SUPREME COURT OF INDIA

State of Uttaranchal

Vs.

Alok Sharma

C.A.Nos.2444-2445 of 2009

(S.B. Sinha and Cyriac Joseph JJ.)

15.04.2009

JUDGEMENT

S.B. SINHA, J:

1. Leave granted.

2. Interpretation and/ or application of various circular letters issued by the State of Uttar Pradesh which have been adopted by the State of Uttarakhand after it was formed in terms of the U.P. State Reorganisation Act is in question in these appeals.

3. Two government companies being M/s. Teletronix Ltd. and Kumaon Television Ltd. were the subsidiary companies of Kumaon Mandal Vikas Nigam Ltd. The employees of the said government companies were retrenched. The State of Uttar Pradesh took a policy decision to appoint the employees of the said government companies. For the said purpose, it framed rules purported to be in exercise of its power under the proviso appended to Article 309 of the Constitution of India, known as the Uttar Pradesh Absorption of Retrenched Employees of Government of Public Corporations in Government Services Rules, 1991 (for short "the Rules").

4. The term "retrenched employee" is defined in Rule 2(c) of the Rules as under:

"(c) "retrenched employee" means a person who was appointed on a post under the Government or a public corporation on or before October 1, 1986 in accordance with the procedure laid down for recruitment to the post and was continuously working in any post under the Government or such corporation upto the date of his retrenchment due to reduction in, or winding up of, any establishment of the Government or the public corporation, as the case may be and in respect of whom a certificate of being a retrenched employee has been issued by his appointing authority."

The charging provision is contained in Rule 3(1) of the Rules, which reads as under:

"3(1) Notwithstanding anything to the contrary contained in any other service rules for the time being in force, the State Government may by notified order require the absorption of the retrenched employees in any post or service under the Government and may prescribe the procedure for such absorption including relaxation in various terms and conditions of recruitment in respect of such retrenched employees."

5. Admittedly, except Karan Pal, respondent No. 1 in Civil Appeal arising out of SLP (C) No. 6451

of 2005 who was appointed in the month of January, 1980 and Vijay Kumar Joshi, respondent No. 1 in Civil Appeal arising out of SLP (C) No. 8239 of 2005 who was appointed on 1.07.1983 (they were absorbed in the services of the State on 14.12.2005), other respondents herein were appointed after the cut-off date provided for in the Rules, viz., 1.10.1986.

6. It also does not appear that pursuant to or in furtherance of the provisions contained in Rule 3(1) of the Rules, the State Government has issued any notified order requiring absorption of retrenched employees in any post or service under the Government or prescribed any procedure therefor including relaxation in various terms and conditions of recruitment in relation to the retrenched employees.

The State of Uttar Pradesh, however, issued a letter to the Managing Director of Kumaon Mandal Vikas Nigam Ltd on 30.12.1995. While informing that approval has been granted by the Governor for winding up of the aforementioned companies, it was stated:

"3. Order for adjustment of the employees retrenched in result of the winding up of the aforesaid units and relaxation in age will be issued separately by the Personnel Department.

4. Retrenched employees will be adjusted/ re- appointed on their equivalent posts in view of their qualification in Kumaun Mandal."

7. It is contended that in terms of paragraph 3 of the said circular letter, no such order had been issued by the Personnel Department of the State of Uttar Pradesh. However, it appears that the Secretary to the Government of Uttar Pradesh issued a letter addressed to all Principal Secretaries / Secretaries of the Government of Uttar Pradesh, all Heads of the Departments and all Commissioners, Uttar Pradesh stating that on humanitarian ground a decision has been taken by the State for adjustment of the employees/ officers retrenched from the said units, subject to the terms and conditions laid down therein; some of which are inter alia being:

"(1) For the Government/ Corporations/ Enterprises service only such employees will be eligible whose services had been regularized with M/s. Teletronics and Kumaun Television Limited, the sister units of Kumaun Mandal Vikas Nigam Limited on or before 1st October 1986 and have been continuously working with the aforesaid Teletronics and Kumaun Television on the date of its winding up."

The said orders were issued with the consultation and approval of the Personnel Department.

