
(2020) 06 JH CK 0051
In the Jharkhand High Court
Case No : L.P.A No. 511 Of 2018

Vivekanand Dubey

APPELLANT

Vs

C.M.D. cum Chairman And Ors

RESPONDENT

Date of Decision : 29-06-2020

Acts Referred:

Constitution Of India, 1950 — Article 16, 226

Citation : (2020) 06 JH CK 0051

Hon'ble Judges : Dr. Ravi Ranjan, CJ; Sujit Narayan Prasad, J

Bench : Division Bench

Advocate : Kanti Kumar Ojha, Mukesh Kumar Sinha

Final Decision : Dismissed

Judgement

1. With the consent of the parties, hearing of this matter has been done through video conferencing. They have no complaint about any audio and visual connectivity.

2. The instant intra-court appeal under Clause 10 of the Letters Patent of the Patna High Court, directed against the order/judgment dated 27.07.2018 passed by learned Single Judge of this Court in W.P.(S) No.160 of 2017, whereby and whereunder the writ petition has been dismissed, denying the claim of the petitioner for regularization in the service as also, has refused to interfere with the order of disengagement passed vide order dated 04.04.2018 by which the prayer for regularization of the service of the writ petitioner has been refused.

3. At the outset, the learned counsel for the appellant has submitted that due to inadvertence the reference of disengagement from service has been typed in the impugned order by making reference of order dated 04.04.2018 but it would be evident from the order dated 04.04.2018 that the same does not pertain to disengagement of the petitioner from service, rather by virtue of the said decision the claim of regularization from service has been rejected.

This Court considering the aforesaid submission and going through the order

dated 04.04.2018 has found substance in the submission advanced on behalf of the learned counsel for the appellant and hence proceeded to examine the legality and propriety of the order dated 04.04.2018 in the pretext of denial of claim of the writ petitioner from regularization in service.

4. The brief facts of the case, which require to be referred herein, read hereunder as:

The appellant had been working as helper (unskilled) employee since the year 2000 without any break, even though he was appointed against the sanctioned vacant post, he has not been regularized.

It is the case of the writ petitioner that the work was perennial in nature, as also sanctioned one, but instead of regularizing in service he has been disengaged from service vide order as contained in letter no.441 dated 04.04.2018.

The writ petitioner has ventilated his grievance along with the proforma respondents by invoking power conferred under Article 226 of the Constitution of India. The writ petition has been dismissed vide order dated 27.07.2018 by showing no interference with the order of disengagement, against which the present intra-court appeal has been filed.

5. Mr. Kanti Kumar Ojha, learned counsel for the appellant-writ petitioner has submitted that the case of the writ petitioner ought to have been considered in view of the ratio laid down by the Hon'ble Apex Court rendered in the case of Secretary, State of Karnataka & Ors. vs. Uma Devi (3) & Ors. reported in (2006) 4 SCC 1 as also, on the basis of judgment rendered in the case of Narendra Kumar Tiwari and Ors. vs. The State of Jharkhand and Ors. reported in (2018) 8 SCC 238, but the learned Single Judge has not considered the factual aspect as also the ratio laid down by the Constitution Bench of the Hon'ble Apex Court rendered in the case of Uma Devi (supra) and as such, the same requires interference by this Court.

6. Per contra, Mr. Mukesh Kumar Sinha, learned counsel for the respondents-JUVNL has argued that the ratio laid down by the Hon'ble Apex Court in the case of Uma Devi (supra) and Narendra Kumar Tiwari (supra) is not applicable, since the nature of appointment of the appellant- writ petitioner was contractual, which was for a period of 89 days and as such, the post having not been sanctioned, the ratio of the aforesaid judgment is not applicable in the facts of the present case.

According to him, since the writ petitioner was appointed against the non-sanctioned post for a period of 89 days and even though his services was renewed from time to time, he cannot claim for regularization in service since the post admittedly was not sanctioned one. Learned counsel for the respondents on the basis of the aforesaid argument, has submitted that there is no infirmity in the impugned order and the same may not be interfered with.

7. This Court has heard learned counsel for the parties and gone across the

materials available on record, as also the finding recorded by the learned Single Judge.

Before proceeding to the legality and propriety of the order dated 27.07.2018 passed by the learned Single Judge in W.P.(S) No.160 of 2017, this Court deem it fit and proper to refer certain undisputed facts in this case as available on record.

