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Court : Allahabad

Decided On : Apr-23-2002

Reported in : 2002(3)AWC1807; (2002)3UPLBEC2150

Judge : R.B. Misra, J.

Appeal No. : C.M.W.P. No. 17565 of 1997

Appellant : Sailesh Kumar Upadhyay and anr.

Respondent : State of U.P. and ors.

Advocate for Def. : S.C.

Advocate for Pet/Ap. : J.A. Azmi and ;L.D. Rajbhar, Advs.

Disposition : Writ petition allowed

Judgement :

R.B. Misra, J.

1. In this petition, the petitioner has prayed for issuing a writ, order or direction in the nature of mandamus directing respondent No. 2 to permit the petitioners to work as Kurk Amins in terms of their respective original letters of appointment till such time that regular work is available and further to regularise the petitioners' services in case duly sanctioned post and work is available with the respondent-

authorities.

Heard Sri L.D. Rajbhar, learned counsel for the petitioner and learned Standing Counsel for the respondents.

2. It appears that advertisement in Dainik Devrath 'Hindi' daily issue dated 9.11.1994 had been issued for inviting applications from eligible persons for certain posts of Kurk Amins. The advertisement aforesaid indicated that candidates must be matriculate. The post of 'Kurk Amin' to be filled for realisation of dues of co-operative societies in the district of Azamgarh. The posts of Kurk Amins thus advertised were to be filled up by eligible candidates after a selection procedure undertaken in accordance with law and the selected candidates were to hold the posts in question against remuneration paid on a commission basis. The petitioners were issued appointment letter dated 22.12.1994. The petitioners appeared before Assistant Registrar respondent for verification of their testimonials and issuance of their letters of appointment. Thereupon, the petitioners were issued with appointment letters (Annexure-3). Petitioners joined the post of Kurk Amins and have been discharging duties assigned to them regularly and continuously. However, in July, 1996, the respondents stopped assigning work to the petitioners and thereafter, the petitioners had given several representations to the authority concerned but no heed was taken, hence the writ petition has been preferred.

3. Learned counsel for the petitioners has relied on the judgment passed in Civil Misc. Writ Petition No. 14377 of 1997, Jokhu Chauhan and Ors. v. State of U.P. and Ors., wherein it was observed :

'The petitioners were appointed Kurk Amins and their services were terminated by order dated 28.11.1995, passed by respondent No. 4 (Annexure-12 to the writ petition). The controversy involved in the present case is whether the petitioners were holding civil post and whether their services could be terminated as Kurk Amins who were appointed on commission basis. A Division Bench judgment in Special' Appeal No. 129 (SC) of 1996, U.P. Sahakari Sangharsha Karmachari Sangh v. State of U.P. and Ors., passed by Lucknow Bench of this Court has held that Kurk Amins on regular basis are holders of civil posts and the same benefits

should be given to Kurk Amins appointed on commission basis also. The Bench further held that Kurk Amins appointed on commission basis are equally entitled to be regularised and absorbed as Kurk Amins and should be paid their salary and allowances admissible to the post subject to availability of the post. It further directed that those employees who can not be absorbed on account of nonavailability of posts, shall be kept in waiting list and should be allowed to continue as such on commission basis till they are absorbed on regular basis as Kurk Amins and till a fresh recruitment is not made. This writ petition is also allowed on the same terms and with the same directions as contained in the aforesaid case.

In the result, the writ petition succeeds and is allowed. The order dated 28.11.1995 (Annexure-12 to the writ petition) is hereby quashed. The respondents are directed to consider the claim of the petitioners for absorption Inregular cadre of Kurk Amins subject to availability of the posts. Those petitioners who cannot be absorbed on account of non-availability of posts, shall be kept on waiting list and shall be allowed to continue on commission basis till they are absorbed as a regular Kurk Amins or till fresh recruitment is made by the respondents.'

4. In State of U.P. v. Chandra Prakash Pandey and Ors., 2001 (2) AWC 1399(SO ; 2001 (2) ESC (SC) 333, the Supreme Court has found that the Kurk Amins appointed on commission basis, within the State of U.P. were treated to be employees of the State Government holding civil post within the meaning of Article 311, as such entitled to same scale of pay as payable to Kurk Amins appointed on regular basis by revenue department :

Para 10.--The question as to when a person can be said to be holder of a civil post has been subject-matter of consideration before this Court on numerous occasions. In the case of State of Assam and Ors. v. Shri Kanak Chandra Dutta, 1967(1) SCR 679. a Constitution Bench of this Court was considering a case where a mauzadar was appointed for collection of land revenue under the mauzadari system prevailing in the Assam Valley whose primary duty was to collect land revenue and other Government revenues. He was working as Revenue Officer and ex officio Assistant Settlement Officer exercising delegated

powers of the Government and the State had the power and right to select and appoint him in as much as power to suspend and dismiss. The mauzadar was drawing not a regular salary but commission by way of a remuneration. The Court observed that there must be existence of relationship of master and servant between the State and its employees and such a relationship can be established by presence of all or some of the ingredients. After due consideration of the entire matter the Court laid down the law as follows :

'Judged in this light, a mauzadar in the Assam Valley is the holder of a civil post under the State. The State has the power and the right to select and appoint a mauzadar and the power to suspend and dismiss him. He is a subordinate public servant working under the supervision and control of the Deputy Commissioner. He receives by way of remuneration a commission on his collections and sometimes a salary. There is a relationship of master and servant between the State and him. He holds an office on the revenue side of the administration to which specific and onerous duties in connection with the affairs of the State are attached, an office which falls vacant on the death or removal of the incumbent and which is filled up by successive appointments. He is a responsible officer exercising delegated powers of Government. Mauzadars in the Assam Valley are appointed Revenue Officers and ex officio Assistant Settlement Officers. Originally, a mauzadar may have been revenue farmer and an independent contractor. But having regard to the existing system of his recruitment, employment and functions, he is a servant and a holder of a civil post under the State.