8. As despite framing of the aforementioned rules and issuance of the aforementioned circulars, respondents had not been absorbed in the services of the State, they filed writ applications before the High Court of Uttaranchal.

9. The case of Vijay Kumar Joshi, respondent No. 1 in the Civil Appeal arising out of SLP (C) No. 8239 of 2005 was decided first wherein having regard to the fact that he was appointed prior to the cut-off date, his writ petition was allowed by an order dated 03.11.2004. Following the said judgment, other writ petitions were also allowed by an order dated 6.06.2005, noticing:

"Learned Counsel for the petitioners has filed the copy of the judgment passed in Civil Writ Petition No. 6609 of 2001 (S/S) Vijay Kumar Joshi &

submitted that this Court has allowed the writ petition of certain other retrenched employees with

the directions that the State of Uttar Pradesh and the counter part of respondent No. 1 and 2 i.e.

Director, Training and Employment, Government of U.P., Lucknow, in the State of Uttaranchal to give appointment to the petitioners in suitable post in compliance of the Government Orders dated 30.12.1995 and 26.02.1996 with full salary w.e.f.

1st April, 1996."

10. Intra-court appeals preferred thereagainst were dismissed by the High Court opining that this Court had issued limited notice in the special leave petitions filed thereagainst. It was held:

"Similar controversy was involved in earlier Civil Writ Petition No. 1322/2003 (S/S) which was decided by the Court per judgment dated 26.10.2004 and the State instead of preferring Special Appeal before the Division Bench went up in S.L.P. before the Hon'ble Supreme Court S.L.P.

(Civil) No. 6451/2005 was registered and by order dated 7.3.2005 the Hon'ble Judges of the Apex Court admitted the S.L.P. only on the point of direction of payment of back wages to that petitioner. Learned Brief Holder for the State submits that the petitioners of the earlier Writ Petition [(1322/2003(S/S)] had already been given appointment in compliance of the order dated 26.10.2004. There can be no controversy that the respondent - petitioners shall also be placed on same footing by the State in regard to the compliance to the direction of the Court regarding appointment as contained in the impugned judgment dated 6.6.2005 and the respondent - petitioners have to be given appointment in the establishments of the State as observed in the judgment under appeal."

11. Ms. Pinki Anand, learned Addl. Advocate General appearing on behalf of the State, would submit that the respondents herein having not fulfilled the conditions precedent for application of the said circulars dated 30.12.1995 and 26.02.1996 as they were appointed after the cut-off date, and as they had not been working continuously and furthermore as no notification was issued by the Personnel Department, the impugned judgments cannot be sustained.

It was furthermore contended that in terms of the Rules, notified orders were required to be issued and the said condition having not been complied with, the Rules could not be said to have come into force.

Statutory rules, it was urged, could not have been superseded, modified or altered by reason of executive instructions as the procedures laid down for making a rule were required to be followed therefor.

12. Ms. Rachana Srivastava, learned counsel appearing on behalf of the Kumaon Mandal Vikas Nigam Ltd., would contend that the names of the candidates should have been in the rolls of the employment exchange. In any event, as the names of the companies having not been mentioned in the IX Schedule appended to the U.P. Reorganisation Act, 2000, as envisaged under Section 66 thereof, the State of Uttarakhand and for that matter, her client had no liability to pay any amount in regard to the dues of the companies.

13. Mr. M.N. Rao, learned senior counsel and Mr. Deba Prasad Mukherjee, learned counsel, appearing on behalf of the respondents, on the other hand, urged:

(i) Notices having been issued limited to the payment of back wages in two matters, this Court

should not exercise its discretionary jurisdiction as the respondents are ready and willing to forego their claim for back wages.

(ii) In Civil Appeal arising out of SLP (C) No. 6451 of 2005 [State of U.P. & Anr. v. Karan Pal & Ors.], the only objection taken by the State being that he did not possess the requisite educational qualification, the contentions raised before this Court for the first time should not be permitted to be raised.

(iii) A large number of retrenched employees having been absorbed in the services of the State pursuant to the aforementioned circular letters although their initial appointment took place after the cut- off date, viz., 1.10.1986, respondents herein must be held to have been discriminated against.