Admittedly herein, the writ petitioner was appointed on the basis of "mandays" in order to discharge the duty of maintenance work, as would appear from the communication as contained in Annexure-1 dated 26.08.2014. It further appears from the office order dated 19.01.2016 that the writ petitioner was appointed to maintain the smooth power supply and maintenance of 33/11 KV Power Substations on the basis of "mandays" which would be for a period of 89 days. Initially it was from the period 29.12.2015 to 26.03.2016 purely on ad hoc basis but further appears from the communication dated 19.01.2016 issued under the signature of Deputy General Manager (Personnel) whereby and whereunder the request was made to review and engage personnel as per actual requirement only with the sanctioned order and that too against the sanctioned vacant post.

The aforesaid communication containing the clause to consider the engagement of the writ petitioner against the sanctioned vacant post clearly clarifies the situation that the writ petitioner was not appointed against the sanctioned post, rather request was made for appointing/engaging him in the sanctioned strength. Further, it is evident that the payment had been decided to be made by the Disbursing Officer available from the fund under the budgetary provision, this Court at this juncture, deem it fit and proper to refer the clause contained in office order dated 19.01.2016, for ready reference:

"2. In pursuance of approval of Board's of Director, Jharkhand Bijli Vitaran Nigam Limited Item no.-18-06 the sanction of aforesaid mandays is for the period of 89 days i.e. 29.12.2015 to 26.03.2016 on purely ad-hoc basis.

3. Respective offices are requested to review and engage personnel as per actual requirement only within the sanctioned order and that too against the sanctioned vacant posts. Any decrease may be reported.

4. Payment shall be made as per existing norms by the Disbursing Officer from available fund under the budgetary provision.

5. The payment of aforesaid mandays will be made as per minimum wage rate of Officer Order no.1917 communicated vide Memo no.1598 dated 26.10.2015. Any rate revision will be informed subsequently.

6. Respective Offices and drawing disbursing officer will ensure the engagement of sanctioned mandays other than the rural franchisee covered areas to avoid payment duplication."

8. Learned counsel for the writ petitioner has tried to impress upon the Court that the writ petitioner was appointed against the sanctioned post but the

contents of the communication dated 19.01.2016 clearly clarifies the position that the writ petitioner had never been appointed on the sanctioned post, rather his appointment was on the basis of "mandays" and the payment was to be made from the available fund under the budgetary provision. Further, he was allowed to continue in service as has been submitted by the learned counsel for the appellant, but even assuming that he was allowed to continue, it cannot be construed that he was allowed to continue against the sanctioned post rather he will be said to have continued in service by virtue of contract for a period of 89 days.

In the light of the aforesaid admitted fact, the question of applicability of the judgment rendered by the Constitution Bench of the Hon'ble Apex Court in the case of Uma Devi (supra) or Narendra Kumar Tiwari (supra) has been scrutinized by us.

This Court, in order to consider about the applicability of the ratio laid down by the Hon'ble Apex Court in the aforesaid case, have gone across the ratio laid down by the Hon'ble Apex Court in the case of Uma Devi (supra) and found therefrom that the question of backdoor entry in the public service was the issue fell for consideration. The Hon'ble Apex Court has been pleased to hold that the backdoor entry in the public service de hors the rule, more particularly the principle laid down under Article 16 of the Constitution of India, however, at paragraph 53 by way of exception it has been laid down, as referred herein below:

"53. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in S.V. Narayanappa, R.N. Nanjundappa and B.N. Nagarajan and referred to in para 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of the courts or of tribunals. The question of regularisation of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases above referred to and in the light of this judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularise as a one-time measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of the courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date. We also clarify that regularisation, if any already made, but not sub judice, need not be reopened based on this judgment, but there should be no further bypassing of the constitutional requirement and regularising or making permanent, those not duly appointed as per the constitutional scheme."

It would be evident from the aforesaid proposition laid down as under paragraph

53 of the aforesaid judgment that the Hon'ble Apex Court had been pleased to distinguish in between the irregular and illegal appointment. If the appointment is illegal, there cannot be any consideration for regularization and it has to be struck off but if the appointment is irregular and if the Government is requiring the service of one or other irregular appointee, the State can regularize one or the other employees by taking them under the regular establishment, if they have been appointed against the sanctioned vacant post and discharging their duty continuously for a period of ten years without any aid of interim order passed by any Court of law.

