

SarajuddIn Vs. State of U.P. and ors.

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Court : Allahabad

Decided On : May-15-1993

Reported in : (1994)IILLJ228All

Judge : B.C. Saksena, J.

Acts : Uttar Pradesh Industrial Disputes Act, 1947 - Sections 2 and 6

Appeal No. : W.P. No. 11181/1990

Appellant : Sarajuddin

Respondent : State of U.P. and ors.

Advocate for Def. : C.S.C.

Advocate for Pet/Ap. : L.P. Mishra, Adv.

Disposition : Petition dismissed

Judgement :

ORDER

B.C. Saksena, J.

1. In view of the order passed by Hon'ble the Supreme Court dated March 15, 1993 in Special Leave Petition (C) No. 13788 of 1992, Senior Judge of this Court directed that this case be listed before me every third day in the cause-list until the

hearing concludes. The writ petition initially was directed to be connected with a few other petitions as referred to in paragraph 27 of the writ petition. However, in view of the order passed by Hon'ble the Supreme Court this writ petition was delinked and was taken up for hearing separately.

2. I have heard the learned counsel for the petitioner as also the learned Standing Counsel.

3. The case of the petitioner, in short, is that he was engaged as a Junior Clerk in the Establishment of Rural Engineering Services Department on November 12, 1967 and he has continuously been working since then except artificial 'gap'. Annexure -1 to the writ petition contains two experience certificates certifying that the petitioner had worked during the following period :

12-11-87 to 11-2-88 13-2-88 to 31-1-89 1-2-89 to 31-1-90 4-2-90 to 31-3-90

4. Besides the said period the petitioner avers that he has also worked during the period of April 1, 1990 till October 3, 1990, and wages for the period up to the end of the month of September, 1990 are alleged to have been paid to him.

5. The petitioner's case further is that he moved an application before opposite party No. 2 for regularisation of his services and on the said application the opposite party No. 2 passed the following orders on April 6, 1989:

'C.A. please write to Executive Engineer, Gorakhpur to regularise his services.'

6. It is alleged that the Chief Engineer by his letter dated September 21, 1989 required the Executive Engineer, Rural Engineering Services, Gorakhpur Division, to pass orders for appointment in terms of the orders issued earlier and to apprise him of the action taken. However, the petitioner on the basis of this order/letter dt. September 21, 1989 Annexure-2 has chosen to state in para 7 that the Chief Engineer had directed that the petitioner be regularised in services. It is further alleged that the opposite party No. 2 had asked opposite parties 3 and 4 to send a list of employees working on work-charge basis or on daily wages for their regularisation but the Executive Engineer, Rural Engineering Services Gorakhpur Division, did not act either on the basis of the said order nor acted on the basis of

the letter dated September 21, 1989, issued by the Chief Engineer. The petitioner alleges that he again moved an application on August 18, 1990, requesting for his regularisation and pointed out that despite earlier order passed by the then Chief Engineer he has not been regularised in service. It is alleged in paragraph 10 that on account of the petitioner's making a request for regularisation and reminding that an order for his regularisation had already been passed and despite those orders he was not regularised in service. The Executive Engineer RES, Gorakhpur orally asked the petitioner on October 4, 1990 not to discharge his duties with effect from the said date and not to come in future. The petitioner challenges his oral termination and has also claimed regularisation and regular scale of pay as admissible to Class HI regular employees working in the RES and other service benefits admissible to them.

7. Two counter-affidavits have been filed on behalf of the opposite parties.

8. The petitioner has filed rejoinder-affidavit in reply to the second counter-affidavit. The first counter-affidavit is on record and it bears an endorsement of receipt by the learned counsel for the petitioner on December 23, 1991. The second counter-affidavit was served on November 8, 1991. One rejoinder-affidavit has been filed by the petitioner which is dated December 28, 1991 but appears to have been sworn before the Oath Commissioner on January 28, 1992. In paragraph 2 of the rejoinder-affidavit it has been stated that the second counter-affidavit only has been served on the petitioner's counsel and no other counter-affidavit has either been served on the petitioner's counsel or the petitioner. This averment is clearly belied from the fact indicated hereinabove that the first counter-affidavit bears acknowledgement under the signatures of the learned counsel for the petitioner dated December 23, 1991 in token of having received the copy of the counter-affidavit. The said counter-affidavit was filed in the Court on January 3, 1992.

