M.P. No. 2711 of 2020

Rupendra Joshi Vs. Municipal Corporation, Gwalior

Gwalior, Dated :10-2-2021

Shri Prakhar Dhengula Counsel for the Petitioner.

Shri Deepak Khot Counsel for the Respondent.

Heard finally through Video Conferencing.

This Petition under Article 227 of the Constitution of India has been filed against the order dated 12-9-2019 passed by Labour Court No.1, I.D. Act, Gwalior in case No. 67A/I.D. Act/2018, by which the Petitioner has been granted compensation in lieu of reinstatement.

The facts necessary for disposal of the present petition in short are that the petitioner filed an Industrial Dispute under Sections 2A,10 of Industrial Disputes Act, on the grounds that he was appointed on daily wages as unskilled labour for the purposes of recovery of revenue and Collection. The respondent had admitted that the petitioner has worked from 1-9-2015 to 20-10-2015 whereas it is the case of the petitioner that he has worked upto 1-8-2016, and on the said date, his services were discontinued by a verbal order, without any rhyme or reason.

The Court below after recording evidence and hearing both the parties, came to the conclusion that since, the respondent, inspite of the order of the Trial Court, did not produce the record, therefore, an adverse inference was drawn and it was held that the petitioner has worked upto 1-8-2016 and thus had completed more than 240 days.

The only question for determination in the present petition is that the Court below instead of directing for reinstatement has directed for payment of Rs.50,000/- by way of compensation in lieu of reinstatement.

Challenging the direction to pay compensation in lieu of reinstatement, it is submitted by the Counsel for the petitioner, that compensation can be directed only when either the project has come to an end or there is no work. The Municipal Corporation is still working and therefore, it cannot be said that there is no work. Further the juniors are still working whereas the petitioner has been retrenched without any sufficient cause. It is further submitted that Code No. is always given to an employee and not to a person, working under any scheme. It is further submitted that on the application filed by the petitioner, the respondent was directed to produce the record, and since, the appointment order of the petitioner was not deliberately filed by the respondent, therefore, it has to be presumed, that the appointment of the petitioner was legal and not illegal. Accordingly, it is submitted that under these circumstances, the Court below should have directed for reinstatement.

Per contra, it is submitted by the Counsel for the respondent, that the petitioner has failed to prove that his appointment was in accordance with law, and the Supreme Court in the case of **Secretary,**

State of Karnataka Vs. Uma Devi reported in **(2006) 4 SCC 1** has held that bypassing the Constitutional Scheme cannot be perpetuated by passing orders of continuing the services of illegally appointed employee. Therefore, the Labour Court, did not commit any mistake by directing for payment of Compensation of Rs.50,000/- in lieu of reinstatement.

Heard the learned Counsel for the Parties.

It is submitted by the Counsel for the Petitioner, that the Supreme Court in the case of **Uma Devi (Supra)** has not considered the provisions of Industrial Disputes Act, therefore, the Court below committed material illegality by denying the relief of reinstatement on the ground that the petitioner has failed to prove that his appointment was in accordance with law.

Article 16 of the Constitution of India reads as under :

> **"16. Equality of opportunity in matters of public employment**.—(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.
> (2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.
> (3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to

such employment or appointment.

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

(4-A) Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion , with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.

(4-B) Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4-A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent reservation on total number of vacancies of that year.

(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

(6) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any economically weaker sections of citizens other than the classes mentioned in clause (4), in addition to the existing reservation and subject to a maximum of ten per cent. of the posts in each category."

Article 16(1) of Constitution of India, guarantees equal opportunities for all citizens of India in matters relating to employment or appointment to any office under the State. The Counsel for the

petitioner could not point out as to how, the provisions of Industrial Disputes Act, would not be governed by the provisions of Article 16(1) of Constitution of India. Thus, it is clear that where any appointment has been made *de hors* the rules, in a clandestine manner, without giving equal opportunities to the citizens, then such appointment would certainly come within the parameters of illegal appointment. In the statement of claim, the petitioner has not claimed that he was appointed after issuance of general advertisement inviting all the aspirants.

It is submitted by the Counsel for the petitioner, that since, the respondent did not produce the record of appointment, inspite of the order of the Labour Court, therefore, this Court should drawn an adverse inference against the respondent, and should be held that the appointment was in accordance with law.

