SUPREME COURT OF INDIA

State of U. P.

Vs.

Desh Raj

C.A.No.5674 of 2006

(S. B. Sinha and Markandey Katju, JJ.)

23.11.2006

JUDGEMENT

S. B. SINHA, J.:-

1. Leave granted.

2. The State of U.P has herein questioned an interim order dated 15.1.04 passed by the learned Single Judge of the Allahabad High Court as also order dated 22.8.2005 passed by a Division Bench of the said Court affirming the same.

3. The respondent was said to have been appointed on daily wages for specific work on Muster Roll purported to be under the provisions of paragraphs 429, 430 and 431 of the Financial Hand Book Volume-VI read with paragraph 476 of the Part-I of the Public Works Department of Manual of orders in local arrangements.

4. A writ petition was filed by the respondent herein, inter alia, praying for his regularization. A learned Single Judge of the Lucknow Bench of the Allahabad High Court on the day of preliminary hearing while issuing rule passed the following order:

"In the meantime, the opposite parties Nos.3 to 5 shall examine the petitioner's claim for regularization under the Regularization Rules 2001 and pass appropriate orders. However, his claim shall not be rejected on the ground of the post being not available. Supernumerary posts have to be created to comply with the provisions of the Regularization Rules and kept alive until regular posts fall vacant. Till a decision is taken, the petitioner shall be paid wages equivalent to the minimum of pay scale admissible to a Mate working in the department with effect from 1st January, 2004."

5. A special appeal filed thereinagainst but the same was barred by limitation. The Division Bench, inter alia, on the said premise refused to interfere with the order passed by the learned Single Judge stating:

"In these circumstances, the appeal Court should not interfere but leave the matter to be decided by the Hon'ble single Judge on a final basis. The appeal is thus dismissed on merits and also on the ground of delay which we are not minded to condone, although this is illogical, we thought it better to make our minds known."

6. A bare perusal of the impugned order should show that the learned Single Judge for all intent and purport had allowed the writ petition on the very first day, which in our opinion, was not justified. It is now well-settled that a relief which can be granted only at the final hearing of the matter, should not ordinarily be granted by way of an interim order. It is also doubtful as to whether the impugned directions could have been issued even at the final hearing of the matter which would amount to creation of supernumerary post in purported compliance of the regularisation rules.

7. Whatever may be the import and purport of such regularization rules, in view of the recent Constitution Bench decision of this Court in Secretary, State of Karnataka and Ors. vs. Umadevi and Ors. [(2006) 4 SCC 1)], it is now well-settled that the appointments, if made in violation of the constitutional scheme of equality as enshrined under Articles 14 and 16 of the Constitution of India, would be rendered illegal and, thus void ab initio. No regularization rules, therefore, could have been made by the State of Uttar Pradesh in derogation to the statutory or constitutional scheme.
2006 AIR SCW 1991

8. Furthermore, the State of Uttar Pradesh must have made rules in terms of the proviso appended to

Article 309 of the Constitution of India, providing for the mode and manner in which recruitments are to be made. Such rules have statutory force.

9. The learned counsel for the respondents, however, drew our attention to paragraph 53 of Umadevi (supra), which reads as under: 2006 AIR SCW 1991, (Para 44)

"One aspect needs to be clarified. There may be cases where irregular appointments [not illegal appointments] as explained in S.V. Narayanappa, AIR 1967 SC 1071, AIR 1972 SC 1767, AIR 1979 SC 1676 R.N. Nanjundappa and B.N. Nagarajan and referred to in para 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of the courts or of tribunals. The question of regularization of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases abovereferred to and in the light of this judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularize as one time measure, the services of said irregularly appointed, who have worked for ten years and more in duly sanctioned post but not under cover of orders of the Courts or of Tribunals and should further ensure that regular recruitments are undertaken to fill that vacant sanctioned posts that required to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date. We also clarify that regularization, if any already made, but not subjudice, need not be reopened based on this judgment. But there should be no further bypassing of the constitutional requirement and regularizing or making permanent, those not duly appointed as per the constitutional scheme."

