(1996) 05 CAL CK 0014

Calcutta High Court

Case No: F.A.T. No. 2886 of 1987

Sarama Das and Others		APPELLANT
	Vs	
The Superintendent Sub-Divisional Hospital and Others		RESPONDENT

Date of Decision: May 24, 1996

Acts Referred:

- Constitution of India, 1950 - Article 162, 309
- Industrial Disputes Act, 1947 - Section 25F

Citation: 100 CWN 1026

Hon'ble Judges: S.N. Chakraborty, J; S.B. Sinha, J

Bench: Division Bench

Advocate: Moloy Kumar Basu and Bimal Jyotsna Chatterjee, for the Appellant;P. K. Chatterjee and Amal Kumar Basu Chowdhury, for the Respondent

Final Decision: Dismissed

Judgement

S.B. Sinha, J.

This appeal arises out of a judgement and order dated 4.8.87 passed by U.C. Banerjee. J. in CO. No. 2719(W) of 1987 whereby and whereunder the said learned Judge allowed the writ application filed by the writ petitioners in part. The writ petition was filed by 16 persons claiming, inter alia, that they were appointed as casual workers in Group- D post at Durgapur Sub-Divisional Government Hospital, Bidhan Nagar since 1977, and had been continuously discharging their services and thus, pursuant to or in furtherance of the circular letters issued by the State of West Bengal dated 3.8.79 and 4.1.84, their services were bound to be regularised.

2. It appears that of the disposed of the writ application, a contempt petition was also filed. Before the learned trial Judge, a chart was produced,. which is at page 58 of the paper book and in view of the statements, made therein to the effect that 6

out of 16 writ petitioners completed 240 days of continuous service, the learned, trial Judge without assigning any reason whatsoever, has allowed the writ application in relation to those writ petitioners. Other 10 writ petitioners, being aggrieved by and dissatisfied with the said judgment and order preferred this appeal.

3. ti appears from a supplementary affidavit filed on behalf of the appellants that a Division Bench of this court by an order dated 21.11.88 upon taking into consideration the fact that no affidavit in opposition had been filed denying the contention to the effect that the writ pertitioners had been in employment for several years gave certain directions which is in the following terms:

(i)The petitioners- shall be offered employment and continued to be employed unless the cessation of employment is for valid reasons and in accordance with law.

(2) No person junior to the petitioners shall be employed in preference to them under any circumstances whatsoever.

(3) The aforesaid order shall come into effect immediately upon service of a certified copy thereof upon the concerned respondents; the registry shall make the certified copy available to the petitioners upon payment of urgent charges within a week of the application therefor.

4. As the said order was allegedly not complied with, a contempt application Was filed on 26.6.89, and by an order dated 8.5.90, a Division Bench presided over by P.D. Desai, CJ. passed the following order:

We are accepting the apology tendered in the affidavit subject to the condition, however, that the payment of the wages be made to the petitioners al the prevailing rates for the entire period between January 1, 1989 till their re-employment, pursuant to this order, on and with effect from May 10, 1990. on the.said date, i.e; on May 10, 1990, they shall report, for, duty to;the Superintendent,. Durgapur S.D. Hospital, Bidhan Nagar Durgapur and their further employment shall be governed by the. prder dated November 21 1989. The payment directed to be, made, as aforesaid shall be made on or before June 15 1990.

These orders are mandatory and peremptory and any breach thereof will invite further action in contempt jurisdiction.

The application is disposed of in terms of the foregoing order.

5. Mr. Basu appearing on behalf of the appellants has raised a short question in support of this appeal. Learned counsel submits that keeping in view the fact that the writ petitioners apart from the fact that they had been working since 1977, as pursuant to the order of this court had been working since 1990 uninteruptedly, they come within the purviev of a recent notification dated l3.3.96 which is contained in Annexare "Z" to the supplementary affidavit, and thus their services

should be regularised.

6. Mr. Chatterji appearing on behalf of the respondents, however, submits that the question as to whether the appellants had been working continuously or not is a disputed question, and this, this court should not go into the said question in this jurisdiction.

7. It appears that the learned trial Judge has passed an order without assigning any reason purported to be in terms of the aforementioned two circular letters issued by the State of West Bengal. The learned trial Judge while passing the said order, did not consider as to whether the said circular letters were in conflict with the recruitment rules framed by the State of West Bengal made in exercise of the power under the provision appended to Article 309 of the Constitution of India. There cannot be any doubt whatsoever that a person does not have any legal right to be absorbed in service permanently only because-he has worked as a casual labourer for more than 240 days. He may derive a right to obtain compensation in terms of Section 25F of the Industrial Disputes Act. but that provision does not entitle him to be absorbed permanently in service. Reference in this connection may be made to Madhyamik Shiksha Prishad''s case, reported in Madhyamik Siksha Parishad, U.P. Vs. Anil Kumar Mishra and others etc., .

