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Court : Allahabad

Decided On : Mar-12-2004

Reported in : 2004(3)AWC2506

Judge : D.P. Singh, J.

Appeal No. : C.M.W.P. No. 8350 of 1991

Appellant : Ashok Kumar and ors.

Respondent : State of U.P. and ors.

Advocate for Def. : S.C.

Advocate for Pet/Ap. : A.K. Sharma, ;Vijay Khare and ;S.P. Srivastava, Advs.

Judgement :

D.P. Singh, J.

1. Heard counsel for the parties.

2. This petition has been filed for quashing the orders dated 8.3.1991 and 9.3.1991 by which the services of the petitioners, who are class IV employees in the Employees State Insurance Hospital, Aligarh, were dispensed with.

3. The petitioners alleged that in July, 1990, they were appointed on different posts in class IV on daily wages in the Employees State Insurance Hospital, Aligarh. It is

further alleged that the posts were created by the Government vide its G.O. dated 20.3.1989 and, thus, by various orders dated 26.7.1990 issued by the Superintendent, Employees State Insurance Hospital, Aligarh, their appointments were regularised with effect from 1.8.1990. It is further alleged that in pursuance of a letter dated 27.2.1991 issued by Director, Employees State Insurance Scheme, Kanpur, to the Senior Medical Superintendent that as there were 13 surplus class IV employees in Agra region, steps should be taken so that all the 13 surplus employees be accommodated in E.S.I. Hospital at Aligarh. It was also stipulated therein that any class IV employee who has not been regularly appointed, should be relieved from service. It is alleged that on the basis of this letter the services of the petitioners have been terminated.

4. A counter-affidavit has been filed on behalf of respondent No. 2 wherein it is stated that new posts of class III and class IV Employees were created vide G.O. dated 20.3.1989 in consequence of an earlier G.O. dated 29.7.1988 whereby large number of posts of Paramedical Staff and class III and class IV posts in the E.S.I. Scheme were declared surplus. The posts which were created by G.O. dated 20.3.1989 were not to be filled up by direct recruitment. It is also asserted that the petitioners were appointed against the rules and they purposely did not file the G.O. along with the writ petition. The Superintendent E.S.I. Hospital, Aligarh, who had given the appointment letters to the petitioners, Dr. J. L. Bhatia, was facing an enquiry because of the said appointments. It is also alleged that no procedure whatsoever was followed in granting the appointments and it was made in the whimsical manner in unchaste haste by pick and choose method. It is also alleged that persons were appointed to Mechanical and Technical posts without any qualification. It is thus alleged that the impugned orders need not be interfered under writ jurisdiction of this Court.

5. It has been contended by the counsel for the petitioner that the appointing authority of the petitioners was Medical Superintendent while the termination order has been passed by the Senior Medical Superintendent and, therefore, the order is illegal. In support of his contention, learned counsel for the petitioner has relied upon a decision of this Court rendered in the case of Surendra Singh v. District Cane Officer, 1992 AWC 874. In Surendra Singh's case, the petitioners were

appointed following the procedure prescribed under the Service Rules by the District Assistant Registrar Cane Cooperative Societies and their services were terminated by the Secretary of the Society. The Secretary of the Society was admittedly a junior person than the District Assistant Registrar and, therefore, set aside the termination order. In the present case, as is evident from the counter-affidavit, the Superintendent without resorting to the powers under the Recruitment Rules issued the appointment letter even though the posts were reserved for surplus employees for whom the said posts were created. The Senior Superintendent exercises the same power as the Superintendent and as such it cannot be said that he did not have the power to terminate the services. Further, the Superintendent having resorted to illegal means by issuing the appointment letter was rightly not trusted by the Senior Official. In any event no prejudice has been caused to the petitioners because in the first place the posts were reserved for surplus staff and the petitioners had absolutely no right or lien over it. Therefore, in my opinion, this contention of the petitioners does not merit acceptance and has to be rejected.

6. Learned counsel for the petitioner has then urged that once their services were regularised, it could not be terminated without following the due procedure prescribed under the Rules. From the averments in the writ petition, it is apparent that the petitioners were never employed in accordance with the group D Recruitment Rules, 1985, further, perusal of their appointment letter shows that their services were purely temporary and ad hoc and could be terminated with a month's notice and by the impugned order their services were terminated by following the procedure prescribed under U. P. Temporary Government Servants (Termination of Service) Rules, 1975. Recently, the Apex Court in the case of Union of India v. A.P. Bajpai, 2003 (2) AWC 882 (SC) : AIR 2003 SC 923, has held that a temporary employee has no right or lien to the post. Thus, this argument of learned counsel for the petitioner is devoid of any merit.

7. Learned counsel for the petitioner has then urged that once the petitioners were given regular appointment, they could not be removed without any opportunity. A bare perusal of the appointment letters which are annexed with this petition shows that one of the conditions stipulated therein was that the petitioners could be

removed without any notice. There is no averment that the removal was due to some misconduct and, thus, no opportunity was necessary before the impugned orders were passed. The petitioners have failed to show that they had any lien over the post. Therefore, this argument of learned counsel for the petitioner is bound to be rejected.

8. It has then been urged that though juniors have been retained the services of the petitioners have been terminated. He has relied upon the allegations made in paragraph 8 of the petition to state that Smt. Nirmala Devi and Shri Udey Ram who were juniors have been retained. The respondents have explained in paragraph 10 in the counter-affidavit that Smt. Nirmala Devi has been appointed on ad hoc basis till a regular appointment is made and so far as Shri Udey Ram is concerned he was a terminated employee, but on appeal the same was set aside and he was reinstated into service. Thus, this allegation of the petitioner is without any substance and hence is rejected.

