

State of U.P. Vs. Presiding Officer, Labour Court li and anr.

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Court : Allahabad

Decided On : Mar-27-2003

Reported in : 2003(3)AWC2119; [2003(97)FLR1055]; (2003)2UPLBEC1285

Judge : B.S. Chauhan, J.

Acts : [Constitution of India](#) - Articles 14 and 16; [Industrial Disputes Act, 1947](#) - Sections 25J

Appeal No. : C.M.W.P. No. 21684 of 1992

Appellant : State of U.P.

Respondent : Presiding Officer, Labour Court li and anr.

Advocate for Def. : Y.K. Sinha, Adv. and ;S.C.

Advocate for Pet/Ap. : S.P. Srivastava, Addl. C.S.C. and ;O.P. Singh, Adv.

Judgement :

B.S. Chauhan, J.

1. In all these writ petitions common questions of facts and law are involved. The impugned award of the labour court dated 30.1.1992 has been challenged on various grounds by the State. C.M.W.P. Nos. 21684-87 of 1992 and W. P. No. 32500 of 1992 have been filed challenging the order of reinstatement, while

C.M.W.P. No. 21688 of 1992 has been filed against the direction given by the same award for regularization of the services of the workmen. C.M.W.P. No. 16710 of 1999 has been filed by the workmen for seeking direction to the District Collector, Meerut, to make the recovery as per the recovery certificates Issued by the Deputy Labour Commissioner, Meerut, on various dates in execution of the award dated 30.1.1992. The petitions have been heard together and are being disposed of by a common judgment.

2. The facts and circumstances giving rise to these petitions are that the respondent workmen raised an Industrial dispute and the appropriate Government vide order dated 17th August, 1987, made a reference to the labour court as to whether the termination of services of the said workmen w.e.f. 16th August, 1986 and 5.1.1987 was in accordance with law and if not, to what relief they are entitled to and further whether the workmen were entitled to regularization of their services? In pursuance to these references, the workmen filed claim petitions contending that they had been in service for not less than six years continuously and their services had been terminated in violation of provisions of Section 6N of the [Industrial Disputes Act, 1947](#) (hereinafter called Act, 1947) and they had worked for 240 days in a calendar year counting backward from the date of termination and also claimed regularization after reinstatement. The management contested the claims denying the averments made by the workmen contending that the workmen had been employed on the posts which were funded out from the contingency fund ; they have been appointed Illegally by a person having no authority to appoint and their termination after the completion of the work did not attract the provisions of Section 6N of the Act, 1947.

3. In view of the pleadings, the parties were permitted to lead evidence, and after considering the same, the labour court came to the conclusion that the workmen had worked for more than 240 days in a calendar year counting backward from the date of termination ; their services had been terminated without following the statutory provisions of the Act, 1947, and in view of their above pleadings the award was made reinstating the workmen with all consequential benefits Including the back wages and a further direction to frame a scheme for their regularization within the stipulated period vide award dated 30.1.1992. Hence, the first set of writ

petitions has been filed challenging the termination order. Writ Petition No. 21684 of 1992 has been filed against the direction issued for regularization. As the award was not implemented, the workmen approached the Deputy Labour Commissioner, Meerut and the recovery certificates had been issued by him to recover the amount but the District Collector, Meerut, did not make the recovery. C.M.W.P. No. 16710 of 1999 has been filed by the workmen to issue direction to the District Collector, Meerut, to make recovery in pursuance of the said recovery certificates.

4. Learned counsel for the parties have made same submission which had been made before the labour court. In a limited jurisdiction under Article 227 of the Constitution, there is very much limited scope of interference on finding of facts and the learned Standing Counsel miserably failed to show that the findings recorded by the labour court are perverse being based on no evidence or contrary to the evidence on record. Thus, no interference is called for. However, the labour court has not considered the issue at all as to whether during this period, the workmen had gainfully been employed anywhere and none of the parties made any effort to lead evidence on this issue. In such a fact situation, payment of full back wages may not be justified. Thus, the award deserves to be modified to the extent that the workmen shall be entitled to 50. per cent of the back wages from the date of reference till the date of award passed by the labour court. The first set of writ petition is disposed of accordingly. As a consequence W. P. No. 16710 of 1999 is disposed of with a direction that the District Collector, Meerut, shall return the recovery certificates to the Deputy Labour Commissioner, Meerut, who shall issue fresh recovery certificates in terms of this judgment and the District Collector, Meerut, shall make recovery in accordance with law.