8. it is unfortunate that before the learned trial Judge the pertinent question as regards the applicability of the aforementioned circulars visit-vis the recruitment rules, which might have been framed by the State, was not canvassed, The learned trial Judge proceeded on the basis that some of the writ petitioners having completed 240 days of work continuously, were entitled to he absorbed in service. This, in our opinion, is not the law of the land, in as much as. it is now well settled by reason of various decisions of the Supreme Court of India that regulation in absence of any. statute or a statutory rule or a policy decision, which obviously would not be in conflict with such statute, can be a mode of appointment. Reference in. this connection may be made to the decisions reported in B.N. Nagarajan and Others Vs. State of Karnataka and Others, and 1972 2 SCC 799 which decisions have been referred to with approval recently by the Supreme. Court.of India in the case of V. Srinivas. Reddy v. Goverrment of.Andhra pradesh. repoorted in V. Sreenivasa Reddy and others Vs. Govt. of Andhara Pradesh and others, . it. is also now well known that a mere prolonged or continuoues service (sic).not. ripen into a regular service to claim permanent or substantive status. Reference in this connection may be made to the case of State of Orissa vs. Pran Mohan Misra, reported in Judgment Today 1995 2 SC 54 : AIR 1995 SC 974. These aspects of the matter have been considered by this court in various decisions, some of which are reported in Narendranath Palai Vs. State of West Bengal and Others, . The Supreme Court has also elearly held that in absence of a provision for relaxation in the recruitment rules, nobody can be appointed by way of regularisation or otherwise. Reference in this connection may be made to 1994 2 SCC 630.

9. For the reasons aforementioned, we are of the opinion that the appellants did not derive any legal right whatsoever.to be absorbed in permanent service only because they allegedly had worked as casual labourers for a period of more than 240 days.

10. So far as the statements made in the supplementary affidavit are-concerned, they are subsequent events. The appellants continued to work as casual labourers on the basis pf the statements made before the -learned Appeal Court which had not been controverted, that they had been working for a period of over 8 years. Such interim order, in our opinion, is subject to any final order that may be passed by this court while disposing of the appeal. In our considered view, if the writ petitioners are not otherwise entitled to be regularised in service, their services cannot be directed to be regularised only because they had been allowed to continue in service by reason of interim order passed by this court, which has been noticed by us hereinbefore. The only question which remains for consideration is as to whether the writ petitioners can claim absorption in terms of the aforementioned memorandum dated 13.3.96. The said memorandum has been issued by the Labour Department. The. said memorandum is not even authenticated. Our attention has not been drawn by the learned counsel for the parties as to whether the said memorandum would be in conflict with the recruitment rules framed by the State either in exercise of its statutory power or in exercise of its power under the proviso appended to Articfe" 309" of the Constitution, of India. There cannot be any doubt whatsoever that regularisation of a service is possible if a legislation is made or a statutory rule is framed. Such regularisation would also be possible by way of a policy decision of the State provided the same is not in conflict with any recruitment rules. The court while interpreting a circular vis-a-vis recruitment rules will have to bear in mind the well known principle of law as enunciated by the Supreme Court of India in the cases referred to hereinbefore that regularisation cannot be a mode of appointment, as there exists only two known modes therefor, namely, by regular appointment or In way of promotion. In certain cases, an appointment by way of transfer is also permissible.

11. Having considered these aspects of the matter, we are not in a position to accede to the request of'' the learned counsel that this appeal should be disposed of in terms of the aforementioned memorandum dated 13.3.96. If the appellants have derived any right which we are not finally deciding in this, appeal they may ventilate their grievances before an appropriate forum subject to the observations made hereinbefore. Before such forum it would be open to the parties to contend as to whether the said memorandum is contradictory to or inconsistent with any recruitment rules and/or whether there exists, any provision for relaxation entitling the State to issue such circulars. Assuming that the said memorandum had been issued by the State in exercise of its jurisdiction under Article 162 of the constitution of India, although it is not for us at this stage to express our final opinion, it-is.settled law that such an executive instruction would be subject to any state or any statutory rule, in as much as, no executive instruction can be issued contrary to

or inconsistent with any statute or statutory rule. For the reasons aforementioned, we are of the opinion that there is no merit in this appeal, which is dismissed subject to the observations made hereinbefore. However, in the facts and circumstances of the case, there will be no order as to costs.

Satya Narayan Chakraborty

I agree.