9. In the counter-affidavits the case of the opposite parties is that the petitioner at no time had been appointed as the Junior Clerk in the Office Establishment nor on any other post in the Office Establishment and he has never worked in the Office Establishment. The case is that the petitioner was appointed on daily wage basis

as work-charge Supervisor in connection with certain works being carried on and he has been paid wages on daily basis at the rate admissible from time to time viz. Rs. 13.50 prior to April 1, 1989 and at the rate of Rs. 18/- per day thereafter, since rates have been revised by an order dated March 15, 1989. On the basis of the averment that the petitioner has never been appointed as a Junior Clerk in the Office Establishment his claim for payment in the scale of Rupees 950-1500/- has been disputed. It is pleaded that the petitioner is not entitled to said scale of pay. Further stand of the opposite party in the counter- affidavit is that no post of work-charge Supervisor has been sanctioned as a regular post in the Rural Engineering Services. The sanction is accorded for three months at a time and accordingly the petitioner has been allowed to work for the period indicated by him in paragraphs 3 and 4 to the writ petition.

10. In the counter-affidavit a further plea has been taken that the Rural Engineering Service is a department of the State Government as the P.W.D. and Irrigation Department and thus the conditions of services are not governed by the Industrial Disputes Act.

11. The record of the writ petition further shows that few miscellaneous applications for interim relief have been moved on behalf of the petitioner and a learned single Judge of this Court by an order dated February 14, 1992 confirmed the initial interim order, passed on November 13, 1990 and further provided that the petitioner would be entitled to get the minimum pay in the pay scale of Rs. 950-1500 plus dearness allowances without any increment if the pay scale of clerk is Rs. 950-1500/-. It was also provided that in case the pay scale of clerk is different from 950-1500 the petitioner would be entitled to get the minimum pay of the pay scale applicable to a clerk. This direction was given on the basis that the petitioner even as work-charge employee was working as a Clerk. The record shows that against this order dated February 14, 1992 passed by a learned single Judge of this Court the opposite parties had preferred Special Leave Petition (C) 13788/92.

12. The record of the writ petition further shows that the opposite parties after the passing of the said order dated February 14, 1992 moved an application for

modification of the said order. The said application has been numbered as CM. A. No. 10829-92. The said application has however not been taken up for consideration since it was not listed before brother R.K. Agrawal, J. who has passed the order on February 14, 1992 and in view of the directions of Hon'ble the Supreme Court in the SLP aforesaid writ petition itself was taken up for final hearing.

13. In the writ petition as noted hereinabove the petitioner feels aggrieved by his oral termination from services but in the relief clause no relief for quashing the said order of termination has been prayed for. A writ of mandamus has been prayed for to be issued 'commanding the opposite parties to treat the petitioner in regular service w.e.f. November 12, 1987 and to pay him and to provide all the service benefits which benefits are admissible to regular Class III employees working in the Department of Rural Engineering Service.' A further writ of mandamus has been prayed for commanding the opposite parties not to treat the petitioner as a retrenched employee and to pay him salary regularly every month. The second mandamus prayed for is an indirect way of claiming that the oral termination be ignored but all the same no positive relief for quashing of the oral termination has been prayed for.

