the option to pay the NPP his pay and allowance for the period of one month or the period by which such notice falls short of one month and terminate his service immediately. On the other hand, the NPP has no such option, but has necessarily to give one month notice, so that action may be taken to recruit his/her successor. NPP shall be released in normal situation, within one month of notice period. However, if the job demands, NPP must stay and complete the urgent/important assignment in hand prior to seeking release.

b. PMC in consultation with Ministry of Steel and UNDP India, shall have the right to withhold a reasonable amount of payment due to the NPP, if PMC has to incur additional costs resulting from termination of this agreement by the NPP in a manner, contrary to the preceding subsection, or from failure by the NPP to complete the terms of this agreement to the satisfaction of PMC/Ministry of Steel/ UNDP.

5. The contract of employment of the respondent came to an end in September 2009. However, the same was extended by the appellant, by a communication dated 16.11.2009, for a further period upto 31.08.2010. The contract of employment was further extended for the second time on 30.08.2010 for a further period till 31.08.2011 which was again extended till 31.12.2011. In the meantime, the appellant no. 2 alongwith officers of UNDP decided to appoint a second manager, in addition to the respondent, to speed up the pending activities of the project. Accordingly, the appellants appointed another person as Manager (Finance & Administration), however, the same was challenged by the respondent by way of a writ petition being W.P.(C) No. 3382/2011 filed in this court. The said writ petition was disposed off by an order dated 19.05.2011, wherein it was observed that the respondent had made a representation against the appointment of the second Manager (Finance & Administration) but has not received any response with respect to the same. This Court accordingly directed appellant no. 2 to dispose of the representation of the respondent and with this direction disposed off the writ petition.

6. The appellant no. 2 made some internal noting with regard to the performance of respondent no. 1 from time to time. At a meeting held on 28.12.2011 the Steering Committee of the Project decided to form a committee to review the performance of National Project Personnel (NPP) and other staff employed with the Project and recommend extension of their contract and increment based on their performance review. The relevant extract of the minutes of the said meeting are as under:

5.2 Performance appraisal system and extension/increment to staff

NPC informed that as decided in 16th PSC, a system is designed for reviewing performance of staff/NPPs for extension and increment as below:

? A self performance form will be designed based on UNDP format for self assessment.

? The same will be filled out by staff/NPP and will be commented by respective supervisor

? Review of performance will be done by an external committee. Committee may ask for further information/report from concerned NPP or Personnel 1/c if required

? The committee will recommend extension & increment.

? The committee constitution will be decided by NPD (for NPPs) and NPC (for support staff)

? On approval of above, detailed procedure will be put up for approval by NPD and implemented.

The Chairman appreciated the efforts taken by NPC and approved the above regulations.

7. Pursuant to the decision of the Steering Committee an external evaluation committee was formed on 03.01.2012 to review the performance of personnel and to recommend their extension. The said committee consisted of one representative each from the Ministry of Steel, UNDP and National Institute of Secondary Steel Technology. The external evaluation committee met on 28.03.2012 and decided not to recommend further extension of the employment contract with the respondent. This recommendation was accepted and the appellant no. 2 issued a letter dated 17.04.2012 extending the contract only till 17.4.2012 and further communicating the decision not to extend the contract any further. Thus the services of the respondent came to an end on 17.4.2012. The letter dated 17.04.2012 also communicated that the respondent would be paid one month''s fees in lieu of the notice period. The letter dated 17.04.2012 is extracted below:-

Date: 17th April 2012

To

Mr. Satish Joshi

Manager (F & A-NEX)

Project Management Cell

UNDP/GEF Steel Project

39, Tughlakabad Institutional Area

M B Road

New Delhi

Subject: Discontinuation of service in Project Management Cell(PMC)

The undersigned is directed to refer to the aforesaid subject and to convey the decision of the competent authority that your service contract engagement with PMC which expired on 31-12-2011, has been extended up to 17-4-2012 and the competent authority has decided not to extend the service contract further.