Counsel for the State stressed the fact that normally a mauzadar does not draw a salary. But a post outside the regularly constituted services need not necessarily carry 'a definite rate of pay'. The post of a mauzadar carries with it remuneration by way of a commission on collections of Government dues. Counsel stressed the fact that a mauzadar is not a whole time employee. But a post outside the regularly constituted services may be a part time employment. The conditions of service of a mauzadar enable him to engage in other activities.

In Venkata Swamy v. Superintendent of Post Offices, AIR 1957 Ori 112, the Orissa High Court held, on a consideration of the relevant conditions of

employment, that a temporary extra-departmental branch post-master was not a person holding a civil post, but the observation in that case that a part time employee cannot be the holder of a civil post outside the regularly constituted services is too wide and cannot be supported.'

Part 11.--In the case of Superintendent of Post Offices etc. etc. v. P.K. Rajamma etc. etc., 1977(3) SCR 678, this Court was considering the case whether extra-departmental agent held a civil post and for his dismissal or removal, the provision of Article 311(2) of the Constitution was applicable. The Court laid down that an extra-departmental agent held a civil post and his dismissal or removal would be invalid if there was infraction of provisions of Article 311(2) of the Constitution as it then stood. The Court observed that extra-departmental agent was not a casual worker but he held a post under the administrative control of the State and the relationship between the postal authorities and the extra-departmental agent was that of a master and servant.

Para 12.--In the case of State of Gujarat and Anr. v. Raman Lal Keshav Lal Soni and Ors., 1983 (2) SCC 33, again a Constitution Bench of this Court was considering the question as to whether the Panchayat Service constituted under Section 203 of the Gujarat Panchayat Act was a civil service of the State and the members of the service were Government servants. The Court after due consideration, enumerated the following indicia for deciding whether a particular person is a member of civil servant of the State and a Government servant in paragraph 27 which runs thus : 'We do not propose and indeed it is neither polite nor possible to lay down any definitive test to determine when a person may be said to hold a civil post under the Government. Several factors may indicate the relationship of master and servant. None may be conclusive. On the other hand, no single factor may be considered absolutely essential. The presence of all or some of the factors, such as, the right to select for appointment, the right to appoint, the right to terminate the employment, the right to take other disciplinary action, the right to prescribe the conditions of service, the nature of the duties performed by the employee, the right to control the employee's manner and method of the work, the right to issue directions and the right to determine and the source from which wages or salary are paid and a host of such circumstances,

may have to be considered to determine the existence of the relationship of master and servant. In each case, it is a question of fact whether a person is servant of the State or not.'

5. In *Dinesh Kumar Asthana v. Collector, Azamgarh/Deputy Collector, Tahsil Phulpur, district Azamgarh and Ors.*, 2001 (1) AWC 785, it was held in para 8 :

'Necessary pleadings on this aspect are wanting. Even the counter-affidavit does not disclose that no person in the list prepared in the year 1993 has been regularised whose recovery was below the prescribed limit or that all the persons above such regularised persons were inefficient and/or had poor efficiency on comparison. This Court has no means to find out whether the recovery in a particular year with respect to the petitioner was low for reason other than his own efficiency. It is very relevant circumstance while considering efficiency of Seasonal Collection Amins. For example, recovery is not possible beyond a certain limit for various factors and reasons like-orders from Court, the total extent of recovery to be made in one's area and/or whether Government itself kept recovery in abeyance due to famine, flood, drought, etc. These will be relevant considerations to be taken into account and a Seasonal Collection Amin, being put to sufferance for reasons beyond his control, cannot be non suited for low recovery as if does not reflect at all upon his efficiency.'

6. Following the above decision of *Dinesh Kumar Asthana* in *Brijesh Kumar v. Collector/District Magistrate, Manipuri and Ors.*, (2001) 3 UPLBEC 2544, it was held in para 3 :

'The Impugned order does not disclose the period till which he was assigned target of particular collection and the actual period available to him for achieving the said target. Apart from the above, it may be noted that mere non-achieving of target for collection, bereft of other relevant facts cannot' be the criterion for achieving efficiency.

7. In the light of the above observations, the respondents are directed to consider the claim of the petitioners. Thus, the petitioners who cannot be absorbed on account of non-availability of posts, shall be kept in waiting list and should be

allowed to continue as such on commission basis till they are absorbed on regular basis as Kurk Amins and till fresh recruitment is not made.

8. In view of the above observations, the writ petition is allowed.

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