SUPREME COURT OF INDIA

Md. Ashif

Vs.

State of Bihar

C.A.Nos.4256-4257 of 2010

(J.M. Panchal and T.S.Thakur JJ.)

06.05.2010

JUDGEMENT

T.S.Thakur, J.

1. Leave granted.

2. These appeals by special leave arise out of an order passed by a Division Bench of the High Court of Patna whereby Letters Patent Appeal Nos.33 and 540 of 2002 have been allowed, the order passed by the learned Single Judge 2 set aside and Writ Petitions No.11701 and 9024 of 2001 dismissed.

3. The appellants in these appeals were in June 1985 appointed as Voluntary Health Workers in State run dispensaries within the district of Darbhanga in the State of Bihar. In lieu of their services they were paid a monthly honorarium of Rs.50/- only. Less than five months after their initial appointment they were absorbed as Primary Health Workers by the Chief Medical Officer which carried a pay scale of Rs.535-765. It is not in dispute that the appellants continued to work for nearly 15 years as Primary Health Workers, till their services were terminated by an order dated 20th February, 2001 on the ground that their promotion/absorption as Primary Health Workers was illegal and contrary to the rules. The termination, it appears, came pursuant to an enquiry regarding procedure followed in the making of the appointments to class III posts. The enquiry revealed that the appointments were in breach of 3 circular/instructions dated 3rd December, 1980 issued by the Chief Secretary of the State of Bihar pointing out that appointment to Class-3 posts had been made in violation of procedure laid down by the State Government in terms of two circulars dated 10th July, 1980 and 26th September, 1980. The Government, therefore, directed all the Heads of the Departments, Divisional Commissioners and the District Magistrates to review the system and to send their reports to ensure that action for filling up of the vacant posts is taken in accordance with the prescribed procedure. It was further directed that appointments made in violation of the prescribed procedure would not only call for action against those who make such appointments but render the appointments liable to be cancelled.

4. Aggrieved by the termination of their services as Primary Health Workers and reversion to Voluntary Health Workers the appellants filed Writ Petitions No.11701 and 9024 of 2001 in the High Court of Patna, inter alia, asserting 4 that the appointments of the petitioners (appellants herein) had been made after a proper advertisement and that the termination of their services 15 years after the commission of the alleged irregularity in making the appointments was unfair and legally impermissible. By an order dated 9th November, 2001 a Single bench of the High Court of Patna held the termination of the services of the appellants to be illegal inasmuch as the same was based on an alleged irregularity committed 15 years earlier. Reliance in support was placed upon the decisions of this Court in *Roshni Devi*[1].

5. The order passed by the learned Single Judge was, assailed before a Division bench in Letters Patent Appeal Nos.33 and 540 of 2000 filed by the State of Bihar. The Division Bench opined that since the initial appointment of the appellants herein was illegal the very fact that the appellants had worked for a long period did not cure that 5 defect so as to justify their reinstatement in service. In support of that view the Division Bench placed reliance upon *State of Bihar & Ors.*[2] *and State of Mirzapur & Anr.*[3] The present appeals call in question the correctness of the said order as already noticed above.

6. We have heard learned counsel for the parties at considerable length. The legal position regarding the right of an employee to seek regularisation of his services stands settled by a long line of the decisions of this Court. In Ashwani Kumar's case (supra) this Court declared that the question of regularisation of the services of an employee may arise in two contingencies. It may arise firstly in situations where against an available clear vacancy an appointment is made on ad hoc or daily-wage basis by an authority competent to do so and such appointment is 6 continued from time to time without any artificial break in service. Any such appointment may be regularized giving him security of tenure. The all important condition precedent for such regularization is that the initial entry of such an employee must be made against a sanctioned vacancy and by following the rules and regulations governing such entry.

7. The second situation in which regularization could be granted was where the initial entry of the employee against an available vacancy was found suffering from some flaws in the procedure in making the appointment though the person appointing was competent to make such initial recruitment and had otherwise followed the procedure prescribed for such recruitment. A need may then arise for regularization of the initial appointment by the competent authority with a view to curing the irregularity if any in the same and with a view to granting security of tenure to the incumbent. It is necessary in such situations that the initial entry of the 7 employee is not totally illegal or in breach of the established rules and regulations governing such recruitment.

8. The law regarding regularization of employees was on a comprehensive review authoritatively declared by a Constitution Bench of this Court in Secretary, State of SCC 1. This Court in that case drew a distinction between an irregularity and an illegality in the

making of an appointment and declared that where the due process of appointment has been deviated from, the Court can regularize the same. In cases where the process itself is completely violative of the constitutional scheme underlying public employment and no procedure has been followed while granting such appointments the Court cannot allow such an illegality to continue irrespective of the length of time for which it has continued. Relying upon the decision of this Court in Ashwani Kumar's case (supra) this Court in Uma Devi's case (supra) observed:

> "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.
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> 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.
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> 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.
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> 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 9 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."

