

State of U.P. and anr. Vs. Anand Kumar Saxena and ors.

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Court : Allahabad

Decided On : Nov-30-2004

Reported in : 2005(1)ESC410; (2005)2UPLBEC1149

Judge : B.S. Chauhan and ;Dilip Gupta, JJ.

Acts : [Motor Vehicles Act, 1939](#); Punjab Re-Organisation Act, 1966; Rajasthan University Teachers and Officers (Special Conditions of Service) Act, 1974; Allocated Government Servants (Absorption, Seniority, Pay and Allowances) Rules, 1957; [Constitution of India](#) - Articles 14, 16 and 311

Appeal No. : Special Appeal No. 758 of 1999

Appellant : State of U.P. and anr.

Respondent : Anand Kumar Saxena and ors.

Advocate for Def. : J.N. Singh, ;S.C. Shukla, ;K.K. Misra and ;Amar Singh, Advs.

Advocate for Pet/Ap. : S.C.

Judgement :

B.S. Chauhan, J.

1. This Special Appeal has been preferred by the State against the judgment and order of the learned Single Judge dated 3.5.1999 wherein the following direction

has been issued :

'The authorities are directed to absorb and appoint the petitioners as Clerk on regular basis against any existing substantive vacancy or vacancies which may occur in near future. The appointment against the existing vacancies shall be made within a period of two months from the date of production of a certified copy of this judgment before the appropriate authority'.

2. The operation of the aforesaid judgment and order was stayed by the Division Bench vide order dated 23.12.1999.

3. It has been submitted by the learned Standing Counsel that the Court cannot take the task of the statutory authorities and issue the direction to appoint/absorb an employee. At the most, direction could have been issued to consider the case for absorption.

4. On the contrary, it is submitted by Mr. Mishra, that the respondent employee had been working as seasonal employee for a long period, thus the learned Single Judge has rightly directed the appellants-authorities to absorb them. Thus, no interference is called and appeal is liable to be dismissed.

5. We have considered the rival submission made by the learned Standing Counsel for the appellants and Sri K.K. Misra, learned Counsel for the respondents.

6. It is not permissible for the Court to issue a direction in the nature and language, the direction had been issued by the learned Single Judge in the impugned judgment and order for absorption of an employee. The submission made on behalf of the State stands fortified by large number of judgments of the Hon'ble Supreme Court.

7. In Life Insurance Corporation of India v. Asha Ramchandra Ambekar (Mrs.) and Anr., AIR 1994 SC 2148, the Hon'ble Apex Court held that the writ jurisdiction cannot be exercised issuing directions straightway as the Courts are required to issue directions for mere consideration of the claim of the employee as straightway direction to appoint a particular person would only put the authority concerned in a

piquant situation. The disobedience of the said direction may entail contempt notwithstanding the fact that the appointments etc. may not be warranted as per the Rules.

8. An employee has a right to be considered for promotion and not a right for promotion. Thus, Court can direct to consider the case as per law and cannot issue direction for promotion straightway.

9. In *Hindustan Shipyard Ltd. and Anr. v. Dr. P. Sambasiva Rao and Ors.*, (1996) 7 SCC 499, the Hon'ble Apex Court held that in a case where the relief of regularisation is sought by employees working for a long time on ad hoc basis, it is not desirable for the Court to issue direction for regularisation straightway. The proper relief in such cases for issuing direction to the authority concerned to constitute a Selection Committee to consider the matter of regularisation of the ad hoc employees as per the Rules for regular appointment for the reason that the regularisation is not automatic, it depends on availability of number of vacancies, suitability and eligibility of the ad hoc appointee and particularly as to whether the ad hoc appointee had an eligibility for appointment on the date of initial as ad hoc and while considering the case of regularisation, the Rules have to be strictly adhered to as dispensing with the Rules is totally impermissible in law. In certain cases, even the consultation with the Public Service Commission may be required, therefore, such a direction cannot be issued.

10. In *Government of Orissa and Anr. v. Hanichal Roy and Anr.* (1998) 6 SCC 626. the Hon'ble Supreme Court considered the case wherein the High Court had granted the relaxation of service conditions. The Apex Court held that the Court cannot take upon itself the task of the Statutory Authority and only order which Court could have passed was directing the Government to consider relaxation itself forming an opinion in view of the statutory provisions as to whether the relaxation was required in the facts and circumstances of the case. Issuing such a direction by the Court is illegal and impermissible.

