
(2011) 05 AHC CK 0292

Allahabad High Court

Case No: Civil Misc. Writ Petition No. 59090 of 2006

State of U.P. and
Others

APPELLANT

Vs

Dy. Labour
Commissioner and
Another

RESPONDENT

Date of Decision: May 2, 2011

Acts Referred:

- Constitution of India, 1950 - Article 309, 372
- Government of India Act, 1915 - Section 81
- Government of India Act, 1935 - Section 93
- Police Act, 1861 - Section 2
- Provincial Legislature in Uttar Pradesh Municipalities Act, 1916 - Section 10, 11, 187, 188, 4
- Railways Act, 1989 - Section 2
- United Provinces Fire Service (Recruitment and Conditions of Service) Rules, 1945 - Rule 2, 29(1), 29(2), 30
- Uttar Pradesh Fire Services Act, 1944 - Section 13, 25
- Workmens Compensation Act, 1923 - Section 2, 2(1)

Citation: (2011) 5 ADJ 508 : (2011) 5 AWC 4763 : (2011) 130 FLR 881 : (2011) 3 UPLBEC 1917

Hon'ble Judges: Sudhir Agarwal, J

Bench: Single Bench

Final Decision: Allowed

Judgement

Sudhir Agarwal, J.

This writ petition has been filed on behalf of State of Uttar Pradesh through Secretary, Department of Home Affairs and two others aggrieved by the order dated 23rd February,

2006 passed by Deputy Labour Commissioner (Prescribed Authority) Azamgarh in the capacity as Workmen Compensation Commissioner (hereinafter referred to as "Commissioner") deciding the preliminary objection regarding maintainability of Workmen Compensation Case before. The Petitioners contended that "Fire Department" and its employees are not within the purview of Workman Compensation Act, 1923 (hereinafter referred to as "1923 Act" and the Fireman of U.P. Government Fire Department is not a "Workman". The commissioner has decided the two issues against Petitioners.

2. The Commissioner has held that employees of Fire Department are not members of Police Force in view of the definition of "workman" u/s 2(n)(ii) read with entry (xi) Schedule 2 of 1923 Act and a person employed in the service of Fire Brigade would be a "workman" and therefore it has jurisdiction to proceed with the matter.

3. Learned Standing Counsel vehemently contended that the members of U.P. Fire Department are governed by the provisions of United Provinces Fire Service Act, 1944 (hereinafter referred to as "1944 Act") read with the rules framed there under and hence the provisions of 1923 Act would not cover them. The Commissioner has held otherwise holding the application filed by Respondent No. 2 maintainable and has directed to proceed with the matter after impleading the State of U.P. also as one of the Respondent.

4. The sole question raised before this Court is "whether Respondent No. 2 is a "workman" within the meaning of Section 2(n) of 1923 Act and Petitioners "employer" within the meaning of Section 2(e) of the said Act and also "whether the said Act would apply to the members of service of United Provinces Fire Service".

5. The earliest provision in respect to the maintenance of a team of persons for controlling fire in public or private premises etc. was made by the Provincial Legislature in U.P. Municipalities Act, 1916 (Act No. 2 of 1916). This Act received assent of Lieutenant Governor of U.P. on 11th May, 1916 and of the Governor General on 15th June, 1916 and published in the Gazette u/s 81 of the Government of India Act, 1915 on 24th June, 1916. Section 187 and 188 thereof provides for establishment and maintenance of "Fire Brigade" and the power of Fire Brigade and other person for suppression of fire. The provisions are quoted as under:

187. Establishment and maintenance of fire brigade.- The Board may establish and maintain a fire brigade and may provide any implements, machinery, or means of communicating intelligence which it thinks necessary for the prevention and extinction of fire.

188. Power of fire brigade and other persons for suppression of fires.-(1) On the occasion of a fire in a municipality any magistrate, any member of the board, the executive officer, the engineer or a secretary of the board, or any member of the fire-brigade directing its operations and (if required so to do by a magistrate, a member of the board, the executive officer, the engineer or a secretary of the board) any police officer, above the

rank of constable, may -

(a) remove, or order the removal of, any person who by his presence interferes with or impedes the operations for extinguishing the fire or for saving life or property;

(b) close any street or passage in or near which a fire is burning;

(c) for the purpose of extinguishing the fire, break into or through or pull down, or cause to be broken into or through or pulled down or used for the passage of houses or other appliances, any premises ;

(d) cause mains and pipes to be shut off as to give great pressure of water in or near the place where the fire has occurred ;

(e) call on the person in charge of a fire-engine to render such assistance as may be possible ; and

(f) generally take such measures as may appear necessary for the preservation of life or property.