The petitioner has filed a copy of the application filed before the Labour Court, by which prayer was made to direct the respondent to produce the documents. The documents sought by the petitioner in the said application reads as under :

> अ. प्रथम पक्ष का दिनांक 01.05.2015 से 01.08.2016 तक का हाजिरी पत्रक एवं वेतन पत्रक
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> ब. कार्यालय आयुक्त नगर निगम ग्वालियर द्वारा दिनांक 18.10.2017 जिसका क्रमांक 1/17/2/10/स.प्र./2017 को जारी अकुशल स्थाई कर्मी की सूची
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> स. कार्यालय आयुक्त नगर निगम ग्वालियर द्वारा क्षेत्राधिकारी

> क्षेत्र क्रमांक 03 नगर निगम ग्वालियर के माध्यम से पदस्थ कर्मचारियों की सूची दिनांक 01.02.2016
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> द. सहायक यंत्री जल प्रदाय संधारण उपखंड ग्वालियर नगर पालिक निगम ग्वालियर द्वारा पत्र क्रमांक 26 दिनांकत 15.1.2016 के माध्यम से अधीक्षण यंत्री जलप्रदाय विभाग नगर निगम ग्वालियर को दी गई जानकारी एवं संलग्न पदस्थ कर्मचारियों की सूची

Thus, it is clear that the petitioner, never prayed for a direction to the respondent to produce the appointment order, or record pertaining to his appointment. Thus, in absence of any such prayer, no adverse inference can be drawn against the respondent for holding that the appointment of the petitioner was in accordance with law. On the contrary, the initial burden was on the petitioner to plead and prove that his initial appointment was not illegal appointment, and having failed to do so, this Court is of the considered opinion, that the Court below did not commit any mistake in holding that the initial appointment of the petitioner was not in accordance with law.

The Supreme Court in the case of **Uma Devi (Supra)** has held as under :

> **"43.** 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. 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. 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. 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 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.

44. The concept of "equal pay for equal work" is different from the concept of conferring permanency on those who have been appointed on ad hoc basis, temporary basis, or based on no process of selection as envisaged by the rules. This Court has in various decisions applied the principle of equal pay for equal work and has laid down the parameters for the application of that principle. The decisions are rested on the concept of equality enshrined in our Constitution in the light of the directive principles in that behalf. But the acceptance of that principle cannot lead to a position where the court could direct that appointments made without following the due procedure established by law, be deemed permanent or issue directions to treat them as permanent. Doing so, would be negation of the principle of equality of opportunity. The power to make an order as is necessary for doing complete justice in any cause or matter pending before this Court, would not normally be used for giving the go-by to the procedure established by law in the matter of public employment. Take the situation arising in the cases before us from the State of Karnataka. Therein, after *Dharwad decision* the Government had issued repeated directions and mandatory orders that no temporary or ad hoc employment or engagement be given. Some of the authorities and departments had ignored those directions or defied those directions and had continued to give employment, specifically interdicted by the orders issued by the executive. Some of the appointing officers have even been punished for their defiance. It would not be just or proper to pass an order in exercise of jurisdiction under Article 226 or 32 of the Constitution or in exercise of power under Article 142 of the Constitution permitting those persons engaged, to be absorbed or to be made permanent, based on their appointments or engagements. Complete justice would be justice according to law and though it would be open to this Court to mould the relief, this Court would not grant a relief which would amount to perpetuating an illegality.

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 in 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 casually got employed should be directed to be continued permanently. By 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 employment temporarily, contractually or casually, would not be getting even 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 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."

Thus, it is clear that, where the employee has failed to prove that his appointment was legal and was not illegal, then this Court cannot perpetuate the illegality by directing the reinstatement of the petitioner.

So far as the question of payment of compensation in lieu of reinstatement is concerned, no fault can be found with the direction of the Labour Court. Admittedly, the petitioner has worked for less than a year. His initial appointment was not in accordance with law. Under these circumstances, directing for reinstatement would be nothing but would be perpetuating the illegality, which cannot be done.

The Supreme Court in the case of **Jayant Vasantrao Hiwarkar Vs. Anoop Ganaptrao Bobde** reported in **(2017)11 SCC 244** has upheld the grant of compensation in lieu of reinstatement as the respondent had merely worked for a period of one year.

