(2014) 07 CAL CK 0077

Calcutta High Court

Case No: W.P. 16344 (W) of 2014

Sisir Kumar Ganguly		APPELLANT
	Vs	
State of West Bengal		RESPONDENT

Date of Decision: July 16, 2014

Acts Referred:

- Constitution of India, 1950 - Article 14, 21

Citation: (2015) 1 LLN 97

Hon'ble Judges: A.K. Dasadhikari, J

Bench: Single Bench

Advocate: R.N. Majumder, Supratim Bhattacharya and Sourav Chakraborty, Advocate for the Appellant; Chaitali Bhattacharya and Subhendu Sengupta, Advocate for the Respondent

Final Decision: Allowed

Judgement

Ashoke Kumar Dasadhikari, J.
This is an unfortunate case where the writ petitioner was appointed as Laboratory Assistant by the Principal, Trivenidevi Bhalotia College, Raniganj, Burdwan, w.e.f. 1st August, 1984.

2. This appointment was subject to approval of Governing Body of the said college. Later on the writ petitioner''s designation was changed from Laboratory Assistant to Laboratory Instructor on and from 1st August, 1984. Although, it was an appointment on temporary basis and his service is terminable at any time without any notice or without any reason whatsoever the petitioner continued as Laboratory Instructor since 1st August, 1984. It would appear from the Government Memo dated 22nd November, 1989 that the strength of Laboratory Instructor was eight, three were existing approved posts and three were additional posts. Writ petitioner continued his service without any interruption till date.

3. During his entire service period of about last thirty years, writ petitioner made several representations before all the authorities including the Minister for his regularisation. None of the officers who are responsible for such regularisation, although they were aware of the petitioner''s appointment and uninterrupted working in the said institution, did not take any step for regularisation of service of the writ petitioner. Writ petitioner produced some records issued by the concerned authorities of the State Government. It appears from memo No. 123/95 dated 16th August, 1995, Deputy Regional Education Officer & Ex-Officio, A.D.P.I., Burdwan Division, Chinsurah, Hooghly, wrote to Director of Public Instruction, Education Directorate, Government of West Bengal, that present staff pattern of the aforementioned college shows out of thirteen existing posts of Laboratory Instructor two vacancies are there. It also appears from the said memo that writ petitioner''s name featured at serial number 1 as Laboratory Instructor (Chemistry) and his date of joining is shown 1st August, 1984.

4. Thus it is evident that the writ petitioner''s appointment was in the knowledge of the respondent authorities. In spite of available vacancies and in spite of several representations made by the writ petitioner, writ petitioner''s appointment was not regularised. He was being paid a meagre sum of Rs. 2,000/- (rupees two thousand only) per month. It is also evident from the resolution of the Governing Body dated 16th June, 1995 wherein it was resolved that two employees including the petitioner have been rendering continuous and satisfactory service for more than a decade and, as such, Governing Body feels that the college authorities has no alternative but to regularise the writ petitioner''s service without any further delay. It was also resolved that this temporary appointments be approved and the Professor-in-Charge and Ex-Officio Secretary to the Governing Body be authorised to issue formal letters of appointment to the individual incumbents as mentioned above. Governing Body also urged that the government to take necessary steps to regularise the appointments already made and because of pressing needs of the college.

5. Even in spite of such resolution, which was forwarded to the appropriate authority, the concerned respondents did not take any decision over the matter.

6. It appears from the memo dated 9th July, 1996 some employees were appointed but the writ petitioner was not regularised.

7. It is evident from the annexures that writ petitioner made several representations. However, he also wrote to Hon''ble Minister-in-Charge, Higher Education, Government of West Bengal. He also wrote to the Secretary, Ministry of Higher Education, Government of West Bengal. He also wrote to the Director of Public Instruction, Education Directorate, West Bengal on 1st October, 1996. Unfortunately, all these representations did not work.

8. Subsequently, government approved appointment of some non-teaching employees in the year 2000 but the writ petitioner''s case was not considered. The writ petitioner again made representation on 27th February, 2006 and, thereafter, many representations were made. Ultimately the poor employee who could not gate success even in spite of all such representations to all pillars and posts had to come before this Hon''ble Court by filing this writ petition just few months before his retirement with a prayer that in spite of his continuous service for about thirty years on a meagre sum of money, his appointment should be regularised by the appropriate authority and at least his pay fixation should be made notionally on and from 1st August, 1984 and he should also be paid regular pension.

