
(1997) 07 AHC CK 0050
In the Allahabad High Court
Case No : C.M.W.P. No. 16595 of 1994

Vidya Varidhi Pandey

APPELLANT

Vs

Sahayak Vikas Adhikari and Others

RESPONDENT

Date of Decision : 10-07-1997

Acts Referred:

Constitution of India, 1950 — Article 141, 311

Citation : (1997) 07 AHC CK 0050

Hon'ble Judges : R.A. Sharma, J;Aloke Chakrabarti, J

Bench : Division Bench

Advocate : H.N. Tripathi, for the Appellant; H.R. Misra and S.C., for the Respondent

Final Decision : Dismissed

Judgement

R.A. Sharma, J.—Petitioner, who was an Accountant in Sadhan Sahkari Samiti Ltd., Dugraee, district Fatehpur, moved an application before the District Assistant Registrar, Co-operative Societies, Fatehpur for his appointment as Secretary, Sadhan Sahkari Samiti Ltd., Dharupur, district Fatehpur (hereinafter referred to as Dharupur Society). Petitioner's prayer was recommended by the Assistant Development Officer and the Branch Manager of the District Cooperative Bank. The District Assistant Registrar vide his order dated 6.2.1990 appointed the Petitioner to work as the Secretary of Dharupur Society till further arrangement is made. Pursuant to the said order, the Petitioner handed over charge of the post of Accountant in Dugraee Society and joined Dharupur Society to officiate as its Secretary. By order dated 24.7.1993, the Respondent No. 3, who was a Cadre Secretary working in another society, was transferred to Dharupur Society as its Secretary. As the Petitioner did not handover the charge of the post of Secretary of Dharupur Society to Respondent No. 3, Sahayak Vikas Adhikari (Co-operative), Fatehpur asked the Petitioner, vide order dated 10.3.1994 at Annexure X to the writ petition, to handover charge to Respondent No. 3. Being aggrieved by the said order, the Petitioner has filed this writ petition.

2. Parties have exchanged affidavits and we have heard the learned Counsel for the parties. Learned Counsel for the Petitioner has made the following submissions in support of the writ petition:

1. As the initial appointment of the Petitioner as Secretary of Dharupur Society was confirmed by the Society on 20.1.1992, he became a confirmed cadre Secretary belonging to the centralised service and therefore, he cannot be replaced by any other Secretary unless he is also transferred to another society as Secretary.

2. As the transfer of Respondent No. 3 to Dharupur Society was stayed by the Deputy Registrar, Co-operative Societies vide order dated 29.9.1993, the transfer order cannot be implemented and the Petitioner cannot be relieved from the post of Secretary of Dharupur Society and Respondent No. 3 cannot work as Secretary of that Society,

3. As the Petitioner is working as Secretary for several years, his service is liable to be regularised, and

4. In any case the Petitioner is entitled to be reverted to his original post of Accountant in Dugraee society.

Learned counsel for the Respondents has disputed the aforesaid contentions.

3. Dharupur Society is a Primary Agricultural Co-operative Credit Society. The Government of U.P. in exercise of power conferred on it by Section 122A of the U.P. Co-operative Societies Act, 1965 (hereinafter referred to as the Act) has made the U.P. Primary Agricultural Co-operative Credit Societies Centralised Service Rules, 1976 (hereinafter referred to as the Rules) for regulating the conditions of service of the members of the centralised service of such societies. As per Rule 3, the centralised service comprises of the posts of Secretaries of Primary Agricultural Co-operative Credit Societies. By Rule 13, the District Administrative Committee has been made the appointing authority of the members of the centralised service in the district. Rule 24 provides that appointment to the centralised service shall be made by direct recruitment or by promotion. According to Rule 25, appointment of Secretaries of category IVth is to be made by direct recruitment by the Regional Committee by holding written test and viva, as may be prescribed by the Registrar. The appointment to other categories of Secretaries is to be made by promotion in accordance with Rule 26. Rule 27 requires that a person appointed to the centralised service is to be placed on probation for a period of two years, which period may be extended by the District Administrative Committee for a further period of six months. Rule 30 empowers the State Authority to frame Regulations for the members of the centralised service on their service matters such as method of promotion, confirmation, termination of service, service record, pay scale etc. In exercise of powers conferred by Rule 30, the U.P. Primary Agricultural Co-operative Credit Societies Centralised Service Regulations, 1978 (hereinafter referred to as the Regulations) have been framed. Regulation 16 has laid down the source of

recruitment, according to which, subject to Rule 25, the appointment in the centralised service may be made both by direct recruitment and by promotion. But irrespective of the source of recruitment, power to appoint the Secretary vests in the District Administrative Committee. The District Assistant Registrar, who is a Secretary/Member of the District Administrative Committee does not have any such power. Rule 14, which has enumerated the powers of the Secretary/Member does not confer any power on him to appoint a Secretary. There is also no resolution/order of the District Administrative Committee on the record authorising the Secretary/Member to appoint the Secretary. Even the regulations do not confer any power on the Secretary/Member to appoint a Secretary. The Petitioner's appointment as Secretary was, therefore, dehors the rules and regulations. Supreme Court in *Ashwani Kumar and Others Vs. State of Bihar and Others*, . has laid down that the appointments which are dehors the rules are *ex facie* illegal.