The Supreme Court in the case of **Hari Nandan Prasad Vs. Food Corporation of India,** reported in **(2014) 7 SCC 190** has held as under:-

> **"19.** The following passages from the said judgment would reflect the earlier decisions of this Court on the question of reinstatement: (*BSNL case*, SCC pp. 187-88, paras 29-30)
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> "*29*. The learned counsel for the appellant referred to two judgments wherein this Court granted

compensation instead of reinstatement. In *BSNL* v. *Man Singh*, this Court has held that when the termination is set aside because of violation of Section 25-F of the Industrial Disputes Act, it is not necessary that relief of reinstatement be also given as a matter of right. In *Incharge Officer* v. *Shankar Shetty*, it was held that those cases where the workman had worked on daily-wage basis, and worked merely for a period of 240 days or 2 to 3 years and where the termination had taken place many years ago, the recent trend was to grant compensation in lieu of reinstatement.

30. In this judgment of *Shankar Shetty*, this trend was reiterated by referring to various judgments, as is clear from the following discussion: (SCC pp. 127-28, paras 2-4)

'*2*. Should an order of reinstatement automatically follow in a case where the engagement of a daily-wager has been brought to an end in violation of Section 25-F of the Industrial Disputes Act, 1947 (for short "the ID Act")? The course of the decisions of this Court in recent years has been uniform on the above question.

3. In *Jagbir Singh* v. *Haryana State Agriculture Mktg. Board*, delivering the judgment of this Court, one of us (R.M. Lodha, J.) noticed some of the recent decisions of this Court, namely, *U.P. State Brassware Corpn. Ltd.* v. *Uday Narain Pandey*, *Uttaranchal Forest Development Corpn.* v. *M.C. Joshi*, *State of M.P.* v. *Lalit Kumar Verma*, *M.P. Admn.* v. *Tribhuban*, *Sita Ram* v. *Moti Lal Nehru Farmers Training Institute*, *Jaipur Development Authority* v. *Ramsahai*, *GDA* v. *Ashok Kumar* and *Mahboob Deepak* v. *Nagar Panchayat, Gajraula* and stated as follows: (*Jagbir Singh case*, SCC pp. 330 & 335, paras 7 & 14)

"*7*. It is true that the earlier view of this Court articulated in many decisions reflected the legal position that if the termination of an employee was found to be illegal, the relief of reinstatement with full back wages would ordinarily follow. However, in recent past, there has been a shift in the legal position and in a long line of cases, this Court has

> consistently taken the view that relief by way of reinstatement with back wages is not automatic and may be wholly inappropriate in a given fact situation even though the termination of an employee is in contravention of the prescribed procedure. Compensation instead of reinstatement has been held to meet the ends of justice.
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> *14*. It would be, thus, seen that by a catena of decisions in recent time, this Court has clearly laid down that an order of retrenchment passed in violation of Section 25-F although may be set aside but an award of reinstatement should not, however, be automatically passed. The award of reinstatement with full back wages in a case where the workman has completed 240 days of work in a year preceding the date of termination, particularly, daily-wagers has not been found to be proper by this Court and instead compensation has been awarded. This Court has distinguished between a daily-wager who does not hold a post and a permanent employee."
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> *4. Jagbir Singh* has been applied very recently in *Telegraph Deptt.* v. *Santosh Kumar Seal*, wherein this Court stated: (SCC p. 777, para 11)
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> *11*. In view of the aforesaid legal position and the fact that the workmen were engaged as daily-wagers about 25 years back and they worked hardly for 2 or 3 years, relief of reinstatement and back wages to them cannot be said to be justified and instead monetary compensation would subserve the ends of justice.'"
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> **21.** We make it clear that reference to *Umadevi*, in the aforesaid discussion is in a situation where the dispute referred pertained to termination alone. Going by the principles carved out above, had it been a case where the issue is limited only to the validity of termination, Appellant 1 would not be entitled to reinstatement....."

Even otherwise, in the present case, the termination of the

petitioner has been held to be invalid. If an order of reinstatement is given, even then, the petitioner would not be entitled for regularization. The employer can still terminate the services of the petitioner, after making payment of retrenchment compensation as provided under Section 25-F of Industrial Disputes Act. Thus, because of illegal termination, the petitioner is merely entitled for compensation. Under these circumstances, if the Labour Court has directed for compensation in lieu of reinstatement, then it cannot be held that the Labour Court has committed any illegality.

As no jurisdictional error could be pointed out by the Counsel for the petitioner, therefore, the order dated 12-9-2019 passed by Labour Court No.1, I.D. Act, Gwalior in case No. 67A/I.D. Act/2018 is upheld.

The petition fails and is hereby **Dismissed.**

(G.S. Ahluwalia)
Judge