5. So far as the Writ Petition No. 21688 of 1992 is concerned, it raises substantial question of law as to whether labour court in this fact situation could issue the direction for regularization of the workmen.

6. The issue of regularization has been considered by the Hon'ble Apex Court from time and again and the law has been laid down in very clear terms in the cases, i.e., *State of Haryana and Ors. v. Piara Singh and Ors.* (supra) ; *Jacob M.*

Puthuparambil and Ors. v. Kerala Water Authority and Ors., 1991 (1) SCC 28 ; J. and K. Public Service Commission etc. v. Dr. Narinder Mohan and Ors., 1993 (6) JT 593 ; Dr. A. K. Jain v. Union of India, 1988 (1) SCR 335 ; Ek. Ramakrishnan and Ors. v. State of Kerala and Ors., 1996 (10) SCC 656 and Ashwani Kumar and Ors. v. State of Bihar and Ors., 1997 (1) JT 243 ; and the ratio of all those judgments can be summarized to the extent that the question as to whether the services of certain employees appointed on ad hoc basis should be regularized relates to the condition of service. The power to prescribe the conditions of service can be exercised either by making rules under the proviso to Article 309 of the [Constitution of India](#) or any analogous provision and in the absence of such rules, under the instructions issued in exercise of its executive power. The Court comes into the picture only to ensure observance of fundamental rights and statutory provisions, rules and other instructions, if any, governing the conditions of service. The main concern of the Court in such matters is to ensure the Rules of Law and to see that the executive acts fairly and gives a fair deal to its employees consistent with the requirements of Articles 14 and 16. It also means that the State should not exploit its employees nor should it seek to take advantage of the helplessness and misery of either the unemployed persons or the employees, as the case may be. As is often said, the State must be a model employer. It is for this reason. It is held that equal pay must be given for equal work, which is indeed one of the Directive Principles of the Constitution. It is for this very reason it is held that a person should not be kept in a temporary or ad hoc status for long. A perusal of the authorities would show that appointments are as a rule to be made in accordance with statutory rules, giving equal opportunity to all the aspirants to apply for the posts and following the prevalent policy of reservation in favour of Scheduled Castes/Scheduled Tribes and other backward classes. Whenever the employees are appointed on ad hoc basis to meet an emergent situation, every effort should be made to replace them by the employees appointed on regular basis in accordance with the relevant rules as expeditiously as possible. Where the appointment on ad hoc basis has continued for long and the State has made rules for regularization, regularization has to be considered in accordance with the rules. Where, however, no rules are operative, it is open to the employees to show that they have been dealt with arbitrarily and their weak position has been

exploited by keeping them on ad hoc for long spell of time. However, it is a question of fact whether in the given situation, they were treated arbitrarily. In *Khagesh Kumar v. Inspector General of Registration, U.P. and Ors.*, AIR 1996 SC 417, the Supreme Court did not issue direction for regularization of those employees who had been appointed on ad hoc basis or on daily wages after the cut off date, i.e., 1.10.1986 as was mandatorily required by the provisions of U.P. Regularization of Ad hoc Appointment (On posts Outside the Purview of the Public Service Commission) Rules, 1979 and those who were not eligible under the said rules were not given regularisation. The same view has been taken by the Supreme Court in *Inspector General of Registration and another v. Awadhesh Kumar and Ors.*, 1996 (1) AWC 69 (SC) ; 1996 (9) SCC 217. Moreover, the above referred cases further laid down that for the purpose of regularization, various prerequisite conditions are to be fulfilled, i.e., the temporary/ad hoc appointment of the employee should be in consonance with the statutory rules, it should not be a back-door entry. The service record of the petitioner should be satisfactory, the employee should be eligible and/or qualified for the post at the time of his initial appointment. There must be a sanctioned post against which the employee seeks regularization and on the said sanctioned post, there must be a vacancy. Moreover, regularization is to be made according to seniority of the temporary/ad hoc employees. The regularization should not be in contravention of the State Policy regarding reservation in favour of Scheduled Castes/Scheduled Tribes and other Backward Classes and Other Categories for which State has enacted any Act or framed rules or issued any Government order etc.