4. Petitioner's claim about the confirmation of his service as Secretary by Dharupur Society vide order dated 20.1.1992 is also unsustainable. Under the rules and regulations, no Primary Agricultural Co-operative Credit Society has the power to appoint a Secretary or to confirm him in service. A Secretary is appointed by the District Administrative Committee. As per Rule 27 read with Regulation 23, a new appointee is placed on probation for a period of two years, which period is liable to be extended by the District Committee for further period of six months. Under Rule 24, the power to confirm an employee on completion of statutory period of probation vests in the District Administrative Committee. The order of Dharupur Society confirming the Petitioner is thus a nullity and cannot be acted upon. Such an order does not confer any right on the Petitioner. That apart, Supreme Court in *Ashwani Kumar and Ors. v. State of Bihar and Ors.* (supra) has held that if the initial entry into the service itself is unauthorised, the question of its confirmation does not arise and if any order of regularisation or confirmation is passed, it would be an exercise in futility. The first contention of the learned Counsel for the Petitioner is, therefore, rejected.

5. The second submission of the learned Counsel for the Petitioner has to be rejected for three reasons, namely:

(i) Rule 13(1)(ii) has conferred power to transfer a Secretary on the District Administrative Committee. To the same effect is Regulation 36, according to which District Administrative Committee can transfer a Secretary as per Rule 13 and the guidelines laid down by the State Authority. The rules and regulations do not give power to the Deputy Registrar to transfer the Secretary or to stay his transfer. No such provision has been placed before the Court by the learned Counsel for the parties,

(ii) The Respondent No. 3 was transferred to Dharupur Society by the District Administrative Committee on 24.7.1993. The Deputy Registrar vide his order dated 29.9.1993 has directed that if any transfer order has not been implemented till then, the same may be stayed. The Respondent No. 3 reported

to Dharupur Society pursuant to the order of his transfer much before the aforementioned order was passed by the Deputy Registrar, but he was not permitted to work by the Chairman in collusion with the Petitioner. The order of the Deputy Registrar cannot apply to such a case, and

(iii) The Petitioner was appointed to work as Secretary till further arrangement is made. Petitioner's authorisation to work as Secretary was conditional, the condition being till further arrangement is made. Further arrangement having been made by transfer of Respondent No. 3, the Petitioner has ceased to have any right to continue as Secretary of Dharupur Society. He has, therefore, no locus standi to challenge the transfer of Respondent No. 3.

6. The third submission also deserves rejection. As mentioned before, the Petitioner was merely authorised to work as Secretary vide order dated 6.2.1990 till further arrangement is made. Further arrangement was made in 1093. Merely because he has worked as Secretary till then for about three years, he cannot get his service regularised as Secretary. That apart, the appointment of the Petitioner being de hors the rules and regulations his service cannot be regularised. Supreme Court in E. Ramakrishnan and Others Vs. State of Kerala and Others, , has laid down that a person appointed de hors the service rules, although officiated for a long period (14 years in that case), cannot be granted regularisation of service. In Ashwani Kumar and Others Vs. State of Bihar and Others, , the relevant extract of which is reproduced below, the Supreme Court has laid down that the question of regularisation in service of an employee can arise only in two contingencies mentioned therein.

In this connection, it is pertinent to note that question of regularisation in any service including any Government service may arise In two contingencies. Firstly, if on any available clear vacancies which are of a long duration appointments are made on ad hoc basis or daily-wage basis by a competent authority and are continued from time to time and if it is found that the incumbents concerned have continued to be employed for a long period of time with or without any artificial breaks, and their services are otherwise required by the institution which employs them, a time may come in the service career of such employees who are continued on ad hoc basis for a given substantial length of time to regularise them so that the employees concerned can give their best by being assured security of tenure. But this would require one precondition that the initial entry of such an employee must be made against an available sanctioned vacancy by following the rules and regulations governing such entry. The second type of situation in which the question of regularisation may arise would be when the initial entry of the employee against an available vacancy is found to have suffered from some flaw in the procedural exercise though the person appointing is competent to effect such initial recruitment and has otherwise followed the procedure for such recruitment. A need may then arise in the light of the exigency of administrative requirement for waiving such irregularity in the Initial appointment by a competent authority and the irregular initial appointment may