(2) No person shall be liable to pay damages for an act done by him under Sub-section (1) in good faith.

(3) Any damage done in the exercise of a power conferred for a duty imposed by this section shall be deemed to be damaged by fire within the meaning of a policy of insurance against fire.

6. It appears that in compliance and to give effect the said provision, various municipalities governed by the said Act established Fire Brigade and also recruited personnel to maintain it so as to discharge statutory duties under the said provisions. It is this establishment of "Fire Brigade" which was continuing when the Workman Compensation Act, 1923 (Act No. 8 of 1923) was enacted and came into force on 1st July, 1924. The definition of "employer" and "workman" are contained in Section 2(1)(e) and (n) of 1923 Act which reads as under:

(e) "employer" includes any body of persons whether incorporated or not and any managing agent of an employer and the legal representative of a deceased employer, and, when the services of a workman are temporarily lent or let on hire to another person by the person with whom the workman has entered into a contract of service or apprenticeship, means such other person while the workman is working for him;

(n) "workman" means any person who is-

(i) a railway servant as defined in [clause (34) of Section 2 of the Railway Act, 1989 (24 of 1989)], not permanently employed in any administrative, district or sub-divisional office of a railway and not employed in any such capacity as is specified in Schedule II, or

[(ia) (a) a master, seaman or other member of the crew of a ship,

(b) a captain or other member of the crew of an aircraft,

(c) a person recruited as driver, helper, mechanic, cleaner or in any other capacity in connection with a motor vehicle,

(d) a person recruited for work abroad by a company, and who is employed outside India in any such capacity as is specified in Schedule II and the ship, aircraft or motor vehicle, or company, as the case may be, is registered in India, or]

(ii) employed in any such capacity as is specified in Schedule II, whether the contract of employment was made before or after the passing of this Act and whether such contract is expressed or implied, oral or in writing; but does not include any person working in the capacity of a member of the Armed Forces of the Union; and any reference to a workman who has been injured shall, where the workman is dead, include a reference to his dependants or any of them.

7. Schedule II at item No. xi of 1923 Act contains an entry which is relevant in the case in hand and reads as under:

(xi) employed in the service of "any fire brigade"; or

8. The question as to whether "Fire Brigade" Department of a Municipality is an "industry" for the purpose of the Industrial Disputes Act came to be considered in the case of Corporation of the City of Nagpur v. Its Employees and Ors. 1961 (I) LLJ 523 and the Apex Court with reference to the definition of "Industry" under 1957 Act found that the said Department constitute Industry. Later on there are two decisions of the High Courts taking a different view inasmuch as Punjab and Haryana High Court in Municipal Committee, Bhiwani v. Padam Singh 1973 Lab IC 1512 held that the Fireman Services maintained by Municipal Committee was an industry but Bombay High Court took a different view holding it not an industry in Administrator of the City of Nagpur Municipal Corporation v. Presiding Officer, Labour Court, Nagpur 1976 Lab IC 107.

9. Both these judgments have been noticed by Apex Court in the later decision i.e. [Municipal Corporation of Delhi Vs. Female Workers \(Muster Roll\) and Another](#), but the Court has let the question open as to which judgment of the two High Courts is correct.

10. We also at this stage need not to be struck by the aforesaid authorities and views for the reason that there is a major alteration of the situation in the State of U.P. after enactment of 1923 Act. The power of Provincial Legislature vested in the Governor of U.P. in 1944 pursuant to proclamation dated 3rd November, 1939 promulgated u/s 93 of Government of India Act, 1935, and, in purported exercise thereof the Government of U.P. enacted Uttar Pradesh Fire Service Act, 1944 (U.P. Act No. 3 of 1944). The Act was enacted to improve fire fighting arrangement in certain provinces and in particular to constitute and

maintain a "Provincial Fire Service" for staffing and operating the Fire Brigade in those towns. Therefore, a separate service was constituted namely Provincial Fire Service. It was enforced in the town of Agra, Allahabad, Benaras, Cawnpur and Lucknow immediately and in other areas as and when notified by the Government. The service was titled as "U.P. Fire Service" as provided in Section 4 and consisted of certain officials in different ranks as provided therein. The expenditure of Fire service are to be met, out of the revenue of the Provincial Government vide Section 10 but it may be recovered from the local authority of the town, as may be directed from time to time. The fire fighting property set up and belong to local authorities sought to be acquired u/s 11 of the Act. Section 187 and 188 of U.P. Act No. 2 of 1916 were repealed vide Section 13 of 1944 Act.