9. Mr. Majumder, learned Counsel appearing for the writ petitioner, submitted that at that relevant point of time i.e. in the year 1984 college authorities had power to appoint non-teaching staff of the college and no prior approval was necessary. Therefore, the selection and appointment of the writ petitioner as Laboratory Assistant redesignated as Laboratory Instructor is not an illegal appointment. By an application of the writ petitioner made under Right to Information Act, 2005, writ petitioner received some documents from which it appears that the college had vacancies and the appropriate State authorities were aware of petitioner''s continuous employment for more than ten years. In the year 1996 Governing Body took several resolutions and the resolutions were forwarded. D.P.I. was represented. Minister-in-Charge was represented but, unfortunately, the grievances of the writ petitioner were not redressed. He submitted that the writ petitioner although appointed on temporary basis but continued as a permanent full time employee for more than thirty years and the concerned respondents are well aware about the facts. Concerned respondents are also aware that the writ petitioner is being paid by a meagre amount of money against his full time work which is required for the interest of the college as well as the benefit of the students. He further submitted that at no point of time any of the authorities have given any reply to the representations made by the writ petitioner for his regularisation.

10. He then submitted that there are several decisions of the Hon''ble Apex Court where it has been held that more than ten years of service was enough for a direction for regularisation of those employees who were although worked as casual employees but worked for more than ten years as a permanent employee on regular basis.

11. Mr. Majumder cited several judgments and he has referred Secretary, State of Karnataka and Others Vs. Umadevi and Others, and he also referred the latest judgment of the Hon''ble Apex Court reported in State of Jharkhand and Others Vs. Kamal Prasad and Others, Mr. Majumder relied upon the judgment and the relevant portion which is applicable is quoted hereunder:-

He further submits that the High Court, considering the law declared in Umadevi''s case (supra) at para 53 and also keeping in view the justice and good conscious, has

granted the relief to the respondent-employees. The same cannot be termed either as erroneous or error in law. Further, it is contended that the Division Bench of the High Court of Jharkhand has rightly rejected the contentions urged by the Advocate General to the effect that the persons who are appointed on ad hoc/temporary basis had an opportunity to get another appointment in regular selection and they failed to participate in the selection process, therefore the same would not be a ground for the appellants to refuse regularization of service of the respondent-employees, even after they have not availed such opportunity. The employer State Government did not choose to dispense with their services though there is no restraint order from the court. In the cases in hand, both the Government of State of Bihar and Jharkhand have continued the service of all the respondent-employees for 10 or more years even after they failed to get appointed to the posts on a regular basis. Therefore, the principle laid down in Umadevi''s case (supra) would squarely apply in the case in hand in support of the respondent-employees. The submission made by the learned senior counsel on behalf of the appellants that the regularization of the respondent-employees in their service would deprive the other eligible persons from employment is wholly untenable in law as the same would constitute not only discrimination but also deprivation of their livelihood, which is not legally permissible in law. The question is whether the appellants can terminate the services of the present employees who have served for more than 10 to 30 years, thereby rendering injustice to the eligible people. Therefore, in any event, it is doubtful whether the employer, more particularly the State can raise such a plea to deny employment to the employees and whether the law can be interpreted in a manner so as to give all benefits to the wrongdoers. The appointments were given to a large number of engineers by the State Government of Bihar consciously and there is no allegation of unfairness in their appointment which can be said to be tainted or as a result of any nepotism. The error of the State Government of either Bihar or Jharkhand would not justify to throw away the respondent-employees by making them unemployed who have been well-settled in their life since the same would amount to a clear case of discrimination and deprivation of their livelihood. Further, the Division Bench of High Court has rightly held that there is duty cast upon the State Government of Jharkhand to consider the claim of the respondent-employees as one-time regularization of ad-hoc/temporary employees in their posts. Further, it is contended by the learned senior counsel that similarly situated employees are continuing in service in the State Government of Bihar. Therefore, the relief sought by the respondent-employees'' continuation in service, clearly takes care of all the hurdles coming in their way. The Division Bench of the High Court is of the considered opinion that the employees services should have been regularised, but on the other hand, the appellant-State Government, during pendency of the Letters Patent Appeals, has terminated their services. The same cannot be a hurdle for it and it would not come in the way of the appellant-State Government for grant of relief in favour of the respondent-employees. Lastly, it is submitted that there is material distinction between filling up a vacant post by direct

