Civil Revision

PRESENT:**The Hon'ble JUSTICE I.P. MUKERJI**

C.O. NO.10875 (W) OF 1991

Judgment on: 08.04.2010

SARAT KUMAR RAY

Versus

THE STATE OF WEST BENGAL AND ORS

POINTS:

REGULARISATION- Petitioner worked for about thirty years with the State-State whether should give the writ petitioner an opportunity to arrange his post retirement life before terminating his service- Service Law

FACTS:

The petitioner is a class-IV peon, working from 1981 at Mitra Nandapur High School, Bankura. Though the State Government had not approved such post, the writ petitioner was appointed with an assurance that his appointment on permanent basis would be considered if opportunity arose and that his remuneration would be paid from the contingency fund of the school. However, he was removed in July, 1990. He claimed regularization and permanent appointment in that post which was refused. The writ petitioner filed this writ challenging the letter of the District Inspector of Schools and asking for his regularization in that post.

HELD:

If this appointment is regularised the State will be prevented from appointing a regular employee for two or three years left of the writ petitioner's service. Further, the State will be enjoined to pay

gratuity, pension and other retirement benefits calculated on almost full service rendered basis. It will create financial burden. If the State denies the writ petitioner regular employment, then the State would be equally estopped from alleging that this employee would be superannuated at the age when regular employees are superannuated. There is no such condition in his letter of appointment. Neither is it mentioned in that letter of appointment that this employee would be terminated with one month's notice and so on. Thus, having worked for about thirty years with the State, the State should give the writ petitioner an opportunity to arrange his post retirement life before terminating his service. Therefore, the State should not interfere with his service for a reasonable period, to enable him to do so. Therefore, there will be an order of injunction restraining the State from interfering with the service of the writ petitioner for a period of five years from date. Further his arrear salary up to date and current and future salary up to five years from date should be paid by the State in accordance with law. Para-11

CASES CITED:

1) Secretary, State of Karnataka and others Vs. Umadevi (3) and others, (2006) 4 SCC 1

2) Official Liquidator – vs – Dayanand and others (2008) 10 SCC 1.

3) U.P. State Electricity Board Vs Pooran Chandra Pandey and others, (2007)11 SCC 92

4) Steel Authority of India Ltd. Vs Sri Baidyanath Sardar and ors; 2006 (2) CLJ (Cal) 341.

For the petitioner	:	Mr. Subrata Ghosh Mr. Mahadeb Khan
For the State	:	Mr. Soumitra Dasgupta Mr. Washef Ali Mondal
For the school authority	:	Mr. Tarapada Das

THE COURT:

1) This is a very old writ of 1991. This is by a peon, a class-IV staff of Mitra Nandapur High School, Bankura. He has been so working from 1981.

He claims regularization and permanent appointment in that post.

2) In 1981 no such post was approved by the State Government. Yet, the writ petitioner was appointed as a class-IV staff by the school, by an appointment letter dated 3rd January 1981. It was also stated there, that his appointment on permanent basis would be considered if opportunity arose and that his remuneration would be paid from the contingency fund of the school. He carried on in this way upto July, 1990. In reply to the letter dated 31st May, 1990 of the Secretary of the school, the District Inspector of Schools, wrote on 3rd July, 1990 that there was no provision to absorb the writ petitioner in a permanent post and that the Secretary should fill up the group-D post in accordance with "new recruitment rules."

3) The writ petitioner filed this writ challenging that letter of the District Inspector of Schools dated 3rd July, 1990 and asking for his regularisation in that post. The prayers do not seek regularisation directly. They are in negative form seeking restraint upon the respondent authorities from filling up the post. But, from the tenor of the prayers it is quite plain that regularisation is sought for by the writ petitioner. Any defect in the prayer is to be attributed to the draftsman of the writ petition and I would treat the writ as asking for permanent appointment.