The undersigned is also directed to convey that, as per decision taken by competent authority, PMC will pay you one month''s professional fees in lieu of one month''s notice period on handing over all the official documents, computers, cheque books, pass books, keys etc. to administration I/c and the same should be done immediately before close of business hours today.

Further, as decided by competent authority, the task of handing over/taking over will be coordinated by Ms. Manisha Sanghani, Administration I/c alongwith Shri Arindam Mukherjee, Deputy Manager (Implementation).

Sd/-

ACR Das

Industrial Advisor, Ministry of Steel &

National Project Coordinator

8. Aggrieved by the non-extension of his contract of employment, the respondent preferred a writ petition being W.P.(C) No. 3215/2012. The said writ petition was disposed off by an order dated 20.03.2013 which is impugned in the present appeal. The learned Single Judge set aside the letter dated 17.04.2012 and further held that the respondent could not be removed from service without following principles of natural justice. The learned Single Judge referred to the decision of the Supreme Court in the case of Secretary, State of Karnataka and Others Vs. Umadevi and Others, and held that contractual appointment for a project are ordinarily for a period of the project and the services of the employees have to be co-terminus with the project. The learned Single Judge further held that principles of natural justice had been violated inasmuch as the respondent had been removed without calling any explanation from the respondent. The learned Single Judge also noted that the issue regarding inadequate performance of the respondent had not been brought to the notice of the respondent and the letter dated 17.04.2012 did not provide any reasons for termination of the services of the respondent.

9. We have heard the counsel for the appellant and the respondent in person. In the present case, the principal question to be considered is whether the respondent has any vested right in continuing with his employment despite his contract of employment having come to an end by efflux of time.

10. Indisputably the contract of employment of the respondent had come to an end on 31.12.2011. The same was extended by the letter dated 17.04.2012 till that date and the appellant had decided not to extend the same any further. The General Service Agreement entered into between appellant no. 2 and the respondent expressly provided that the respondent would not be considered in any respect as being a staff member of UNDP/Ministry of Steel but would be considered as an expert on mission for the purpose of providing services. The agreement further provided that it would be effective till September 2009 but would be extended for the desired period subject to "performance, requirement and extension of the project period beyond September 2009". We do not think that the contract leaves any doubt as to the terms of the employment and we find it difficult to read in the agreement any right in favour of the respondent which would entitle him to insist that the contract be extended beyond the period specified if the performance of the respondent was found wanting by the appellants. It is also relevant to note that the General Services Agreement

contains a termination clause entitling either party to terminate the agreement by giving one month''s notice of its intention to do so. It has been expressly agreed that appellant no. 2 would have the option to pay the respondent, his salary and allowance for the period by which the notice of termination falls short of one month and terminate the services with immediate effect. Having agreed to the terms of the contract it would not be open for the respondent to contend that his services were liable to be continued de-hors the contract which he had voluntarily signed.

11. We are also unable to agree with the decision of the learned Single Judge that the services of persons employed for a project have to be co-terminus with the project in question. We are unable to interpret the decision of the Supreme Court in the case of Umadevi (supra) to support the view that persons employed on a contractual basis for a project have a right to continue in employment for the complete tenure of the project notwithstanding their contract having come to an end with efflux of time. In that case, the Supreme Court was considering the question of whether persons employed on ad hoc basis without following the regular process of selection and appointment, could be regularised. The court held that unless an appointment was in terms of the relevant rules after a proper competition among qualified persons, the same would not confer any right on the employees so appointed. Although the said decision may not be applicable on the facts of the present case, the following observations made by the court are relevant:-

43. ....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.