7. Similar view has been taken in *Union of India v. Vishamber Dutt*, 1996 (11) SCC 341 and *State of Uttar Pradesh v. U.P. Madhyamik Parishad Kshramik Sangh*, AIR 1996 SC 708. In the case of *State of Himachal Pradesh v. Ashwani Kumar*, 1996 (1) SCC 773, the Apex Court has held that if an employment is under a particular scheme or the employee is being paid out of the funds of a scheme, in case the scheme comes to closure or the funds are not available, the Court has no right to issue direction to regularize the service of such an employee or to continue him on some other project, for the reason that 'no vested right is created in a temporary employment.'

8. Admittedly, respondent-workmen had been appointed without following any procedure prescribed under the Act or the Rules by the person, who had no competence to appoint them. It has been contended on behalf of the respondent that even if their appointment was not in accordance with law, the provisions of the Act, 1947, are attracted for the reason that provisions of Section 25J of the Act have over-riding effect on other laws because the Legislature, in its wisdom, thought that the rights and liabilities arising out of the law and retrenchment should be uniform throughout wherever the Act was in force and every State should have its own law in consonance with the Central Law. This view stands fortified by the judgment of the Hon'ble Supreme Court in *P. Virudhachalam and Ors. v. Management of Lotas Mills and Anr.*, (1998) 1 SCC 650 ; *Krishna District Co-operative Marketing Society Ltd. v. N.V. Puranchandra Rao and Ors.*, (1987) 4 SCC 99 and *Vikramaditya Pandey v. Industrial Tribunal and Anr.*, 2001 (1) AWC 625 (SC) : 2001 AIR SCW 310.

9. In *Prabhu Dayal Jat v. Alwar Sahkari Bhumi Vikas Bank*, 1991 Lab IC 944, the Court considered the case of an employee, whose services stood terminated on the ground that he had been appointed without any authorization of law. This Court held that even in that case, the provisions of the Act were attracted.

10. On the contrary, in *Sita Ram Mali v. State of Rajasthan*, 1994 (2) WLC 177, Rajasthan High Court held as under :

'Making appointment on daily wages without the availability of the post and without following the provisions of Articles 14 and 16 suffers from patent illegality. Apparently for the reasons which are only extraneous, the officers of the department have given appointments on daily wages to few favoured. Those who have waited in queue at the employment exchange have been altogether ignored. In fact, while the length of the queue continuously increase, the back-door entrants got the entry in service as daily wages employee and got the order of appointment on salary in the regular pay scale and ultimately the order of regularization on the service.'

The Court deprecated the practice of making appointments on daily wages and held- that even the appointment on daily wages without advertising the vacancy or

calling the names from Employment Exchange violates the provisions of Articles 14 and 16 of the Constitution and hence it is violative of the fundamental rights of other eligible persons and, thus, the relief of regularization cannot be claimed.

11. The question of appointment de hors the rules has been considered by the Hon'ble Supreme Court from time and again and the Court held that such appointments are unenforceable and inexecutable. It is settled legal proposition that any appointment made de hors the rules violates the public policy enshrined in the rules and, thus, being void, cannot be enforced. [Vide Smt Ravinder Sharma and Anr. v. State of Punjab and Ors., (1995) 1 SCC 138 ; Smt. Harpal Kaur Chahal v. Director, Punjab Instructions, 1995 (Suppl) 4 SCC 706 ; State of Madhya Pradesh v. Shyama Pardhi, (1996) 7 SCC 118 ; State of Rajasthan v. Hitendra Kumar Bhatt, 1997 (Supp) AWC 249 (SC) : (1997) 6 SCC 574 ; Patna University D. Dr. Amita Tiwari, AIR 1997 SC 3456 ; Madhya Pradesh Electricity Board v. S. S. Modh and Ors., 1998 (1) AWC 2.70 (SC) (NOC) : AIR 1997 SC 3464 ; Bhagwan Singh v. State of Punjab and Ors., (1999) 9 SCC 573 and Chancellor v. Shankar Rao and Ors., (1999) 6 SCC 255].