14. The learned counsel for the petitioner on the basis of the facts indicated hereinabove urged that the termination of the petitioner's services without following the mandatory requirement of Section 6-N of the U.P. Industrial Disputes Act is bad in law and the petitioner is entitled to be reinstated. For this proposition the learned counsel has referred the following decisions:

- (i) Umesh Saksena v. Presiding Officer Labour Court, Agra (1993) 1 UPLBEC 77.
- (ii) Govind Singh v. Presiding Officer Labour Court, Agra (1991) 1 UPLBEC 571.
- (iii) U.P. State Food and Essential Commodities Corporation v. Krishna Kumar Dubey, 1992 LCD 147.
- (iv) Ashok Kumar Srivastava v. State of U.P., (1991)1 UPLBEC 40.

Except the third decision which is a decision of Hon'ble the Supreme Court all the other decisions have been rendered by brother M.L. Bhatt, J. There can be no dispute with regard to the proposition of law laid down in all the aforesaid decisions. It has been held in all the said cases that if a workman has worked for more than 240 days the termination of his services without following mandatory requirements of Section 25F would be bad and the workman would be entitled to be reinstated. It may be stated that an analogous provision to that of Section 25F of the Industrial Disputes Act is Section 6-N of the U.P. Industrial Disputes Act. In the instant case the U.P. Act would apply.

15. However, from a perusal of the writ petition I find that there is no averment in the writ petition that the condition precedent to Section 6-N of the U.P. Industrial Disputes Act has not been complied with. No doubt the petitioner states that Rural Engineering Service is 'Industry' and the petitioner is a workman within the meaning of the said term as defined under the said Act and the Rules framed thereunder.

16. In paragraph 22 of the writ petition Rule 42 of the U.P. Industrial Disputes Rules, 1957 has been reproduced. The only averment made in para 23 is that there has been non-compliance of Clause (3) of Rule 42 of the said Rules and it has been stated that the petitioner has also not been asked to submit his address in writing duly signed or thumb impression as required under Clause (iii) for the purpose of sending intimation to the workman for re-employment as required in Rule 43.

17. In paragraph 12 of the writ petition it has been slated that the oral termination from service of the petitioner amounts to his retrenchment from service. Beyond these pleadings there is no specific pleading in the writ petition to show that the conditions precedent for retrenchment as provided under Section 6-N have not been complied with. In this state of the pleadings it is well nigh impossible to interfere with the order of termination. No positive relief for declaring the termination as illegal has also been prayed for as noted hereinabove.

18. As noted hereinabove it has been pleaded on behalf of the opposite parties that the R.E.S. is a department of the Government as the P. W.D. and the

Irrigation Departments. It has, therefore, been pleaded that the provisions of the U.P. Industrial Disputes Act are not applicable. This plea merits no serious consideration. By now it is fairly well settled that the P.W.D. and the Irrigation Departments are 'industries' within the meaning of the said term under the Industrial Disputes Act. See : (1988-II-LLJ-149) Desk Raj v. State of Punjab. It cannot therefore be held that the Rural Engineering Services is not an industry.

19. The learned counsel for the petitioner has furnished photostat copy of judgment of a learned single Judge of this Court dated September 26, 1991, passed in writ petition Tribhuwan Singh v. State of U.P. wherein Rural Engineering Services have been held to be an industry within the meaning of the term under the Industrial Disputes Act.

20. The question of regularising of the petitioner in service can only arise if the termination of his services is held to be bad in law. In view of the findings hereinabove no case for interference with the action of the opposite parties in terminating the petitioner's services has been made out.

21. In the application Civil Misc. Application No. 10829 of 1992, preferred by the opposite parties for seeking the modification of the order dated February 14, 1992 documents have been filed in support of the assertions in the counter-affidavit that the petitioner at no time was appointed as a Junior Clerk, on the contrary he was appointed as a Work Supervisor on daily wage basis throughout for the intermittent periods indicated in paragraphs 3 and 4 to the writ petition. In the said application modification only of that part of the order dated February 14, 1992 is sought whereby it has been held that the petitioner would be entitled to get the minimum pay in the pay scale of Rs. 950-1500/- plus dearness allowances without increment, if the pay scale of the junior Clerk is Rs. 950-1500/-. If any other pay scale is there, then he will be entitled to get the minimum pay of the pay scale applicable to a Clerk. (See paragraph 5 of the application). A modification has been sought for providing that if sanction for construction work is received, the petitioner may be engaged on daily wage basis. That appears to be a reasonable stand.