(iv) The State itself having absorbed the employees in its services despite fixation of cut-off date, the same would amount to grant of suo motu relaxation by the State and in that view of the matter respondents being similarly situated are entitled to be treated alike.

(v) Some of the respondents being respondent Nos. 5 and 6 in Civil Appeal arising out of SLP (C) No. 12526 of 2007, respondent Nos. 1 and 3 in Civil Appeal arising out of SLP (C) No. 3241 of 2006 having been appointed temporarily and working in that post, the other respondents, in particular respondent Nos. 1 and 2 in Civil Appeal arising out of SLP (C) Nos. 2171-2172 of 2006, respondent in Civil Appeal arising out of SLP (C) No. 3242 of 2006 are out of job which itself go to show that the appellant had not been taking the same stand in the case of similarly situated persons.

(vi) Even if the circular letters are held to be not applicable, the principles of industrial law, viz., last-cum-first-go should be applied in this case.

(vii) The employees of the erstwhile companies having been subjected to gross injustice, this Court should not exercise its discretionary jurisdiction under Article 136 of the Constitution of India.

14. The relationship between the respondents herein and the said government companies was that of employee and employer. The companies under liquidation although were incorporated and registered under the Companies Act, 1956, they are `State' within the meaning of Article 12 of the Constitution of India. As a `State', therefore, they were bound to comply with the equality clause contained in Articles 14 and 16 of the Constitution of India; in terms whereof cases of all the eligible candidates for appointment were required to be considered. Recruitment in government service must be carried out in terms of the Rules framed under a statute or the proviso appended to Article 309 of the Constitution of India.

15. In Secretary, State of Karnataka and Others v. Umadevi (3) and Others [(2006) 4 SCC 1], a Constitution Bench of this Court while laying emphasis on the strict application of the principles of equality clauses contained in Articles 14 and 16 of the Constitution of India, held:

"37. It is not necessary to multiply authorities on this aspect. It is only necessary to refer to one or two of the recent decisions in this context. In State of U.P. v. Neeraj Awasthi this Court after referring to a number of prior decisions held that there was no power in the State under Article 162 of the Constitution to make appointments and even if there was any such power, no appointment could be made in contravention of statutory rules. This Court also held that past alleged regularisation or appointment does not connote entitlement to further regularisation or appointment. It was further held that the High Court has no jurisdiction to frame a scheme by itself or direct the framing of a scheme for regularisation. This view was reiterated in State of Karnataka v. KGSD

Canteen Employees' Welfare Assn."

It was furthermore opined:

"43. Thus, it is clear that adherence to the rule of equality in public employment is a basic feature of our Constitution and since the rule of law is the core of our Constitution, a court would certainly be disabled from passing an order upholding a violation of Article 14 or in ordering the overlooking of the need to comply with the requirements of Article 14 read with Article 16 of the Constitution. Therefore, consistent with the scheme for public employment, this Court while laying down the law, has necessarily to hold that unless the appointment is in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointee. If it is a contractual appointment, the appointment comes to an end at the end of the contract, if it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued. Similarly, a temporary employee could not claim to be made permanent on the expiry of his term of appointment. It has also to be clarified that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. It is not open to the court to prevent regular recruitment at the instance of temporary employees whose period of employment has come to an end or of ad hoc employees who by the very nature of their appointment, do not acquire any right. The High Courts acting under Article 226 of the Constitution, should not ordinarily issue directions for absorption, regularisation, or permanent continuance unless the recruitment itself was made regularly and in terms of the constitutional scheme. Merely because an employee had continued under cover of an order of the court, which we have described as "litigious employment" in the earlier part of the judgment, he would not be entitled to any right to be absorbed or made permanent in the service. In fact, in such cases, the High Court may not be justified in issuing interim directions, since, after all, if ultimately the employee approaching it is found entitled to relief, it may be possible for it to mould the relief in such a manner that ultimately no prejudice will be caused to him, whereas an interim direction to continue his employment would hold up the regular procedure for selection or impose on the State the burden of paying an employee who is really not required. The courts must be careful in ensuring that they do not interfere unduly with the economic arrangement of its affairs by the State or its instrumentalities or lend themselves the instruments to facilitate the bypassing of the constitutional and statutory mandates."