10. The observations made in the said paragraph must be read in the light of the observations made in paragraphs 15 and 16 of the judgment. The Constitution Bench referred to the decisions of this Court in State of Mysore vs. S.V. Narayanappa 1967 (1) SCR 128, R.N. Nanjundappa vs. T. Thimmiah, 1972 (1) SCC 409 and B.N. Nagarajan vs. State of Karnataka 1979 (4) SCC 507. B.N. Nagarajan is a decision rendered by a three judge bench of this Court in which it has clearly been held that the regularisation does not mean permanence. A distinction has clearly been made in those decisions between 'irregularity' and 'illegality'. An appointment which was made throwing all constitutional obligations and statutory rules to winds would render the same illegal whereas irregularity pre-supposes substantial compliance of the rules. AIR 1967 SC 1071

AIR 1972 SC 1767

AIR 1979 SC 1676

11. Distinction between irregularity and illegality is explicit. It has been so pointed out in National Fertilizers Ltd. and Ors. vs. Somvir Singh ((2006) 5 SCC 493) in the following terms: 2006 AIR SCW 2972, (Paras 24, 25 and 26)

"the contention of the learned counsel appearing on behalf of the respondents that the appointments were irregular and not illegal, cannot be accepted for more than one reason. They were appointed only on the basis of their applications. The Recruitment Rules were not followed. Even the Selection Committee had not been properly constituted. In view of the ban on employment, no recruitment was permissible in law. The reservation policy adopted by the appellant had not been maintained. Even cases of minorities had not been given due consideration.

The Constitution Bench thought of directing regularization of the services only of those employees whose appointments were irregular as explained in State of Mysore vs. S.V. Narayanappa, R.N. Nanjundappa vs. T. Thim-miah and B.N. Nagarajan vs. State of Karnataka wherein this Court observed: [Umadevi (3) case 1, SCC p.24, para 16] AIR 1967 SC 1071, AIR 1972 SC 1767, 2006 AIR SCW 1991, Para 14, AIR 1979 SC 1676

"16. In B.N. Nagarajan v. State of Karnataka this Court clearly held that the words 'regular' or 'regularization' do not connote permanence and cannot be construed so as to convey an idea of the nature of tenure of appointments. They are terms calculated to condone any procedural irregularities and are meant to cure only such defects as are attributable to methodology followed in making the appointments."

Judged by standards laid down by this Court in the aforementioned decisions, the appointments of the respondents are illegal. They do not thus, have any legal right to continue in service."

[See also State of Madhya Pradesh and Ors. vs. Yogesh Chandra Dubey and Ors. ((2006) 8 SCC 67)]

12. It is not the case of the respondents that they were recruited in terms of the provisions of the recruitment rules framed under the proviso appended to Article 309 of the Constitution of India. In that view of the matter ex facie their appointments were illegal. We, however, must observe that we have not been taken through the purport and import or the various provisions of the PWD rules to which we have made reference heretobefore. But in any event, the question of regularisation of the employees by reason of any policy decision adopted by the State is impermissible in law. The learned Division Bench could have dismissed the special appeal filed by the appellant on the ground of delay. It did not do so. It purported to uphold the order of the learned Single Judge even on merits.

13. In that view of the matter only we had to enter into the merits of the matter. The judgment of the

High Court, for the reasons stated hereinbefore suffer from a legal error. It is set aside accordingly. We are, however, of the opinion that the respondents should be compensated, as the appeal preferred by the State of Uttar Pradesh was barred by limitation, We quantify the same at Rs.10,000/- (Rupees ten thousands only). We, however, may observe that it would be open to the State to recover the said amount from the officers who may be found responsible for causing the delay in preferring the appeal.

14. With the aforementioned directions, the impugned orders are set aside. The appeal is allowed. No costs.

Appeal allowed.