11. Section 25 confer power upon the Provincial Government to make rules for carrying out the purposes of 1944 Act. The Governor of U.P. also enacted United Provinces Fire Service (Recruitment and Conditions of Service) Rules, 1945 which came into force on 3rd October, 1945. It provides definition of "service" under Rule 2(d) and "member of the service" under Rule 2(e) which reads as under:

(d) "service" means the United Provinces Fire Service; and

(e) "Member of the Service" means a person appointed in a substantive capacity under the provisions of these rules to a post in the cadre of the service.

12. Various provisions relating to recruitment and conditions of service are being skipped at the moment but would refer to Rule 29(1) and (2) which is of some relevance and read as under:

(1) Upon the supersession by the United Provinces Fire Service of a Fire Brigade under any local authority, any member of that Fire Brigade may be recruited to the United Provinces Fire Service.

(2) The service of a person recruited under Sub-rule (1) who has not reached the age of 30 years will be pensionable, but his previous service with the local body will not count for pension. The service of a person recruited after the age of 30 years will be non-pensionable. Previous service with the local authority will not count towards pension.

13. Regarding other conditions of service, Rule 30 provides that the same shall be governed by the rules and regulations of other government servants.

14. The aforesaid provisions cumulatively would show that the municipalities, under the statutory exercise of power, established Fire Brigade and the persons employed therein were given the benefit of 1923 Act vide entry 11 Schedule 2 thereof. The said Fire Brigade, however, stood superseded and the property was acquired by the State Government under the provisions of 1944 Act and a new service was created in the name of U.P. Fire Service. The persons employed in this service have not been included in 2nd

Schedule of 1923 Act. Learned Counsel for the Respondent could not show any such entry. His contention was that 1923 Act being a beneficiary legislation, the entries must be read with wider ramification so as to include the new service also. The submission cannot be accepted. A particular establishment/service or industry known in a peculiar manner, when ceased to operate, and a new establishment with a different concept is established, unless there is anything to show that legislature intended the new forum also, a meaning which is not otherwise within the compass of a particular entry of Schedule II of 1923 Act cannot be provided. It would amount to violation with the specific language of the statute and extending its scope to something which is not otherwise within its purview. The members of service of U.P. Fire Service have been provided certain status and various benefits including Employees Welfare Schemes, as are admissible to other holders of civil posts, and the employees of State Government. Hence it cannot be said that simultaneously a benefit over and above such schemes also continue to be available to the members fire service by virtue of entry 11 Schedule II of 1923 Act. It is well known that when language of statute is clear, it would not be stressed or extended unless there is something to compel the Court to do so. In such a case a casus omissus is not to be inferred.

15. This Court is aware that the rules of the interpretation are not rules of laws and are not to be followed like rules enacted by legislature in Interpretation Act as observed by the Hon"ble Apex Court in [Superintendent and Legal Remembrancer, State of West Bengal Vs. Corporation of Calcutta](#), . The principles of interpretation serve only as a guide. A casus omissus cannot be supplied by the Court. There is no presumption that a casus omissus exists and language permitting the Court should avoid creating a casus omissus where there is none. It would be appropriate to recollect the observations of Devlin, L.J. in Gladstone v. Bower (1960) 3 All ER 353 (CA):

The Court will always allow the intention of a statute to override the defects of working but the Court's ability to do so is limited by recognized canons of interpretation. The Court may, for example, prefer an alternative construction, which is less well fitted to the words but better fitted to the intention of the Act. But here, there is no alternative construction; it is simply a case of something being overlooked. We cannot legislate for casus omissus.

16. The Hon"ble Apex Court in [Bangalore Water Supply and Sewerage Board Vs. A. Rajappa and Others](#), quoted with approval the following observation of Lord Simonds in the case of Magor and St. Mellons R.D.C. v. Newport Corporation (1951) 2 All ER 839 (841):

The duty of the Court is to interpret the words that the Legislature has used. Those words may be ambiguous, but, even if they are, the power and duty of the Court to travel outside them on a voyage of discovery are strictly limited.