recruitment on the one hand and "regularization" of existing employees in their posts by applying the decision of Umadevi''s case (supra) who have served for more than 10 years in the posts with the appellants without the interventions of any interim orders granted by any court. Further, he urges that the principle which flows from the mandate of Articles 14 and 21 of the Constitution of India is supported at paragraph 53 of the Secretary, State of Karnataka and Others Vs. Umadevi and Others, It is further contended that it is not a case of "appointment" as mentioned hereinbefore but it is a case of "regularization". The only qualification for the latter is continuous service of the employees without intervention of the court order for a period of 10 years. Once this takes place, the citizen''s right to livelihood as guaranteed under Article 21 as also his/her right to fair treatment and against arbitrary action of the appellants is protected by Article 14 of the Constitution of India. That is the ratio of the impugned judgment of Division Bench of the High Court. The conclusion and the finding and reasons recorded by the Division Bench of the High Court on this aspect of the matter in the impugned judgment is squarely covered by the Constitution Bench decision of this Court in the case of Olga Tellis and Ors. v. Bombay Municipal Corporation & Ors. The relevant paras of the same will be extracted in the reasoning portion of the judgment. Therefore, the learned senior counsel has prayed for dismissal of the appeals.

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19. The learned senior counsel appearing on behalf of the appellants argued that there have been repeated findings of the High Court that the respondents have been continued in service voluntarily by the employer for more than 10 years. Correctness of the same is disputed by the learned senior counsel for the appellants by placing reliance upon at least six interim orders passed by the High Court all of which are prior to 10-4-2006, the dates of these orders are as follows:

(i) Order dated 15-12-1996 in CWJC No. 9420 of 1996-Param Kumar v. State of Bihar.

(ii) Order dated 20-6-1997 in CWJC No. 11761 of 1996-Sardar Pradeep Singh v. State of Bihar.

(iii) Order dated 4-4-2002 in CWJC No. 2606 of 2002-Jawahar Prasad Bhagat v. State of Bihar.

(iv) Order dated 4-4-2002 in CWJC No. 4327 of 2002-Akhilesh Prasad v. State of Bihar.

(v) Order dated 4-4-2002 in CWJC No. 4365 of 2002-Vijay Kumar Sharma v. State of Bihar.

(vi) Order dated 8-1-2003 in CWJC No. 2087 of 2010.

Further, two stay orders have also been passed by the High Court subsequent to 10-4-2006, which are (1) Order dated 9-9-2007 of the learned single Judge and (2) Order dated 13-9-2011. Further, in the case of Secretary, State of Karnataka and

Others Vs. Umadevi and Others, it has been held by the Constitution Bench of this Court that:

53. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointment) as explained in State of Mysore and Another Vs. S.V. Narayanappa, R.N. Nanjundappa Vs. T. Thimmiah and Another, and B.N. Nagarajan and Others Vs. State of Karnataka and Others, and referred to in paragraph 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 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 above referred 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 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 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 regularization, if any already made, but not sub-judice, need not be reopened based on this judgment, but there should be no further by-passing of the constitutional requirement and regularizing or making permanent, those not duly appointed as per the constitutional scheme.
(Emphasis laid by this Court)

The learned senior counsel for the appellants placing reliance upon the aforesaid paragraph of the decision submits that the respondents do not fulfil the requirement of 10 years of uninterrupted service which is sine qua non for regularization of the services of the employees in their posts. Hence, the legal principle laid down by this Court in the aforesaid case cannot apply in the present case, therefore, the respondents are not entitled for regularization.

20. We have heard the factual and legal contentions urged by the learned senior counsel for both the parties and carefully examined the findings and reasons recorded in the impugned judgment with reference to the evidence produced on behalf of the respondent-employees. The evidence on record produced by the respondent-employees would clearly go to show that they have been rendering services in the posts as ad hoc Engineers since 1987 and have been discharging their services as permanent employees with the appellants. Additional 200 posts were created thereafter by the State Government of Bihar. However, the respondents continued in their services as ad hoc employees without any disciplinary proceedings against them which prove that they have been discharging services to their employers to their satisfaction.