11. Similar view has been reiterated by the Hon'ble Supreme Court in *A. Umarani v. Registrar, Co-operative Societies and Ors.*, (2004) 7 SCC 112.

12. In *G. Veerappa Pillai v. Raman and Raman Ltd.*, AIR 1952 SC 192, the Constitution Bench of the Hon'ble Supreme Court while considering the case for grant of permits under the provisions of [Motor Vehicles Act, 1939](#), held that High Court ought to have quashed the proceedings of the Transport Authority, but issuing the direction for grant of permits 'was clearly in excess of its power and jurisdiction.'

13. The relief granted in the aforesaid case has been of absorption, which has to be understood in a different connotation with their regularisation. Question of absorption does arise when an employee of one department goes on deputation to another department and he may be absorbed therein permanently, or where after re-organisation of a State, a particular employee is allocated to any other State he is absorbed therein.

14. In *Rajiv Amar Singh v. State of Rajasthan*, AIR 1958 SC 228, the Constitution Bench of the Hon'ble Supreme Court held that there is a distinction between rights of property and contractual rights when there is a change of sovereignty or master. When one State is absorbed in another, whether by accession, conquest, merger, integration of contract of service between the prior Government and him is automatically terminated, and thereafter those who elected to serve the new State and are taken by it, serve on such terms and conditions as the new State may choose to decide. This is nothing more than an application of the principle that applies as law of master and servant when there is a change of masters.

15. In *M.D. Shukla and Ors. v. State of Gujarat and Ors.*, AIR 1971 SC 117, the Hon'ble Supreme Court considered the provisions of Allocated Government Servants (Absorption, Seniority, Pay and Allowances) Rules, 1957 and explained the meaning of absorption observing that it is a transfer from one department to another or one State to another because of compelling circumstances, as a result of integration of service.

16. Similar view has been reiterated by the Hon'ble Apex Court in *Union of India and Anr. v. P.K. Roy and Ors.*, AIR 1968 SC 850, observing that a person who is absorbed on such circumstances could not be put in disadvantageous position.

17. In *Mohd. Sagiruddin v. District Mechanical Engineer, North East Frontier Railway and Ors.*, AIR 1973 SC 1306 the Apex Court considered the provisions of Railway Establishment Code and held that when a person becomes medically unfit and instead of removing him from service he is absorbed in some other suitable job, as required under the Rules of the Establishment, the action cannot be held to be stigmatic and the provisions of Article 311 are not attracted.

18. In *State of Punjab and Ors. v. Balveer Singh and Ors.*, AIR 1977 SC 629 the Apex Court considered the provisions of Punjab Re-Organisation Act, 1966 and held that by change of territorial adjustment because of re-organisation of a particular State, though the Sovereignty does not change but the service conditions may change as the State where an employee is absorbed has a right to choose and dictate the terms and conditions on which it wants the employee to work. But the rule applicable earlier or Government Orders in force would not change unless they are repudiated by express provisions.

19. In *Smt. Usha Rani Dutta and Ors. v. State Industrial Court, Indore and Ors.*, AIR 1985 SC 1016, the Hon'ble Supreme Court explained the concept for absorption of the employees of one wing of the establishment to another wing of the same establishment therein the Court held that the clinic where the employee had been working had been the integral department of the plant as it had no independent existence though employees of the clinic were entitled for absorption in the plant.

20. In *Dr. (Mrs.) Shushma Sharma and Ors. v. State of Rajasthan and Ors.*, AIR 1985 SC 1367 the Court held that the provisions of Rajasthan University Teachers and Officers (Special Conditions of Service) Act, 1974 provided for eligibility for absorption prescribing a particular period of continuous employment. Thus, it was tantamount to regularisation of the teachers and other employees working for a long time having relevance to the cut off date mentioned therein.

21. In *Inder Pal Yadav and Ors. v. Union of India and Ors.*, (1985) 2 SCC 648, a similar view has been reiterated. Therefore, it is evident from the aforesaid judgments that absorption of an employee would depend upon the existing statutory provisions and the Courts have to give a strict adherence to the said

provisions and a Government case requires to be considered only in the light of the existing statutory provisions.