22. In the order dated February 14, 1992 the learned single Judge was persuaded to hold that the petitioner's assertion that he was appointed as a Junior Clerk is borne out from the certificates, contained in Annexures 1 and 2 to the writ petition. It has been stated that the Executive Engineer is the only competent authority to sanction post and engagement of daily wagers. The certificates issued by the Assistant Engineer are, therefore, of no avail. When the order dated February 14, 1992 was passed the documents now placed along with the aforesaid application for modification of the order dated February 14, 1992 had not been placed on record. Copy of the application for modification was served on the learned counsel for the petitioner and the petitioner has filed no counter-affidavit to rebut the averments made in the said application. That being so it is held that the petitioner throughout has been engaged as Work Supervisor on daily wage basis only and had not been appointed at any time on the post of Junior Clerk.

23. The main thrust in the writ petition is that in view of the order passed by the Chief Engineer an order for regularisation of the petitioner should have been passed and the petitioner thus, it is alleged, has attained the status of a permanent employee and his retrenchment at this juncture, it is pleaded, should shock anyone's conscience. Relief 'I' has been prayed for in view of this thrust of the pleadings and the grounds in the writ petition. As indicated hereinabove the opposite parties appear to be inclined to re-engage the petitioner as and when construction work is sanctioned and need to engage a Work Supervisor on daily wage basis arises. This would be in accord with the provision of S. 6 of the U.P. Industrial Disputes Act.

24. The learned counsel for the petitioner urged that the petitioner having put in more than 240 days of continuous service is entitled to be regularised. The learned counsel for the petitioner for this proposition has cited the following decisions:

(i) Sandip Kumar v. State of U.P., AIR 1992 SC 713

(ii) Tejpal v. Director of Education, (1991) 1 UPLBEC 401.

(iii) State of Haryana v. Piyara Singh, (1993-II-LLJ-937)

(iv) Vijay Pal Sharma v. Delhi Administration, (1992) 4 SCC 114.

(v) Niadar v. Delhi Administration, (1992) 4 SCC 112.

(vi) Anil Kumar Mishra v. Madhyamik Shiksha Parishad U.P. and Ors. connected petition, (1991) 1 UPLBEC 76.

(vii) Tej Pal v. Director of Education (supra)

(viii) Bhagwati Prasad v. Delhi State Mineral Development Corporation (1990-I-LLJ-320).

25. The aforesaid decisions and a large number of other decisions, referred therein, show that the Apex Court in the earlier cases had taken the view that the casual daily employees are entitled to be regularised after having put in six months of service. In the later decisions the service of one year was considered necessary for being regularised. In some other subsequent decisions instead of directing regularisation the authorities were required to draw up scheme for regularisation. The Supreme Court in some decisions also took the view that three years service ignoring artificial break for short periods in the circumstances of some cases held sufficient for regularisation and provided that the regularisation be made in phases in accordance with seniority.

26. Hon'ble the Supreme Court in some cases finding that the claim for equal wages at par with regular employees and for regularisation involved disputed question of fact and needed investigation remitted the matter to some nominated Court or Tribunal or expert body to examine the contention raised in the petition before it and the stand taken by the respondent on all issues after providing full opportunity to the parties of hearing including leading of evidence oral and documentary required the State Tribunal or body to make a report to the Registrar of the Supreme Court within time-frame. After the receipt of the report the Supreme Court considered the recommendations and passed necessary orders. In this regard reference may be made to the case of Bhagwati Prasad v. Delhi State Mineral Development Corporation (supra). Some other decisions on the question of regularisation deserve to be noted. In the case of Delhi Development