9. Learned counsel for the petitioner has then urged that when this petition was filed the termination orders were stayed vide order dated 23.3.1991 and on the strength of the stay order the petitioners are continuing in service for about 13 years and as such at this juncture it would not be just and humane to throw them out of job. He has relied upon the following judgments rendered by the Apex Court :

(1) Arun Kumar Raut v. State of Bihar, AIR 1998 SC 1477,

(2) H.C. Puttaswamy v. Hon'ble Chief Justice of Karnataka High Court, AIR 1991 SC 295.

(3) Miss Shainda Hasan v. State of U.P., 1990 (1) AWC 695 (SC) : AIR 1990 SC 1381.

10. In Arun Kumar Raut's case certain class III and class IV appointments on daily wage basis were terminated after show cause as their appointments were irregular. Their claim for regularisation was also rejected by the High Court on the finding that their appointments itself were against the Rules. The Apex Court found

that all of them possessed the requisite qualification and there was no allegation of any sharp practice being employed by the appointees and thus it went on to hold that even though their appointments were illegal but since they had continued in service for more than 5 years, their regularisation should be considered.

11. In H. C. Puttaswamy's case the High Court after inviting applications for post of Second Division Clerks and Typists issued appointment-orders by passing the Public Service Commission and violating the Rules. The selection was set aside by the High Court and also by the Supreme Court. But on a review application, the appointees, with the agreement of the High Court, allowed them to continue and ordered that they should be adjusted as they had continued for 10 years under the orders of the Court.

12. In Miss Shainda Hasan's case her appointment was challenged on the ground that the qualification had been relaxed without their being any provision in either the advertisement or the Rules, though the Supreme Court held that the appointment was invalid but as the university agreed, she was allowed to continue since she had been working for 14 years and, thus, all benefits were granted.

13. In all the above cases it was found that the petitioners were not to be blamed for the irregularity and sharp practice. But, in this case, as would presently be seen, the demeanour and bona fides are wanting.

14. As is evident from the counter-affidavit, by a G.O. dated 29.7.1988, 213 Paramedical Staff. Class III and Class IV employees had been declared surplus in E.S.I. Scheme with a stipulation that they would be absorbed in existing and new Hospitals and Dispensaries. The State Government after taking over the E.S.I. Hospital, Aligarh, had issued the G.O. dated 20.3.1989, creating several posts and it was mentioned in paragraph 6 of the G.O. that no new appointment by direct recruitment would be made on the posts so created. These posts were to be filled up by those employees whose posts had been declared surplus by G.O. dated 29.7.1988. The petitioners, though had asserted in the writ petition that they were appointed against posts created by G.O. dated 20.3.1989, did not purposely annex along with the writ petition either the G.O. dated 29.7.1988 or G.O. dated 20.3.1989. The purpose is obvious that if the two Government orders had been

annexed along with the writ petition, the petitioners could not have obtained the interim orders by this Court. The petitioners, in the present case, are guilty of suppressing material facts and relevant documents. A perusal of the appointment letters show that the same were issued hastily and even the addresses of the petitioners were not mentioned though the same were to be dispatched to them. Further, it is evident from the array of parties that petitioner Nos. 9, 22, 23, 24 and 25 were appointed against technical posts without ensuring that any of them had the requisite technical qualification. They themselves state that they were taken in employment as daily wagers in July, 1990 and the regularisation order was passed on 26.7.1990, this fact shows that the petitioners were never appointed as daily wagers but they manouvered with the help of Dr. J. L. Bhatia, the then Medical Superintendent and were able to obtain the appointment orders. It is on record that an enquiry was initiated against Dr. J.L. Bhatia for committing such irregularity. The petitioners have encroached upon the rights of others by backdoor. Should they be allowed to continue

15. The writ petition was filed and interim orders were obtained on 21.3.1991. Stay vacation along with a counter-affidavit was filed after being served on the petitioners on 13.9.1991. The petitioners took three years to file their rejoinder-affidavit on 8.2.1994. When the matter was taken up on 13.9.1997 it was adjourned on account of the petitioners. The case was dismissed for non-prosecution on 21.10.1997 and a recall application was filed after 2 years on 26.5.1999. Again when the matter was taken up on 20.5.2002 it was adjourned on account of the petitioners. Should they still be allowed to continue

16. As already noted above, the stand in the counter-affidavit was clear and unambiguous that the vacancies were created for the surplus staff, this counter-affidavit was served on the counsel for the petitioner on 11.9.1991, but no effort worth the name has been made by the petitioners till today to implead any of those surplus staff who are vitally interested in the outcome of this petition. They have not been heard, yet their lien is sought to be appropriated by the petitioners who entered service by the backdoor.

17. Keeping in mind all these factors and that this Court being also a Court of equity, has to balance it between the petitioners and those for whom the posts were created but who are not before the Court. Whether the surplus class IV employees can now be adjusted, there is nothing on record to help the Court to answer to all these questions.

18. From the above facts it is evident that the ratio of the Apex Court in the above cases does not squarely apply to the present case.

19. Having considered the entire facts and circumstances, it appears just to give the following directions and dispose of this petition :

(a) The respondent No. 2 is hereby directed to find out as to whether any of those surplus class IV employees for whom the vacancies were created are still out of job, this exercise may be undertaken also by issuing advertisement in widely circulated local newspapers.

(b) If they are available, they should be adjusted on these posts according to their seniority.

(c) The petitioners 'would be removed' from their posts based on the principle of last come first go, however, if the entry in service is on the same date, the younger, in age would leave first.

(d) In case no such surplus employees are available, the petitioners may be considered for regular appointment after examining the suitability under the Rules and they would be treated as such regular employees from the date of order of regularisation.

20. With these directions, the writ petition is finally disposed of.