17. It would be appropriate at this stage to remind another principle that though a Court cannot supply a real casus omissus, it is equally evident that it should not so interpret a

statute as to create casus omissus when there is really none. Recently in [Vemareddy Kumaraswamy Reddy and Another Vs. State of A.P.](#), the Court reiterated that while interpreting a provision the Court only interprets the law and cannot legislate. If a provision of law is misused and subject to the abuse of process of law, it is for the legislature to amend, modify or repeal it if deemed necessary. The legislative casus omissus cannot be supplied by judicial interpretative process.

18. When the two statutes clearly uses different phrases with a different connotation, mere similarity of functioning and duties would not make them one and the same, but they have to be considered in the light of the scheme of the statutes, as discussed above, showing that earlier what was a Fire Brigade was not continued as such in the same nature of establishment but was converted in a statutory service consisting of holder of civil post as U.P. Fire Service and the establishment of Fire Brigade was transferred to U.P. Fire Service. Moreover, provisions whereunder Fire Brigade by local bodies was created, were deleted/omitted from the statute book itself. The subsequent scheme has not been included in Schedule of 1923 Act. Meaning thereby, the legislature did not intend to include within its compass the new establishment and service namely U.P. Fire Service and therefore, it would not be appropriate for this Court by way of mere interpretation treating something to be missing to extend 1923 Act to a new service which is not otherwise included therein.

19. There is one more aspect of the matter. Article 309 of the Constitution contemplate an appropriate legislature regulating recruitment, and conditions of service appointed, to public services and posts in connection with the affairs of the Union or of any State. But so long as such a statute is not made a parallel power has been conferred upon the President or the Governor, as the case may be, to make rules regulating recruitment, and conditions of service of such persons. These rules would continue till an Act of the appropriate Legislature is made but once the Act is made, the rules shall have effect subject to the provisions of the Act. This power of legislation under Article 309 is subject to the provisions of the Constitution. Schedule VII List I of the Constitution, Entry 70 and in list 2 its Entry 41, provides for the public services and reads as under:

Entry 70. Union Public Services; All-India Services; Union Public Service Commission.

Entry 41. State public services; State Public Service Commission.

20. The power under both the entries is exclusive and is not circumvented by any other entry. There is a general entry under item 24, Schedule VII, list III which provides as under:

24. Welfare of labour including conditions of work, provident funds, employers' liability, workmen's compensation, invalidity and old age pensions and maternity benefits.

21. The scheme of various entries in the Constitution, to my mind, shows that in respect to the public services, the entire matter is covered and governed by separate entries in

different schedules conferring exclusive powers on the respective legislature i.e. Parliament or State Legislature. Therefore any matter relating to State Public Services ought not to be brought within the purview of any entry under Schedule VII list 3, if it is already covered therein, otherwise such power may become ultra virus. Both the enactments i.e. 1923 Act and 1944 Act are pre constitutional enactments and are continuing by virtue of Article 372 of the Constitution but the fact remains that 1944 enactment being a subsequent one, made for a specific service, and therefore, shall apply to exclusion of previous enactment of 1923.

22. Various welfare provisions have been made in case of injuries or loss sustained by the employees during the course of service. I am, therefore, clearly of the view that to a member of U.P. Fire Service Rule, 1923 Act would have no application. The Commissioner has misdirected himself by comparing members of U.P. Fire Services with U.P. Police Force and by holding that the former are not members of U.P. Police Force u/s 2 of the Police Act. This comparison was wholly unwarranted, inasmuch as U.P. Fire Service is a different service having its origin under U.P. Fire Service Act, 1944 and therefore, there is no occasion to compare it with U.P. Police Force u/s 2 of the U.P. Police Act, 1861.

23. Whether Petitioners are "employer" within the meaning of Section 2(e) is a question need not to be answered in this case since I have already held that Respondent No. 2 was not a "workman" within the meaning of Section 2(n) of 1923 Act and therefore 1923 Act is not applicable to the members of U.P. Fire Service.

24. The writ petition is accordingly allowed. The impugned order dated 23rd March, 2006 passed by Deputy Labour Commissioner (Prescribed Authority) Azamgarh (Annexure 1 to the writ petition) is hereby set aside.

25. No order as to costs.