22. However, it was a case of regularisation of seasonal employees which may amount to regularisation for continuously working for a long time. However, the case raises disputed questions of fact as to whether the employees have been working continuously since 1986 ; whether they were seasonal or had been working throughout the year ; whether they are still in service, as the question of regularisation has to be considered either in the light of the scheme framed by the employer for such employees or in terms of a Rule etc. or continuation of ad hoc basis is so long that it becomes arbitrary to keep such employees ad hoc ; and whether the appointment had been made in pursuance of the mandatory provisions of the Statute and whether they were eligible at the initial stage of appointment, i.e. they possessed the minimum educational qualification and fulfilled other essential qualifications, as for want of the same, the initial appointment becomes bad and such employees do not deserve to be regularised. If the appointment itself is in infraction of the Rules or in violation of the provisions of the Constitution, illegality cannot be cured as regularisation cannot be said to be a mode of recruitment. The Government services are essentially a matter of status rather than a contract and no Government servant can claim automatic alteration of status unless that result is specifically envisaged by some provisions in the statutory Rules. Any appointment made without advertising the vacancy remains unenforceable being violative of the mandate of the Articles 14 and 16 of the Constitution and does not require to be protected and such an appointee cannot claim the relief of regularisation. [Vide *State of Mysore and Anr. v. S.V. Narayanappa*, AIR 1967 SC 1071 ; *R.N. Nanjundappa v. T. Thimmaiah and Anr.*, AIR 1972 SC 1767 ; *B.N. Nagarajan and Ors. v. State of Karnataka and Ors.*, AIR 1979 SC 1676; *State of Himachal Pradesh v. Suresh Kumar Verma and Anr.*, AIR 1996 SC 1565 ; *State of M.P. and Anr. v. Dharam Bir*, (1998) 6 SCC 165 ; *Dr. Chanchal Goyal (Mrs.) v. State of Rajasthan*, AIR SC 1713; *State of Haryana and Anr. v. Tilak Raj and Ors.*, AIR 2003 SC 2658 ; *Haryana Tourism Corporation Ltd. v. Fakir Chand and Ors.*, AIR 2003 SC 4465 ; and *Sultan Sadik v. Sanjay Raj Subbga and Ors.*, AIR 2004 SC 1377].

23. The Court has a power only to issue direction to the authorities concerned to consider the case in such eventualities in accordance with law but cannot issue a direction to appoint/absorb straightway for the reason that the absorption may depend upon the availability of the vacancy, satisfactory service rendered by him earlier, or a candidate may be found unsuitable on the ground that he had been given some punishment in the domestic inquiry or he did not possess the requisite qualification at the time of initial appointment etc. etc. Moreso, the Appointing Authority has to give effect to the Reservation Policy of the State.

24. The facts which emerge from the record are that the respondent-employees had been appointed as Seasonal Assistants Wasil Waqi Navis vide order dated 21st January, 1987 for a fixed period of less than three months and the Board of Revenue allocated budget for additional hands on seasonal basis to the Divisional Commissioner. The appointments were made without preparing any select list or inviting applications. When subsequently some funds were released, fresh appointments were made upto 30th June, 1987. Respondent-employees, according to the appellants worked on seasonal basis as Wasil Waqi Navis, which were not of a permanent nature, and they were appointed considering the extent of extra work and the funds available. Similar claims had also been rejected by this Court while deciding earlier Writ Petition Nos. 10996 of 1987, Rajeev Kumar Saxena and Ors. v. Collector, Farrukhabad and 6182 of 1990, Ramendra Kumar Tripathi v. D.M./Collector and Ors., wherein petitions had been allowed. State Government had approached the Hon'ble Apex Court by filing the Special Leave Petition Nos. 21565 of 1993 and 14902 of 1994. The Hon'ble Supreme Court had set aside the said orders passed by this Court. These petitions had been disposed of pointing out that those judgments shall not be treated as precedent and the State will be at liberty to re-agitate the matter before the appropriate forum in future. Thus, the respondents cannot be given the relief as prayed for. There is nothing on record to show as what is the current position. The appointments had been made in 1986 and as to whether the respondent-employees are still working regularly or still seasonal employees and as to whether the State has framed any scheme for their regularisation and/or whenever the vacancy occurs on regular basis of Wasil Waqi Navis, why their cases were not considered.

25. However, in view of the settled legal propositions as explained above, the cases of the respondents-employees require to be considered by the State Authorities/Appellants in the light of the rules for absorption, if any, and/or if they, are working continuously for the whole year, they deserve to be considered for regularisation alongwith other similarly situated persons considering the number of vacancies available now or likely to occur in near future after assessing their suitability and eligibility. This exercise may be done within a period of three months from the date of production of a certified copy of this order before the competent authority.

With these observations, the special appeal stands disposed of. No costs.

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