12. The respondent has relied upon the judgment of a Division Bench of the Calcutta High Court in the case of Union of India & Ors. V. Subhojit Dutta & Ors: delivered on 17.04.09 in W.P.(C) No. 936/2008. A copy of the said judgment has been handed over by the respondent. The said decision also does not further the case of the respondent. In that case, the respondent therein, had filed a writ petition as he was denied the benefit of increase in the age of superannuation from 58 years to 60 years. It was contended on behalf of the appellant therein that the respondent was appointed as a Director (Project Management) in Bridge & Roof Company Ltd., which was a public sector undertaking. The appointment was on the basis of a contract which specified the term of the respondent as "till the date of his superannuation or until further orders". The contract also

specified the term of employment could be terminated by either side on three months notice or on payment of three months salary in lieu thereof. At the time of appointment of the respondent, the age of superannuation for the employees of M/s. Bridge & Roof Company Ltd. was 58 years. It was, thus, contended on behalf of the appellant that the contractual employment of the respondent came to an end on his attaining the age of 58 years. The Court held that there was no valid reason why the petitioner should be denied the benefit of the increase in the age of superannuation especially since all other employees have been granted this benefit. The Court further held that even in contractual matters where the state or its instrumentalities exercise contractual power a judicial review could not be denied. The facts of the present case are completely different. It is not the case of the respondent that he has been excluded from the benefit of a policy which is universally being applied to other employees. In the present case, the term of employment of the respondent has come to an end by efflux of time and the External Committee has not recommended extension of the same. We do not find that the decision of the appellant in not extending the term of the respondent by accepting the recommendation of the External Committee to be arbitrary.

13. In the case of Director, Institute of Management Development, U.P. Vs. Smt. Pushpa Srivastava, the Supreme Court while considering the case of an employee appointed on a contractual basis held as under:-

20....To our mind, it is clear that where the appointment is contractual and by efflux of time, the appointment comes to an end, the respondent could have no right to continue in the post. Once this conclusion is arrived at, what requires to be examined is, in view of the services of the respondent being continued from time to time on ''ad hoc'' basis for more than a year whether she is entitled to regularisation? The answer should be in the negative.

14. In the case of Vidyavardhaka Sangha and Another Vs. Y.D. Deshpande and Others, This court held as under:-

4. It is now well-settled principle of law that the appointment made on probation/ ad hoc basis for a specific period of time comes to an end by efflux of time and the person holding such post can have no right to continue on the post. In the instant case as noticed above, the respective respondents have accepted the appointment including the terms and conditions stipulated in the appointment orders and joined the posts in question and continued on the said post for some years. The respondents having accepted the terms and conditions stipulated in the appointment order and allowed the period for which they were appointed to have been elapsed by efflux of time, they are not now permitted to turn their back and say that their appointments could not be terminated on the basis of their appointment letters nor they could be treated as temporary employee or on contract basis. The submission made by the learned Counsel for the respondents to the said effect has no merit and is, therefore, liable to be rejected. It is also well-settled law by several other decisions of this Court that appointment on ad

hoc basis/temporary basis comes to an end by efflux of time and persons holding such post have no right to continue on the post and ask for regularisation etc.

15. It is settled law that even in matters of contract, a State cannot act whimsically and capriciously or in an arbitrary manner. However, this principle cannot be extended to support the view that in every case it would be incumbent upon the State to extend a contract of employment on its expiry. We find it difficult to accept the proposition that a State has to give a show cause notice or hear a party in the event it decides not to extend a contract which has come to an end by efflux of time. A party to a contract has no right to claim that the contract with him be extended even if such right is not afforded to the party by the terms of the contract. Once the terms of the contract have been duly performed and the contract has come to an end, there would be no obligation on the part of the State to extend the same. In the present case, the contract of employment came to an end on 31.12.2011. The respondent continued to render services during the period pending consideration of extension of contract by the appellants. The Committee formed to consider the issue regarding extension of contracts of NPPs and staff decided not to recommend extension of the employment contract with the respondent after considering his performance. This recommendation of the external committee was accepted and it was decided not to extend the contract of service of the respondent In proceedings under Article 226 of the Constitution of India, this Court is not required to examine the merits of the decision of the appellants or to evaluate the performance of the respondent in discharge of his services under the service agreement. It is sufficient to note that a committee considered the aspects which were relevant for the purpose of deciding whether the contract of service of respondent should be extended or not. Having noted the same, it is not possible to conclude that the decision of the appellant not to extend the contract of respondent was arbitrary or offends Article 14 of the Constitution of India.