It was, however, observed:

"53. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in S.V. Narayanappa, 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 regularisation 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 regularise as a one-time measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of the courts or of tribunals and should further ensure that regular recruitments are

undertaken to fill those vacant sanctioned posts that require 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 regularisation, if any already made, but not sub judice, need not be reopened based on this judgment, but there should be no further bypassing of the constitutional requirement and regularising or making permanent, those not duly appointed as per the constitutional scheme.

54. It is also clarified that those decisions which run counter to the principle settled in this decision, or in which directions running counter to what we have held herein, will stand denuded of their status as precedents."

The aforementioned dicta laid down in Umadevi (supra) has been followed by this Court in a large number of cases. [For example, see Post Master General, Kolkata and Others v. Tutu Das (Dutta) (2007) 5 SCC 317, State of Punjab v. Bahadur Singh and Ors., 2009 (1) SCALE 316 Official Liquidator v. Dayanand and Others (2008) 10 SCC 1, State of Bihar v.

Upendra Narayan Singh & Others 2009 (4) SCALE 282]

16. In case of liquidation of the companies, the employees were entitled to back wages and other amounts by way of compensation as may be admissible to them under the Industrial Disputes Act, 1947. The State, however, framed the Rules purported to be in exercise of its power under the proviso to Article 309 of the Constitution of India. Validity of the said Rules is not under challenge. For the purpose of invoking the provisions of the Rules, however, the employee concerned must be a retrenched employee. In view of the definition of retrenched employee, as contained in Rule 2(c) of the Rules, appointment should have taken place on or before 1.10.1986.

17. The conditions for application of the Rules do not stop there. The Rules envisage issuance of notified order notifying absorption of the retrenched employee. The procedures therefor including relaxation of various terms and conditions of recruitment, if any, were required to be prescribed. It is conceded at the bar that a statutory rule cannot be modified or altered by reason of an executive instruction far less by way of a circular letter. It has been so held in Punjab State Warehousing Corpn., Chandigarh v. Manmohan Singh and Another [(2007) 9 SCC 337], stating:

"12. Furthermore, when the terms and conditions of the services of an employee are governed by the rules made under a statute or the proviso appended to Article 309 of the Constitution of India laying down the mode and manner in which the recruitment would be given effect to, even no order under Article 162 of the Constitution of India can be made by way of alterations or amendments of the said rules. A fortiori if the recruitment rules could not be amended even by issuing a notification under Article 162 of the Constitution of India the same cannot be done by way of a circular letter."

18. Keeping in view the principles laid down by the Constitution Bench of this Court in Umadevi (supra), there cannot be any doubt whatsoever that any condition laid down in any rules which is in derogation of the recruitment rules framed by the State, should receive strict construction.

19. The learned Single Judge committed an error insofar as it proceeded on the basis that the decision of the High Court in Vijay Kumar Joshi was not under challenge. Vijay Kumar Joshi is subject matter of the Civil Appeal arising out of SLP(C) No. 8239 of 2005. The High Court also failed to take into consideration that the circular letters dated 30.12.1995 and 26.02.1996 being not notified orders as envisaged in the Rules would not be law within the meaning of Article 13 of the

Constitution of India.

20. The High Court did not find that the cut-off date to be arbitrary or discriminatory and was, thus, liable to be struck down being ultra vires Article 14 of the Constitution of India. It did not hold that the conditions precedent contained in the Rules prescribing procedure for such recruitment and/ or grant of power of relaxation have been complied with. An authority, unless a power is conferred on it expressly, cannot exercise a statutory power. Power of relaxation must be specifically conferred. Such power having been envisaged to be conferred by reason of a rule made under the proviso appended to Article 309 of the Constitution of India, the contention of the learned counsel for the respondents that relaxation must be deemed to have been granted cannot be accepted.