Horticulture Employees' Union v. Delhi Administration Delhi reported in (1992-II-LLJ-452), a two Judge Bench was pleased to make certain relevant observation. It was observed in the said judgment at page 458:

This country has so far not found it feasible to incorporate the right to livelihood as a fundamental right in the Constitution. This is because the country has so far not attained the capacity to guarantee it, and not because it considers it any the less fundamental to life. Advisedly, therefore, it has been placed in the Chapter of Directive Principles Article 41 of which enjoins upon the State to make effective provision for securing the same' within the limits of its economic capacity and development. 'Thus even while giving the direction to the State to ensure the right to work, the Constitution-makers thought it prudent not to do so without qualifying it.'

The other relevant observation in the said judgment is 'For regularisation there must be regular and permanent post or it must be established that although the work is regular and permanent nature, the devise of appointing and keeping the workers on ad hoc or temporary basis has been resorted to, to deny them the legitimate benefit of permanent employment. ' (p. 457). In paragraph 23 of the said judgment another observation had been made which is relevant for our purpose at page 459:

'We may take note of the pernicious consequences to which the direction for regularisation of workmen on the only ground that they have put in work for 240 or more days, has been leading. Although there is Employment Exchange Act which requires recruitment on the basis of the registration in the Employment Exchanges, it has become a common practice to ignore the Employment Exchange and the persons registered in the Employment Exchanges, and to employ and get employed directly those who are either not registered with the Employment Exchange or who though registered are lower in the long waiting list in the Employment Register. The Courts can take judicial notice of the fact that such employment is sought and given directly for various illegal considerations including money. The employment is given first for temporary periods with technical breaks to circumvent the relevant rules, and is continued for 240 or more

days with a view to give the benefit of regularisation knowing the judicial trend that those who have completed 240 or more days are directed to be automatically regularised. A good deal of illegal employment market has developed resulting in a new source of corruption and frustration of those who are waiting at the Employment Exchanges for years. Not all those who gain such back-door entry in the employment are in need of particular jobs. Though already employed elsewhere, they join the jobs for better and secured prospects. That is why most of the cases which come to the Courts are of employment in Government Departments, Public Undertakings or Agencies.'

In the same judgment Hon'ble Supreme Court was pleased to note another equally injurious effect of indiscriminating regularisation. It has been noted: (p.459):

'that many of the agencies have stopped undertaking casual or temporary works though they are urgent and essential for fear that if those who are employed on such works are required to be continued for 240 or more days have to be absorbed as regular employees although the works are time-bound and there is no need for the workmen beyond the completion of the works undertaken. The public interests are thus jeopardised on both counts.'

In these circumstances regularisation was refused to the petitioner in that case.

27. The other decision which needs to be noted is the decision in the case of State of Haryana v. Piyara Singh (supra). In the said case Supreme Court was pleased to make following observation in para 25 (p. 947):

'While giving any direction for regularisation of ad hoc, temporary, daily wager etc. the Court must act with due care and caution. It must first ascertain the relevant facts and must be cognizant of the several situations and eventualities that may arise on account of such directions. A practical and pragmatic view has to be taken, inasmuch as every such direction not only tells upon the public exchequer but also has the effect of increasing the cadre strength of a particular service, class or category.

'In the said case it was held that the High Court acted rather hastily in directing wholesale regularisation of all such persons who have put in one year's service, and that too unconditionally. It was held that'

'from the mere continuation of an ad hoc employee for one year, it cannot be presumed that there is a need for regular post. Such a presumption may be justified only when such continuance extends to several years. Further there can be no 'rule of thumb' in such matters.Just because in one case a direction was given to regularise employees who have put in one year's service as far as possible and subject to fulfilling the qualifications, it cannot be held that in each and every case such a direction must follow irrespective of and without taking into account the other relevant circumstances and considerations. The relief must be moulded in each case having regard to all the facts and circumstances of the case. It cannot be a mechanical act but a judicious one.' (p. 950).