4) An interim order was passed in the writ application on 9th August, 1991. The interim order was that there was to be status quo with regard to the service of the writ petitioner in the school. This

status quo order has never been challenged and is still subsisting for almost 20 years. Further to this status quo order, a sum of Rs.5,82,016/- was paid by the Government of West Bengal to the writ petitioner towards his arrear salary, as would appear from a memorandum dated 18th May, 2007 handed over to the court and kept with the records. It is, however, submitted that no further payment has been made after the payment evidenced by the communication dated 18th May, 2007. The State contends that the writ petitioner cannot be given permanent appointment. Its learned counsel cites various authorities, discussed below.

DISCUSSION, FINDINGS AND CONCLUSIONS :

5) A five Judges Bench of the Supreme Court in ***Secretary, State of Karnataka and others Vs. Umadevi (3) and others,*** reported in ***(2006) 4 SCC 1*** cited by Mr. Dasgupta, followed in ***Official Liquidator – vs – Dayanand and others*** reported in ***(2008) 10 SCC 1,*** also cited by him has clearly denounced regularisation or permanent appointment to employees, who were appointed on adhoc or temporary basis. It has said in plain language that these employees, by such appointment do not acquire any rights at all. Further, when regular appointment is sought to be made, they have to give way to those appointees, who have been selected in a regular selection process. On the above principles of law, the following dictum of the Supreme Court ***Secretary, State of Karnataka and others Vs. Umadevi (3) and others*** reported in ***(2006) 4 SCC 1*** (supra) is very important:

> **"45. While directing that appointments, temporary or casual, be regularised or made permanent, the courts are swayed by the fact that the person concerned has worked for some time and in some cases for a considerable length of time. It is not as if the person who accepts an engagement either temporary or casual in nature, is not aware of the nature of his employment. He accepts the employment with open eyes. It may be true that he is not a position to bargain – not at arm's length – since he might have been searching for some employment so as to eke**

out his livelihood and accepts whatever he gets. But on that ground alone, it would not be appropriate to jettison the constitutional scheme of appointment and to take the view that a person who has temporarily or cassaully got employed should be directed to be continued permanently. Be doing so, it will be creating another mode of public appointment which is not permissible. If the court were to void a contractual employment of this nature on the ground that the parties were not having equal bargaining power, that too would not enable the court to grant any relief to that employee. A total embargo on such casual or temporary employment is not possible, given the exigencies of administration and if imposed, would only mean that some people who at least get that employment when securing of such employment brings at least some succour to them. After all, innumerable citizens of our vast country are in search of employment and one is not compelled to accept a casual or temporary employment if one is not inclined to go in for such an employment. It is in that context that one has to proceed on the basis that the employment was accepted fully knowing the nature of it and the consequences flowing from it. In other words, even while accepting the employment, the person concerned knows the nature of his employment. It is not an appointment to a post in the real sense of the term. The claim acquired by him in the post in which he is temporarily employed or the interest in that post cannot be considered to be of such a magnitude as to enable the giving up of the procedure established, for making regular appointments to available posts in the services of the State. The argument that since one has been working for some time in the post, it will not be just to discontinue him, even though he was aware of the nature of the employment when he first took it up, is not (sic) one that would enable the jettisoning of the procedure established by law for public employment and would have to fail when tested on the touchstone of constitutionality and equality of opportunity enshrined in Article 14 of the Constitution."

"49. It is contended that the State action in not regularising the employees was not fair within the framework of the rule of law. The rule of law compels the State to make appointments as envisaged by the Constitution and in the manner we have indicated earlier. In most of these cases, no doubt, the employees had worked for some length of time but this has also been brought about by the pendency of proceedings in tribunals and courts initiated at the instance of the employees. Moreover, accepting an argument of this nature would mean that the State would be permitted to perpetuate an illegality in the matter of public employment and that would be a negation of the constitutional scheme adopted by us, the people of India. It is therefore not possible to accept the argument that there must be a direction to make permanent all the persons employed on daily wages. When the court is approached for relief by way of a writ, the court has necessarily to ask itself whether

> **the person before it had any legal right to be enforced. Considered in the light of the very clear constitutional scheme, it cannot be said that the employees have been able to establish a legal right to be made permanent even though they have never been appointed in terms of the relevant rules or in adherence of Articles 14 and 16 of the Constitution."**