be regularised and security of tenure may be made available to the incumbent, concerned. But even in such a case, the initial entry must not be found to be totally illegal or in blatant disregard of all the established rules and regulations governing such recruitment. In any case, backdoor entries for filling up such vacancies have got to be strictly avoided. However, there would never arise any occasion for regularising the appointment of an employee whose initial entry itself is tainted and is in total breach of the requisite procedure of recruitment and especially when there is no vacancy on which such an initial entry of the candidate could ever be effected. Such an entry of an employee would remain tainted from the very beginning and no question of regularising such an illegal entrant would ever survive for consideration, however, competent the recruiting agency may be. The Appellants fall in this latter class of cases. They had no case for regularisation and whatever purported regularisation was effected in their favour remained an exercise in futility.

The Petitioner's case does not fall in any of the two categories laid down by the Supreme Court. He is, therefore, not entitled to regularisation of his service.

7. Learned Counsel for the Petitioner in support of the Petitioner's claim for regularisation has placed reliance on Khagesh Kumar and Ors. v. Inspector General of Registration and Ors. (1996) 1 UPLBEC 23 (SC) and a decision of Division Bench of this Court in Indravir Singh Rana v. State of U.P. and Ors. Writ Petition No. 3625 of 1994, decided on 21.11.1995. Both these cases are of no help to the Petitioner. In Khagesh Kumar and Ors. v. Inspector General of Registration and Ors. (supra), Supreme Court directed the concerned authorities to consider the claim of the registration clerks appointed on ad hoc or daily-wage basis for regularisation of their service under U.P. Regularisation of Ad hoc Appointments (On Posts Outside the Purview of the Public Service Commission) Rules, 1979. In the instant case, that is not the position. There is no statutory rules or regulations providing for regularisation of service of the ad hoc/temporary Secretaries.

8. In Indravir Singh Rana v. State of U.P. and Ors. (supra), a Division Bench of this Court vide its judgment dated 21.11.1995 issued direction to the Respondents therein "to prepare a rational scheme for consideration of regularisation of the Petitioner as well as of other employees similarly situated in view of the guidelines contained in the judgment". In that case, the Petitioner was appointed as officiating Secretary of a Primary Agricultural Co-operative Credit Society by Member/Secretary of the District Administrative Committee vide order dated 13.11.1987 and he continued to work in that capacity till his service was directed to be terminated. The Division Bench allowed the writ petition holding that (i) a person, who has been permitted to work on a post for petty long time, his service cannot be terminated without giving him any opportunity of being heard; (ii) the power to terminate the service of a Secretary including the officiating Secretary vests in the District Administrative Committee and the Registrar has no such power; and (iii) as the Petitioner has worked as

Secretary for more than six years, he is eligible for continuation and regularisation under the existing rules.

9. The question as to whether a temporary/officiating appointee is entitled to a notice and opportunity of being heard before termination of his service has been settled by the courts holding that no such opportunity is required to be given to a temporary/officiating appointee. Supreme Court in *M.P. Hasta Shilpa Vikas Nigam Ltd. v. Devendra Kumar Jain and Ors.* (1995) 1 LBESR 235 (SC) has, in this connection, laid down as under:

In the case of appointment on temporary basis, a servant who is so appointed does not acquire any substantive right to the post, even though the post itself may be permanent and it is an implied term of such appointment that it may be terminable at any time and without notice. A temporary Government servant does not become a permanent Government servant unless he acquires that capacity by force of any rule or he is declared or appointed as a permanent servant. In the present case there is no rule under which the Respondents may be deemed to have become permanent by force of such rule nor they were so declared by any subsequent order of the Appellant-Company to have acquired that status. On the contrary the Respondents all along continued to be temporary and according to the terms of the order of appointment their services could be terminated at any time without any notice or assigning any reasons. In such a case it is not necessary to follow the formalities contemplated by Article 311 of the Constitution. In these facts and circumstances the High Court was not right in holding that the Respondents were entitled for being heard before passing the said order of termination of their services and that the order of termination was bad in law on that account.

Here it may be mentioned that a learned single Judge of this Court in *Ram Khelawan v. State of U.P. and Ors.* (1992) 2 UPLBEC 892, declared that if a temporary employee has worked for three or more years, his service cannot be terminated without giving him an opportunity of being heard. This decision was overruled by a Division Bench of this Court on 6.10.1994 in *Executive Chairman v. Ram Vilas* 1995 ACJ 949, holding that no opportunity of hearing is required to be given to a temporary appointee before termination of his service. It appears that the decisions of the Supreme Court and Division Bench of this Court holding that a temporary/officiating appointee is not entitled to an opportunity of hearing before termination of his service were not brought to the notice of the Division Bench, which decided the *Indravir Singh*'s case.