28. In the said case the other significant observation is the one made in para 21 thereof. It was observed, (pp. 944-945)

'Ordinarily speaking, the creation and abolition of a post is the prerogative of the Executive. It is the Executive again that lays down the conditions of service subject of course to a law made by the appropriate Legislature. This power to prescribe the conditions of service can be exercised either by making Rules under the proviso to Article 309 of the Constitution or (in the absence of such Rules) by issuing Rules/instructions in exercise of its executive power. The Court comes into the picture only to ensure observance of fundamental rights, statutory provisions, Rules and other instructions, if any, governing the conditions of service.'

29. Another decision of the Supreme Court which needs to be noted is the decision by a three Judge Bench of the Supreme Court in the State of Punjab v. Surinder Kumar reported in (AIR 1992 SC 1593). Special Leave Petition was directed against the order of the High Court disposing of a writ petition filed by the two respondents. The entire judgment of the High Court read thus:

'On the facts and circumstances of the case, we are of the opinion that the just and fair order should be that the petitioners who have been appointed on part-time

basis should be continued until the Government makes regular appointments on the recommendations of the Public Service Commission. Meanwhile the petitioners will get their salary for the period of the vacation.'

The Supreme Court found that an instruction by the Education Department was issued in pursuance of which appointments of the respondents in question were made as part-time lecturers. It held that it was not suggested that the respondents accepted the terms set out in the said Government instructions under mistake and consequently it was observed by the Court that 'we therefore do not find any reason as to why the specific terms on which the appointments were made could not be enforced.' It was urged by the learned counsel for the respondent that the order of the High Court can be sustained on the basis that the Supreme Court has issued directions for observation of the temporary or ad hoc Government Servant on permanent basis in several cases. It was argued before the Supreme Court that if this could be done by the Supreme Court without assigning any reason it should be open to the High Courts as well to allow the writ petitions in similar terms. The Court expressed inability to agree. The Supreme Court thereafter proceeded to point out the distinction between the jurisdiction of High Court and the power conferred on Supreme Court under Article 142. It was held that Article 142 empowers the Supreme Court to make such orders as may be necessary 'for doing complete justice in any case or matter pending before it' which authority the High Court does not enjoy. It was observed that 'the jurisdiction of the High Court, while dealing with a writ petition, is circumscribed by the limitations discussed and declared by the judicial decisions, and it cannot transgress the limits on the basis of whims or subjective sense of justice varying from Judge to Judge.'

30. In view of the discussion hereinabove, it would not be proper to assume that daily wager who has put in work for more than 240 days as a 'rule of thumb' is entitled to a direction for his regularisation in services.

31. Plea in the counter-affidavit on behalf of the opposite parties is that no post of Work Supervisor has been sanctioned by the State Government in the regular cadre. Further case is that no direct recruitment is permissible except through the agency of the Selection Committee. In the circumstances of this case the only

appropriate direction that can be given is that as and when selection (sanction?) to the post in the regular cadre is issued, the petitioner's candidature should also be considered in the light of his eligibility for the same and his fulfilling the requisite educational qualifications. In the writ petition the claim for regularisation is not based on any Rule or Instructions that may have been issued in exercise of the executive power. The letter of Chief Engineer makes a vague reference to such Government orders. The petitioner has not placed copies of the said Government Orders on record to enable this Court to appreciate and adjudicate on his right for regularisation. It is needless to state that if the opposite parties engage the petitioner or have already re-engaged him, in view of the interim orders in this writ petition, then the petitioner will be allowed to continue on daily wage basis till the availability of the work for which he is or has been engaged. It is only after the selection on a post in the regular cadre that the petitioner will be entitled to payment of salary of the said post in regular cadre.

32. The writ petition is accordingly dismissed subject to the observations and directions made hereinabove. In the circumstances of the case the parties shall bear their own costs.