6) But in ***Secretary, State of Karnataka and others Vs. Umadevi (3) and others,*** reported in ***(2006) 4 SCC 1*** (supra), the Supreme Court has recognised the power of the courts in granting equitable reliefs, even by moulding the reliefs sought for. The following passages in that judgment is produced below :

> **"43.……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."**

7) I will make this observation that while delivering its judgment in ***Official Liquidator Vs. – Dayanand and others (2008) 10 SCC 1***, the Supreme Court had observed that in ***U.P. State Electricity Board Vs Pooran Chandra Pandey and others,*** *reported in* ***(2007) 11 SCC 92*** a two Judge Bench of the Supreme Court had enunciated some principles which were contradictory to those in Uma Devi case (supra). This decision was a judgment of a three Judges Bench of the

Supreme Court and it had disapproved the ratio in ***Puran Chandra case (2007) 11 SCC 92***. I may also observe here that in ***Steel Authority of India Ltd. Vs Sri Baidyanath Sardar and ors.,*** *reported in* ***2006 (2) CLJ (Cal) 341***, cited by Mr. Dasgupta, the Division Bench of our court following Uma Devi's case had upheld an order discharging the writ petitioner from service in Steel Authority of India Limited.

8) In the case of Uma Devi, the Supreme Court deprecated orders for absorption or regularization or permanent continuance of adhoc employees, on various grounds. The principal grounds are that such orders are against the provisions of the Constitution and interfered with the right given under Article 16 of the constitution for equal opportunities in the field of public employment. The orders of the court for permanent employment would according to the Supreme Court result in "litigious employment". Moreover, creation of this class of permanent employees out of temporary appointments would increase the financial burden of the State.

9) However, as noted above, the Supreme Court did recognize the power of the court to do complete justice by moulding the reliefs even when permanent appointment could not be granted.

10) This case calls for invocation of such equitable principles while fully applying, the above principles of law laid down by the Supreme Court against regularization of temporary appointees. Here is the case of an employee who was appointed in 1981 as a peon in the school. He has rendered about 30 years of continuous service. As stated from the Bar he has about 2 / 3 years of service left, even if he is regularized. An interim order was passed in this writ application way back on 9th August, 1991 continuing his service and such interim order is continuing without being

challenged by the State. Before passing of the interim order and also by virtue of it this employee was paid the wages of a regular peon. In fact, in deference to that interim order by the communication dated 18th May, 2007, the Government of West Bengal gave him Rs.5,82,016/- for his services as arrear salary. If at this point of time an order is passed for his regularization, he would have 2/ 3 years of service and the right to get pension and other retirement benefits as all employees of the State enjoy. But, by virtue of the above judgments of the Supreme Court he cannot be regularized. The above judgments of the Supreme Court, however, do not rule out application of equitable principles while applying the rule against regularization.

11) Viewed practically what is the benefit of the State in resisting permanent appointment? Or what is the loss caused to the state if such appointment is regularised? If this appointment is regularised the State will be prevented from appointing a regular employee for two or three years left of the writ petitioner's service. Further, the State will be enjoined to pay gratuity, pension and other retirement benefits calculated on almost full service rendered basis. I think the second factor is substantial. It will create financial burden. If the State denies the writ petitioner regular employment, then the State would be equally estoppled from alleging that this employee would be superannuated at the age when regular employees are superannuated. There is no such condition in his letter of appointment. Neither is it mentioned in that letter of appointment that this employee would be terminated with one month's notice and so on. Thus, having worked for about thirty years with the State, the State should give the writ petitioner an opportunity to arrange his post retirement life before terminating his service. Therefore, the State, in my opinion, should not interfere with his service for a reasonable period, to enable him to do so. This reasonable period, in my opinion is a period of five years. Therefore, there will be an order of injunction restraining the

State from interfering with the service of the writ petitioner for a period of five years from date. Further his arrear salary up to date and current and future salary up to five years from date should be paid by the State in accordance with law. Such arrear salary should be paid within three months from the date of communication of this order.

12) The writ application is partly allowed.

13) There will be no order as to costs.

14) Urgent certified photocopy of this judgment and order, if applied for, to be provided upon complying with all formalities.

(I.P. MUKERJI, J.)