In Kendriya Vidyalaya Sangathan v. Sajal Kumar Roy [(2006) 8 SCC 671], this Court held:

"11. The respondents are not members of the Scheduled Caste or Scheduled Tribe. Age-limit is prescribed for appointment to the general category of employees. The upper age-limit for appointment to the post of LDC is 25 years. The advertisement also says so. The Rules, as noticed hereinbefore, are in two parts. The first part talks about the age- limit. The second part provides for relaxation.

Such relaxation can be granted for the purpose specified i.e. in favour of those who answered the descriptions stated therein. Relaxation of age-limit even in relation to the Scheduled Caste and the Scheduled Tribe candidates or the retrenched Central Government employees, including the defence personnel is, however, not automatic. The appointing authorities are required to apply their mind while exercising their discretionary jurisdiction to relax the age-limits. Discretion of the authorities is required to be exercised only for deserving candidates and upon recommendations of the Appointing Committee/Selection Committee. The requirements to comply with the rules, it is trite, were required to be complied with fairly and reasonably. They were bound by the rules. The discretionary jurisdiction could be exercised for relaxation of age provided for in the rules and within the four corners thereof. As the respondents do not come within the purview of the exception contained in Article 45 of the Education Code, in our opinion, the Tribunal and consequently, the High Court committed a manifest error in issuing the aforementioned directions."

[See also State of Karnataka and Another v. R.Vivekananda Swamy (2008) 5 SCC 328]

21. It is in the aforementioned backdrop, the circular letters dated 30.12.1995 and 26.02.1996 are required to be construed. Although in the former, no cut-off date as such has been mentioned and paragraph 4 thereof refers to retrenched employees, by reason whereof they were to be adjusted/ re-appointed on their equivalent posts in view of their qualification in Kumaun Mandal, the term `retrenched employees' would carry the same meaning as contained in the rules. Furthermore, the circular letter dated 26.02.1996 was issued in continuation of the earlier letter dated 30.12.1995, which provided for a cut-off date. Both the circular letters are to be read together. If, thus, the respondents were kept outside the purview of the said circular letters, indisputably, they cannot be said to have derived any legal right so as to enable them to pray for issuance of a writ of or in the nature of mandamus.

22. Our attention has been drawn to an additional affidavit filed by the respondents wherein inter alia it has been shown that a large number of employees who had been absorbed were initially appointed after 1.10.1986.

Article 14 carries with it a positive concept. It would have no application in the matter of enforcement of an order which has its source in illegality. In other words, equality cannot be applied in illegality. [See Post Master General, Kolkata (supra) and Punjab State Electricity Board and Others v. Gurmail Singh (2008) 7 SCC 245]

23. Moreover, the matter relating to division of assets of a government company which had been functioning in the State of Uttar Pradesh as also in the territories forming the State of Uttarakhand could be given effect to only in terms of notified order as contemplated in Section 2(g) of the U.P.

Reorganisation Act, 2000 defining it to mean "an order published in the Official Gazette". It has not been denied or disputed that the name of the two companies do not find place in the IXth Schedule appended to the U.P.

Reorganisation Act, 2000.

24. We may furthermore notice that in Civil Appeal arising out of SLP (C) No. 8708 of 2006, the post in which the respondent was working has to be filled up on the basis of the recommendations of the Public Service Commission. Public Service Commission being a constitutional authority, it cannot be by-passed by way of a circular letter or otherwise. It, furthermore, appears that he was employed in another concern. In most of the other cases, orders had been passed ex-parte. He had also been paid a huge amount pursuant thereto.

25. For the reasons aforementioned, the impugned judgments cannot be sustained, which are set aside accordingly. However, if any amount has been paid to the respondents, the same shall not be recovered from them.

26. So far as Civil Appeal arising out of SLP (C) No. 6451 of 2005 and Civil Appeal arising out of SLP (C) No. 8239 of 2005 are concerned, although limited notice having been issued confining the case to back wages, but keeping in view the order passed in the other cases, we are of the opinion that the said order shall be recalled and leave on all points should be granted. Respondents being placed similarly should not, in our opinion, be treated differently. This order is being passed in exercise of our jurisdiction under Article 142 of the Constitution of India. However, we make clear that if any amount has been paid to the said respondents, the same should not be recovered. The appeals are allowed with the aforementioned directions. No costs.