The question of illegal and irregular appointment has further been dealt with by the Hon'ble Apex Court in the case of State of Karnataka & Ors. vs. M.L. Kesari & Ors. reported in (2010) 9 SCC 247, wherein it has been laid down by making distinction in between illegal and irregular appointment. Illegal appointment has been held to be illegal, if appointment is not against the sanctioned post or de hors the rule while irregular appointment has been held to be irregular, if made without following the due procedure.

Likewise in the case of Narendra Kumar Tiwari (supra), the issue crept up when the State of Jharkhand had come out with a regularization rule in the year 2015 providing therein to consider the case of one or the other casual worker who have discharged their duty for a period of ten years and the period of ten years had been ordered to be counted up to the date of judgment rendered in the case of Uma Devi (supra). The said provision of the rule has been interpreted by the Hon'ble Apex Court about counting the period of ten years up to the judgment rendered by the Hon'ble Apex Court in the case of Uma Devi (supra) but from which date, since the State of Jharkhand had come into effect with effect from 15.11.2000 and if it would be counted from 15.11.2000, none of the employee working as daily wager in the State would complete the period of ten years and hence it was decided therein to consider the case of regularization of one or the other daily rated employees who have completed ten years of service on the date of promulgation of rules.

Thus, it is evident that the Hon'ble Apex Court in the case of Narendra Kumar Tiwari (supra) has not laid down any rule separate to that of the exception carved out by the Constitution Bench of the Hon'ble Apex Court rendered in the case of State of Karnataka & Ors. vs. Uma Devi & Ors.

9. This Court is now proceeding to scrutinize the factual aspect, as to whether the writ petitioner is fulfilling the criteria as laid down by the Hon'ble Apex Court, at paragraph 53 of the judgment rendered in the case of State of Karnataka & Ors. vs. Uma Devi & Ors.

We have already referred hereinabove by taking into consideration the office order dated 19.01.2016, as quoted above, the writ petitioner was appointed on the basis of "mandays" and request was made to appoint against the sanctioned vacant post, as on 19.01.2016 direction was passed to make payment from the

available fund from the budgetary provision, which clearly clarifies that the writ petitioner was not appointed against the sanctioned post, rather it was for a period of 89 days on contract, therefore, according to our considered view, the mandatory condition about applicability of ratio laid down by the Hon'ble Apex Court at paragraph 53 of the judgment rendered in the case of State of Karnataka & Ors. vs. Uma Devi & Ors. about consideration of the case of the employee for regularization, if appointed against the vacant sanctioned post is not available, however, as contended by the learned counsel for the writ petitioner that the writ petitioner had been allowed to continue in service fairly for a long period, even for more than period of ten years, but even accepting the said contention of rendering service for a period of ten years, the writ petitioner cannot be allowed to cover with the ratio laid down by paragraph 53 of the aforesaid judgment, as because at paragraph 53 there were three conditions simultaneously if fulfilled then only question of regularization of one or the other candidate will arise i.e. (1) appointment against the vacant sanctioned post, (2) discharge of continuous service for a period of ten years and (3) that discharge for a period of ten years is without aid of interim order passed by any Court of law, but herein the petitioner admittedly has not been appointed against the sanctioned vacant post rather on contract and as such, even though the writ petitioner was allowed to continue in service more than the period of ten years, he cannot get aid of paragraph 53 of the judgment rendered in the case of Uma Devi (supra).

It is evident from the order passed by the authority dated 04.04.2018 that the authorities, after taking into consideration the nature of appointment which was made for a period of 89 days and by breaking in it has been again extended and therefore, have come to conclusion about non-applicability of the judgment rendered by the Hon'ble Apex Court in the case of State of Karnataka & Ors. vs. Uma Devi & Ors.

10. This Court on the basis of detailed discussion made hereinabove about applicability of the judgment rendered in the case of Uma Devi (supra), M. L. Kesari (supra) and Narendra Kumar Tiwari (supra), is of the considered view that the authority while taking decision in not regularizing the appellant-writ petitioner in service has committed no illegality, as such the order passed by the learned Single Judge cannot be faulted with.

11. In the result, the instant appeal fails and is dismissed.