10. Merely because an employee has worked for few years on temporary/officiating/ad hoc/daily-wage basis, he cannot claim regularisation. A Division Bench of this Court in *Zakir Hussain v. Engineer-in-Chief, Irrigation Department, U.P., Lucknow and Ors.* (1993) 1 UPWEC 15, has, in this connection, laid down as follows "

Merely because an employee has worked for two or three years he cannot claim

regularisation of service as a matter of right. For regularisation, as mentioned before, there must be both posts and funds and the need for retention of the employee according to the requirement of work. That apart he must be qualified and the work and conduct of such employee must also be satisfactory. It is also to be considered whether appointment on ad hoc/daily wages basis have been made against the leave or casual vacancies. In cases of appointment on such vacancies there would hardly be any scope for regularisation. These and various other factors have to be taken into consideration before deciding the question as to whether service of an employee, appointed on ad hoc/daily wages basis should be regularised. Regularisation cannot be made as a "rule of thumb" on the basis of completion of certain years of service of such an employee. It all depends on various facts, some of which have been mentioned above and it is for the employer to decide as to whether in view of the facts and circumstances of the case, the services of those employees who were appointed on ad hoc/daily wages basis, should be regularised.

In *Ashwani Kumar and Others Vs. State of Bihar and Others*, the relevant extract of which has already been reproduced before the Supreme Court has laid down the circumstances under which the service of an ad hoc/daily wagee can be regularised. The Division Bench of this Court in *Indravir Singh Rana v. State of U.P. and Ors.* (supra), has issued direction for regularisation of service of the Petitioner therein merely on the ground that "the Petitioner has experience of more than six years as Secretary and there is nothing on the record to show that he was not eligible for continuation and regularisation as Secretary under the existing rules". The decision of the Division Bench in *Indravir Singh Rana's* case was delivered much after the aforesaid decisions of the Supreme Court and the Division Bench of this Court. The findings and the declaration of law by the Division Bench in *Indravir Singh Rana's* case on the two issues mentioned above, namely, the right of temporary/officiating appointee to an opportunity of being heard before termination of his service and his entitlement to regularisation of his service merely on the ground of his working for a few years, are contrary to the decisions of the Supreme Court and the Division Bench of this Court referred to hereinbefore. In fact *Indravir Singh Rana's* case was decided by the Division Bench in ignorance of the aforementioned decisions. It is well settled that a decision given by a Court in ignorance of a decision on the same point of a higher Court or a Court of co-ordinate jurisdiction is *per incuriam* and is not binding. In *State of U.P. and Another Vs. Synthetics and Chemicals Ltd. and Another*, the Supreme Court has laid down as under:

"*Incuria*" literally means "carelessness". In practice, *per incuriam* appears to mean *per ignoratum*. English courts have developed this principle in relaxation of the rule of *stare decisis*. The "quotable in law" is avoided and ignored if it is rendered, "in ignoratum of a statute or other binding authority", *Young v. Bristol Aeroplane Co. Ltd.* Same has been accepted, approved and adopted by this Court while interpreting Article 141 of the Constitution which embodies the doctrine of precedents as a matter of law. In *Jaisri Sahu v. Rajdewan Dubey*, this Court while

pointing out the procedure to be followed when conflicting decisions are placed before a bench extracted a passage from Halsbury's Laws of England incorporating one of the exceptions when the decision of an appellate court is not binding.

Reference in this connection may also be made to Punjab Land Development and Reclamation Corporation Ltd., Chandigarh Vs. Presiding Officer, Labour Court, Chandigarh and Others, .

11. The last submission of the learned Counsel for the Petitioner is, however, liable to be accepted. Before his appointment as officiating Secretary of Dharupur Society, the Petitioner was working as an Accountant in Dugraee Society. In view of the order of appointment dated 6.2.1990, passed by the District Assistant Registrar the Petitioner had handed over the charge of the post of Accountant In Dugraee Society before joining the Dharupur Society as its Secretary. If the Petitioner is relieved from the post of Secretary of Dharupur Society, he is entitled to resume his duty as Accountant in Dugraee Society.

12. This writ petition is accordingly dismissed with the observation that after the Petitioner is relieved from the post of Secretary, Dharupur Society, he is entitled to resume his duty as Accountant in Dugraee Society. In view of the facts and circumstances of the case, there shall be no order as to costs.