16. While considering the contention that principles of natural justice have been violated by not affording the respondent, an opportunity of making any representation with regard to his performance, it would be important to bear in mind that the performance review conducted by the external committee on 28.12.2011 was not for the purposes of inflicting any punitive measure on the respondent but to only consider the suitability of his contract being extended. The decision to not extend the contract of employment of the respondent cannot be considered to be a dismissal from service by way of a punishment. It is a discharge simpliciter on the employment contract coming to an end by efflux of time. An employee will not have a right to be heard where an inquiry is made merely for the purposes of considering the suitability for extending the contract of employment.

17. In the case of State of Uttar Pradesh and Another Vs. Kaushal Kishore Shukla, the Supreme Court considered the case of an employee who was appointed on an adhoc basis for a fixed period as an Assistant Auditor under the

Local Funds Audit Examiner of the State of Uttar Pradesh. The order of appointment stated that the appointment was adhoc, temporary for a fixed term and his services were liable to be terminated at any time without assigning any reason. The adhoc appointment of the employee was extended from time to time. During the course of his employment, it was alleged that the employee had acted in excess of his authority while conducting an audit of the "Boys Fund Account". After a preliminary inquiry into the said allegation, the respondent employee was relieved of his duties from his current posting at Sitapur and was directed to join his duties at Allahabad. He failed to do join his duties and his services were terminated. The employee preferred a writ petition challenging his termination orders as being illegal and in violation of Article 311 of the Constitution of India. A Division Bench of the Allahabad High Court at Lucknow allowed the writ petition. A SLP was preferred on behalf of the State of Uttar Pradesh before the Supreme Court. The Supreme Court granted leave and held as under:-

6....Under the service jurisprudence a temporary employee has no right to hold the post and his services are liable to be terminated in accordance with the relevant service rules and the terms of contract of service. If on the perusal of the character roll entries or on the basis of preliminary inquiry on the allegations made against an employee, the competent authority is satisfied that the employee is not suitable for the service whereupon the services of the temporary employee are terminated, no exception can be taken to such an order of termination.

7. A temporary government servant has no right to hold the post, his services are liable to be terminated by giving him one month''s notice without assigning any reason either under the terms of the contract providing for such termination or under the relevant statutory rules regulating the terms and conditions of temporary government servants. A temporary government servant can, however, be dismissed from service by way of punishment. Whenever, the competent authority is satisfied that the work and conduct of a temporary servant is not satisfactory of that his continuance in service is not in public interest on account of his unsuitability, misconduct or inefficiency, it may either terminate his services in accordance with the terms and conditions of the service or the relevant rules or it may decide to take punitive action against the temporary government servant. If it decides to take punitive action it may hold a formal inquiry by framing charges and giving opportunity to the government servant in accordance with the provisions of Article 311 of the Constitution. Since, a temporary government servant is also entitled to the protection of Article 311(2) in the same manner as a permanent government servant....

8. Learned Counsel for the respondent urged that the allegations made against the respondent in respect of the audit of Boys Fund of an educational institution were incorrect and he was not given any opportunity of defence during the inquiry which was held ex-parte. Had he been given the opportunity, he would

have placed correct facts before the inquiry officer. His services were terminated on allegation of misconduct founded on the basis of an ex-parte enquiry report. He further referred to the allegations made against the respondent in the counter-affidavit filed before the High Court and urged that these facts demonstrate that the order of termination was in substance, an order of termination founded on the allegations of misconduct, and the ex parte enquiry report. In order to determine this question, it is necessary to consider the nature of the respondent''s right to hold the post and to ascertain the nature and purpose of the inquiry held against him. As already observed, the respondent being a temporary government servant had no right to hold the post, and the competent authority terminated his services by an innocuous order of termination without casting any stigma on him. The termination order does not indict the respondent for any misconduct. The inquiry which was held against the respondent was preliminary in nature to ascertain the respondent''s suitability and continuance in service. There was no element of punitive proceedings as no charges had been framed, no inquiry officer was appointed, no findings were recorded, instead a preliminary inquiry was held and on the report of the preliminary inquiry the competent authority terminated the respondent''s services by an innocuous order in accordance with the terms and conditions of his service. Mere fact that prior to the issue of order of termination, an inquiry against the respondent in regard to the allegations of unauthorised audit of Boys Fund, was held does not change the nature of the order of termination into that of punishment as after the preliminary inquiry the competent authority took no steps to punish the respondent instead it exercised its power to terminate the respondent''s services in accordance with the contract of service and the Rules.