The learned senior counsel on behalf of the appellants have failed to show as to how the interim orders upon which he placed strong reliance are extended to the respondents which is not forthcoming except placing reliance upon the decision of this Court in the case of Amrit Lal Berry and Another Vs. Collector of Central Excise, New Delhi and Others, without producing any record on behalf of both the State Governments of Bihar and Jharkhand to substantiate the contention that the interim orders obtained by the similarly placed employees in the writ petitions referred to supra were extended to the respondent-employees to maintain parity though they have not obtained such interim orders from the High Court. Therefore, the learned senior counsel has failed to prove that the respondents have failed to render continuous services to the appellant at least for ten years without intervention of orders of the court, the findings of fact recorded by the Division Bench of the High Court is based on record, hence the same cannot be termed as erroneous in law. In view of the categorical finding of fact on the relevant contentious issue that the respondent-employees have continued in their service for more than 10 years continuously therefore, the legal principle laid down by this "Court in Secretary, State of Karnataka and Others Vs. Umadevi and Others, at paragraph 53 squarely applies to the present cases. The Division Bench of the High Court has rightly held that the respondent-employees are entitled for the relief, the same cannot be interfered with by this Court.

21. In fact, the Division Bench of the High Court by regularizing the respondent employees vide its impugned order has upheld the constitutional principle laid down by this Court in the case of Olga Tellis and Others Vs. Bombay Municipal Corporation and Others, , the relevant para of which reads as under:-

32. As we have stated while summing up the petitioners" case, the main plank of their argument is that the right to life which is guaranteed by Article 21 includes the right to livelihood and since, they will be deprived of their livelihood if they are evicted from their slum and pavement dwellings, their eviction is tantamount to deprivation of their life and is hence unconstitutional. For purposes of argument, we will assume the factual correctness of the premise that if the petitioners are evicted from their dwellings, they will be deprived of their livelihood. Upon that assumption, the question which we have to consider is whether the right to life includes the right to livelihood. We see only one answer to that question, namely, that it does. The sweep of the right to life conferred by Article 21 is wide and far-reaching. It does not mean merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of the death sentence, except according to procedure established by law. That is but one aspect of the right to life. An equally important facet of that right is the right to livelihood because, no person can live without the means of living, that is, the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective

content and meaningfulness but it would make life impossible to live. And yet, such deprivation would not have to be in accordance with the procedure established by law, if the right to livelihood is not regarded as a part of the right to life. That which alone makes it possible to live, leave aside what makes life livable, must be deemed to be an integral component of the right to life. Deprive a person of his right to livelihood and you shall have deprived him of his life. Indeed, that explains the massive migration of the rural population to big cities. They migrate because they have no means of livelihood in the villages. The motive force which propels their desertion of their hearths and homes in the village is the struggle for survival, that is, the struggle for life. So unimpeachable is the evidence of the nexus between life and the means of livelihood. They have to eat to live: only a handful can afford the luxury of living to eat. That they can do, namely, eat, only if they have the means of livelihood. That is the context in which it was said by Douglas, J. in Baksey that the right to work is the most precious liberty that man possesses. It is the most precious liberty because, it sustains and enables a man to live and the right to life is a precious freedom. "Life", as observed by Field, J. in Munn v. Illinois means something more than mere animal existence and the inhibition against the deprivation of life extends to all those limits and faculties by which life is enjoyed. This observation was quoted with approval by this Court in Kharak Singh Vs. The State of U.P. and Others,
(Emphasis laid by this Court)

In view of the foregoing reasons which we have assigned in this judgment and in upholding the findings and reasons recorded by the Division Bench of the High Court in the impugned judgment, it cannot be said that the findings and reasons recorded by the High Court in arriving at the conclusions on the contentious issues that arose for its consideration can be termed either as erroneous or error in law.

22. In view of the foregoing reasons, we are inclined to conclude that the High Court was legally correct in extending the benefits of Secretary, State of Karnataka and Others Vs. Umadevi and Others, to the respondent-employees. Therefore, we answer point Nos. 1 and 2 in favour of the respondent-employees.

12. Mr. Majumder submitted that, in view of the latest decision of the Hon''ble Supreme Court where it was held that only qualification was required was continuous service of the employees without intervention of the court order for a period of ten years, petitioner''s service should be regularised. Once this took place, the citizen''s right to livelihood as guaranteed under Article 21 as also his/her right to fair treatment and against arbitrary action of the respondents is protected by Article 14 of the Constitution of India. According to him, writ petitioner is protected by Articles 21 and 14 of the Constitution of India. He should be regularised in the post of Laboratory Instructor.