12. Appointment de hors the rules violates the mandate of the provisions of Articles 14 and 16 of the Constitution as held by the Hon'ble Supreme Court in Delhi Development Horticulture Employees' Union v. Delhi Administration, AIR 1992 SC 789; and State of Haryana and Ors. v. Piara Singh, AIR 1992 SC 2130. In Delhi Transport Corporation v. D.T.C. Mazdoor Congress and Ors., AIR 1991 SC 101, the Hon'ble Supreme Court recognised the public employment as public property and held that all persons similarly situated have a right to share in it though its enjoyment is subject to the recruitment rules must be in consonance with the scheme of the [Constitution of India](#).

13. In Dr. M.A. Haque and Ors. v. Union of India and Ors., (1993) 2 SCC 213, the Supreme Court observed as under :

'..... We cannot lose sight of the fact that the recruitment rules made under Article 309 of the Constitution have to be followed strictly and not in breach. If a disregard of the rules and by passing of the Public Service Commissions are permitted, it will open a back-door for illegal recruitment without limit. In fact this

Court has, of late, been witnessing a constant violation of the recruitment rules and a scant respect for the constitutional provisions requiring recruitment to the services through the Public Service Commissions. It appears that since this Court has in some cases permitted regularization of the irregularly recruited employees, some Governments and authorities have been increasingly resorted to irregular recruitments. The result had been that the recruitment rules and the Public Service Commissions have been kept in cold storage and candidate dictated by various considerations are being recruited as a matter of course.'

14. Deprecating the practice of making appointment de hors the rules by the State or other State instrumentalities in *Dr. Arundhati A. Pargaonkar v. State of Maharashtra*, AIR 1995 SC 962, the Court rejected the claim of the petitioner therein for regularization on the ground of long continuous service observing as under :

'Nor the claim of the appellant, that she having worked as Lecturer without break for 9 years' on the date the advertisement was issued, she should be deemed to have been regularised appears to be well founded. Eligibility and continuous working for howsoever long period should not be permitted to over-reach the law. Requirement of rules of selection cannot be substituted by humane considerations. Law must take its course.'

15. The Hon'ble Supreme Court in *State of U.P. and Ors. v. U.P. State Law Officers Association and Ors.*, 1994 (1) AWC 645 (SC) : AIR 1994 SC 1654, has observed as under :

'This being so those who come to be appointed by such arbitrary procedure can hardly complain if the termination of their appointment is equally arbitrary. Those who come by the backdoor have to go by the same door.

The fact that they are made by public bodies cannot vest them with additional sanctity. Every appointment made to a public office, howsoever made, is not. There is, therefore, no public interest involved in saving all appointments irrespective of their mode. From the inception some engagements and contracts may be the product of the operation of the spoils system. There need be no legal

anxiety to save them.'

16. Even if there are no Statutory Rules or Bye-laws of the society providing a mode for appointment, the Executive Instructions/Policy adopted by the respondent-society must be there providing for a mode of appointment. Even if no such Executive Instructions/ Policy/ Guidelines/ Circular, etc. is in existence, then a fair procedure for appointment has to be adopted in consonance with the provisions of Articles 14 and 16 of the Constitution. (Vide Nagpur Improvement Trust v. Yadaorao Jagannath Kumbhare, (1999) 8 SCC 99).

17. In Ramesh Kumar Sharma and Anr. v. Rajasthan Civil Services Appellate Tribunal and Ors., 2000 AIR SCW 4206, the Hon'ble Supreme Court held that 'expression 'service rules' cannot be given a restrictive meaning in the absence of the definition of the said term and, therefore, it would include within its sweep, the necessary Government order providing the method of recruitment.'

18. A Constitution Bench of the Hon'ble Supreme Court, in B.R. Kapoor v. State of Tamil Nadu, 2001 (7) SCC 231, (Jayalalitha case) observed that it is the duty of the Court to examine whether the incumbent possesses qualification for appointment and the manner in which the appointment came to be made or the procedure adopted was fair, just and reasonable and if not, appointment should be struck down.

19. A Constitution Bench of the Hon'ble Supreme Court, in Ajit Singh (II) v. State of Punjab and Ors., 2000 (1) AWC 574 (SC) : (1999) 7 SCC 209, held that Articles 14 and 16(1) are basic features of the Constitution. The same view has been reiterated in Ashok Kumar Gupta v. State of U.P. and Ors.. (1997) 5 SCC 201 and Indra Sawhney v. Union of India and Ors., (2000) 1 SCC 168. Thus, strict adherence is required thereto.