9. The above decision has been followed by this Court in Police, *Assam & Ors.*[4], where this Court held that employees who were recruited in connection with a scheme could not claim continuance or regularization in service even when they may have worked on ad hoc basis for as long as two decades. The decision of this Court in once more reiterated the legal position and declared that the observations made by a three-Judge *Pooran Chandra Pandey and Ors*[6] , 10 were only in the nature of obiter dicta. In Pooran Chandra Pandey's case (supra) a two-Judge Bench of this Court had tried to distinguish the ratio of the decision of this Court in Uma Devi's case (supra) and held that the said decision had to be read in conformity with Article 14 of the Constitution and that the same could not be applied mechanically. The decision in G.V. Chandrashekar's case (supra) did not find that reasoning to be correct as is evident from the following passage appearing in the said decision:

"90. We are distressed to note that despite several pronouncements on the subject, there is substantial increase in the number of cases involving violation of the basics of judicial discipline. The learned Single Judges and Benches of the High Courts refuse to follow and accept the verdict and law laid down by coordinate and even larger Benches by citing minor difference in the facts as the ground for doing so. Therefore, it has become necessary to reiterate that disrespect to the constitutional ethos and breach of discipline have grave impact on the credibility of judicial institution and encourages chance litigation. It must be remembered that predictability and certainty is an important hallmark of judicial jurisprudence developed in this country in the last six decades and increase in the frequency of conflicting judgments of the superior judiciary will do incalculable harm to the system inasmuch as the courts at the grass roots will not be able to decide as to which of the judgments lay 11 down the correct law and which one should be followed.

91. We may add that in our constitutional set up every citizen is under a duty to abide by the Constitution and respect its ideals and institutions. Those who have been entrusted with the task of administering the system and operating various constituents of the State and who take oath to act in accordance with the Constitution and uphold the same, have to set an example by exhibiting total commitment to the constitutional ideals. This principle is required to be observed with greater rigour by the members of judicial fraternity who have been bestowed with the power to adjudicate upon important constitutional and legal issues and protect and preserve rights of the individuals and society as a whole. Discipline is sine qua non for effective and efficient functioning of the judicial system. If the courts command others to act in accordance with the provisions of the Constitution and the rule of law, it is not possible to countenance violation of the constitutional principle by those who are required to lay down the law.

> 92. In the light of what has been stated above, we deem it proper to clarify that the comments and observations made by the two-Judge Bench in *U.P. SEB v. Pooran Chandra Pandey*[6] (Supra) should be read as obiter and the same should neither be treated as binding by the High Courts, tribunals and other judicial foras nor they should be relied upon or made basis for bypassing the principles laid down by the Constitution Bench."

10. Reference at this stage may also be made to the *India & Ors.*[7] *and General Manager*[8], where this Court has followed Uma Devi's case (supra) and declared that regularization cannot be granted if the same would have the effect of violating Articles 14 and 16 of the Constitution.

11. Applying the test laid down by this Court in Uma Devi's case (supra) and the cases referred to above, to the case at hand, there is no gainsaying that the appointments of the appellants as Primary Health Workers were totally illegal and violative of Articles 14 and 16 of the Constitution which guarantee equality of opportunity to all those who were otherwise eligible for such appointments. The Chief Medical Officer who had made the appointments was not vested with the power to do so nor were the claims of other candidates eligible for appointments against the posts to which the appellants were appointed, considered.

> "Surprisingly, the appointments had come by way of absorption of the appellants who were working as Voluntary 13 Health Workers on a monthly honorarium of Rs.50/- only.
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> The High Court has, in our opinion, correctly held that there was no cadre of Voluntary Health Workers who were working on an honorarium in State run dispensaries. The very nature of the appointment given to the appellants as Voluntary Health Workers was honorary in nature which entitled them to the payment of not more than Rs.50/- per month. It is difficult to appreciate how the Chief Medical Officer could have regularized/absorbed such Voluntary Health Workers doing honorary service against the post of Primary Health Workers which carried a regular pay-scale and which could be filled only in accordance with the procedure prescribed for that purpose. The appointment of the appellants against the said posts was thus manifestly illegal and wholly undeserved to say the least. Inasmuch as these appointments came to be cancelled pursuant to the said directions no matter nearly a decade and a half later the termination could not be said to be illegal so as to warrant interference of a writ court for reinstatement of those illegally appointed. The High Court 14 was, in that view of the matter, justified in declining interference with the order of cancellation and dismissing the writ petitions."

12. We see no reason to interfere with the order of Division Bench of the High Court. These appeals accordingly fail and are hereby dismissed. No costs.

[1]*AIR 1999 SC 517*
[2]*AIR 1997 SC 1628*
[3]*AIR 2001 SC 201*
[4]*(2009) 6 SCC 611*
[5]*(2009) 4 SCC 342*
[6]*(2007) 11 SCC 92*
[7]*(2009) 5 SCC 193*
[8]*12 7 SCC 205*