13. Ms. Bhattacharya, learned Counsel appearing for the State, submitted that in the instant case appointment is illegal since no prior approval was obtained. She submitted that no post is available for regularisation. She also submitted that there is no post of Laboratory Instructor at present. According to her, the writ petitioner should not be regularised. She submitted that there are several decisions of the Hon''ble Apex Court wherein the Hon''ble Apex Court discarded this type of appointments. She also cited the following judgments:

1) Union of India (UOI) and Others Vs. Vartak Labour Union,

2) Union of India (UOI) and Another Vs. Arulmozhi Iniarasu and Others,

3) (2013)3 S.C.C. page 750.

14. She also placed reliance on Secretary, State of Karnataka and Others Vs. Umadevi and Others, judgment. She submitted that the judgment cited by the learned Counsel appearing for the writ petitioner is distinguishable. She has pointed out two things, one is no post is available in this case and secondly, the payment was made by the college. Therefore, according to her, the writ petitioner''s service should not be regularised.

15. I have considered the submissions made by the learned Counsel appearing for the parties.

16. It is undisputed that the writ petitioner was appointed on 1st August, 1984 following all norms and procedures as Laboratory Assistant and subsequently redesignated Laboratory Instructor. At that relevant point of time college authorities including the Governing Body have the authority and power to appoint non-teaching staff in the college. No prior approval or sanction was necessary. Therefore, I do not find any substance in the submission of Ms. Bhattacharya, learned Counsel for the State that the appointment was illegal. Moreover, no such communication and/or reply was ever given by the concerned respondents that since writ petitioner''s appointment was illegal, his regularisation is not permissible rather it appears from government records that the government is all through aware of his appointment and they are also aware that the governing body recommended for regularisation of the employees who are working for the interest of the institution as well as for the students over a period of thirty years.

17. Now the vacancy position as pointed out by the learned Counsel appearing for the State that there is no post of Laboratory Instructor, is also not correct. It is on record that there were vacancies in the college since the date of appointment of the writ petitioner and it appears from records that in the year 1995 there were vacancies and subsequently, also it appears from different memos and annexures of the writ petition that there were vacancies. Even in the year 2007 also there were vacancies. Therefore, this plea taken by the learned Counsel for the State also have no foundation at all.

18. Therefore, this point goes in favour of the writ petitioner. So far the payment part is concerned, it is evident from records that from the college fund writ petitioner is paid and the Governing Body took this resolution in favour of regularisation which was also sent to the respondents.

19. It appears from annexures that the Director of Public Instruction is aware about the writ petitioner''s employment as communicated in memo No. 123/95 dated 16th August, 1995.

20. Furthermore, it is not in dispute that when the college authorities have taken a resolution to give employment and they have appointed writ petitioner as Laboratory Instructor then they have their own obligation to pay the concerned employee. The payment part is not much material.

21. The latest decision of the Hon''ble Apex Court in case of State of Jharkhand (supra) it was held following the Secretary, State of Karnataka and Others Vs. Umadevi and Others, that in this type of cases where regularisation is required, the only consideration is continuous service of the employee without intervention of courts order for a period of ten years. Once this takes place, the citizen''s right to livelihood as guaranteed under Article 21 as also his/her right to fair treatment and against arbitrary action of the appellants is protected by Article 14 of the Constitution of India.

22. In my considered view, this ratio of the Hon''ble Apex Court squarely applies in the instant case. The writ petitioner has fulfilled all criterion and according to the Hon''ble Apex Court''s decision, the writ petitioner''s service should be regularised in the available vacancy. However, his appointment on and from 1st August, 1984 is to be counted and fixation to be made for calculating petitioner''s retiral dues at the time of his retirement. Writ petitioner would be regularised w.e.f. 1st August, 1984. However, he would get proper pay scale regularly on and from 16th July, 2014. So far the judgments cited by Ms. Bhattacharya, learned Counsel appearing for the State are concerned, those are rendered on different set of facts. Therefore, the respondents are not at all benefited by those judgments.

23. Accordingly, this writ petition is allowed. The concerned respondents are also directed to regularise petitioner''s service with effect from 1st August, 1984 and to give benefit to the writ petitioner with utmost expeditions, latest by 16th August, 2014.

24. The writ petition is allowed.

25. There will be, however, no order as to costs.

26. Urgent photostat certified copy of this order, if applied for, be given to the learned advocates for the parties.