18. The Court further held that an employee has no right to be heard in respect of an inquiry which is held for the purposes of collection of facts in regard to the conduct and work of a Government servant, since the inquiry is only for the purposes of satisfaction of the Government. It is only when the Government decides to hold a regular inquiry for purposes of inflicting punishment that a Government servant gets a protection of Article 311 of the Constitution of India. A hearing is required to be afforded only in cases where an adverse or punitive action is contemplated. In the present case, indisputably the action of the appellant in not extending the contract of service cannot be taken as a punitive measure. The review undertaken by the external committee on 28.12.2012 is only for the purposes of considering extension of contract of NPPs and staff and further considering payment of increments, if any. The said review also cannot be stated to have been undertaken for the purposes of inflicting any punishment. Thus, granting a hearing or a right of representation with respect to such review is not warranted by principles of natural justice and, in our view, the learned Single Judge erred in coming to a conclusion that in the present case principles of natural justice had been violated.

19. It is now settled that a contract of employment stands on a different footing than a commercial contract and an unfettered right of hire and fire is not

available to the State as the same would violate Article 14 of the Constitution of India. However, this is not a case of a permanent employee whose services are being terminated but a temporary employee whose contract of service has come to an end on account of efflux of time. The Supreme Court in the case of Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, struck down Rule 9(i) of Central Inland Water Transport Corporation Limited (Service, Discipline and Appeal) Rules, 1979 as being unconscionable as it provided an unfettered right on the Government to terminate the employment of a permanent employee by giving three months notice. However, this is not a case where the contract of employment has been challenged as being unconscionable or arbitrary as giving an unfettered right of hire and fire to the state. In the present case, there is nothing unconscionable about the contract entered into between the appellant and the respondent and thus, non-extension of contract cannot be stated to be unreasonable or an act which falls foul of Article 14 of the Constitution of India.

20. The Supreme Court in the case of GRIDCO Limited and Another Vs. Sri Sadananda Doloi and Others, while considering the applicability of the principles enunciated in the case of Brojo Nath Ganguly (supra) in relation contractual employees held as under:-

27. Applying the above principles to the case at hand, we have no hesitation in saying that there is no material to show that there is any unreasonableness, unfairness, perversity or irrationality in the action taken by the Corporation. The Regulations governing the service conditions of the employees of the Corporation, make it clear that officers in the category above E-9 had to be appointed only on contractual basis.

28. It is also evident that the renewal of the contract of employment depended upon the perception of the management as to the usefulness of the Respondent and the need for an incumbent in the position held by him. Both these aspects rested entirely in the discretion of the Corporation. The Respondent was in the service of another employer before he chose to accept a contractual employment offered to him by the Corporation which was limited in tenure and terminable by three months'' notice on either side. In that view, therefore, there was no element of any unfair treatment or unequal bargaining power between the Appellant and the Respondent to call for an over-sympathetic or protective approach towards the latter. We need to remind ourselves that in the modern commercial world, executives are engaged on account of their expertise in a particular field and those who are so employed are free to leave or be asked to leave by the employer. Contractual appointments work only if the same are mutually beneficial to both the contracting parties and not otherwise.

21. In the present case also the respondent is a qualified chartered accountant and was aware that his employment with the project was only for a fixed term. The respondent has no vested right to insist that his contract of service be extended beyond the agreed period. Thus, any interference by this Court under

Article 226 of the Constitution of India would not be warranted. For the reasons stated above, we set aside the order dated 20.3.2013 passed by the learned Single Judge in Writ Petition (C) No. 3215/2012. The parties are left to bear their own costs.