20. In Kumari Shrilekha Vidyarthi etc. etc. v. State of U.P. and Ors., AIR 1991 SC 537 and A.P. Aggarwal v. Government (N.C.T.) of Delhi and Ors., (2000) 1 SCC 600, the Hon'ble Supreme Court held that every State action, in order to survive, must not be susceptible to vice of arbitrariness which is a crux of Article 14 of the Constitution and basis of the rule of law.

21. Therefore, any appointment made by a Statutory Authority, which may be a State within the meaning of Article 12 of the Constitution, if found to have been made by a person without any competence or without following the procedure prescribed by law and in case the procedure is not prescribed and the procedure adopted by the authority is not in consonance with Articles 14 and 16 of the Constitution, the incumbent cannot claim any benefit as in such a case, the contract of service becomes enforceable and inexecutable.

22. If the view contrary, to the above is accepted or it is accepted that provisions of Section 25J of the Act would over-ride the mandate of the Constitution also, it will take away the powers of the High Court to issue a writ of quo warranto, wherein the appointment of an incumbent can be challenged not only by an aggrieved person but a stranger also. Invalidity of an appointment may arise not only from want of qualification, but also from the violation of such legal conditions or procedure for appointment as mandatory and as a result of which the appointment becomes void. (Vide M. Pantiah and Ors. v. Muddala Veeramallappa and Ors., AIR 1961 SC 1107 ; University of Mysore v. C. D. Govinda Rao, AIR 1965 SC 491 and P.N. Lakhanpal v. A.N. Roy, AIR 1975 Del 66). There can be no quarrel to the Issue that the Board is an authority, which is a 'State' within the meaning of Article 12 of the Constitution. Thus, question of saving such an illegal appointment did not arise.

23. The instant cases are squarely covered by the Judgment of the Hon'ble Supreme Court in Factory Manager, Cimmco Wagon Factory v. Virendra Kumar Sharma and Anr., (2000) 6 SCC 554, wherein the Hon'ble Supreme Court, while deciding a similar case, held as under :

'Assuming that the respondent was asked to work in a factory in anticipation of securing appointment, that too by an officer who was not competent to give appointment, that did not make the respondent a workman or regular employee of the appellant company.'

24. In view of the above, the law of regularization can be summarized that the appointment should be made at initial stage in accordance with rules. Incumbent must possess the requisite qualification for the post on the date of appointment

and if appointment had been made on temporary/ad hoc basis, the workman should not be permitted to continue for long, rather the vacancies should be filled up on permanent basis in accordance with law. If the statutory provision or executive instruction provides for regularization after completing a particular period, only then regularization is permissible. In special circumstances, Court may give direction to consider the case for regularization provided continuation on ad hoc basis is so long that it amounts to arbitrariness and provisions of Article 14 are attracted. There must be sanctioned post against which regularization is sought. At the same time, policy of the State enforcing the reservation for particular classes like S.C., S.T., O.B.C.. etc. and further for women, handicapped and ex-service men cannot be ignored.

25. In the instant case, the labour court has not given any finding regarding the eligibility of the workmen for the post or availability of the vacancies ; the services were terminated on 16th August, 1986 and 5th January, 1987. Award was made on 30th January, 1992, i.e., after a period of more than 5-6 years.

26. Without considering any relevant factor at such a belated stage, no such direction could have been issued.

27. In view of the above, the direction issued by the learned labour court to the extent of considering the case of the petitioner for regularization is hereby set aside.

28. In the result, the Writ Petition Nos. 21684-87 of 1992 and W. P. No. 32500 of 1992 are disposed of with modification in the award as explained above. C.M.W.P. No. 16710 of 1999 is disposed of with the direction to the District Collector, Meerut, to return the recovery certificates to the Deputy Labour Commissioner, who shall issue fresh recovery certificates in view of the modifications and then the District Collector shall make the recovery in accordance with law. Civil Misc. Writ Petition No. 21688 of 1992 is allowed and the award is set aside to the extent of issuing direction for regularization. In the peculiar circumstances there shall be no order as to costs.