

WA 37/2012

BEFORE

THE HON'BLE MR. JUSTICE AMITAVA ROY

THE HON'BLE MRS JUSTICE ANIMA HAZARIKA

(Amitava Roy,J)

Both these appeals arise from the judgment and order dated 06.09.2011 passed in WP(C) No.4017/2010 and 4016/2010 respectively. The private respondents herein hail from the district of Kamrup in the State of Assam. The appellants, however are from the district of Kamrup. The post involved is that of Accredited Engineers (Diploma Holder) contemplated under the Mahatma Gandhi National Rural Employment Guarantee Act (for short hereinafter referred to as the MNREGA).

We have heard Mr. J.I. Borbhuiya, learned counsel for the appellants, Ms. S. Sharma, learned State Counsel for the official respondents and Mr. P.D. Nair, learned counsel for Respondent Nos.5 & 6.

In both the appeals, the parties in the fray are admittedly Diploma Holders in Civil Engineering. In response to an advertisement dated 19.12.2008 issued by the Deputy Commissioner, Kamrup-cum-District Programme Coordinator, National Rural Employment Guarantee Scheme, Kamrup for appointment to 140 posts of Accredited Engineer on contractual basis under all the Development Blocks/Gaon Panchayat areas of Kamrup District, the private respondents submitted their candidature and were eventually provided with contractual appointment by letters dated 27.08.2009 for a period of 6(six) months from the date of joining subject to the terms of contractual engagement of their service and were accordingly placed at the disposal of the authorities as mentioned therein. The letters of appointment, in specific terms mentioned that the contractual appointment would be governed by the terms of contractual engagement as envisaged therein. The contract agreements were executed by and between the parties, Clause 2 whereof read as hereunder:

2. Duration of contract: The engagement shall be purely on contract basis for the period as mentioned in the Order for Contractual Engagement, unless terminated earlier. The services of the contractual staff shall stand automatically terminated at the expiry of the contract period, unless terminated earlier, without any necessity of the Agency giving any notice to the contractual staff and without any liability on the part of the Agency to pay any retrenchment or other compensation or other amounts to the contractual staff. The contract may also be terminated without assigning any reason before the contract period by either party subject to giving one month's advance notice to the other party .

Noticeably, the period of contractual appointment as mentioned hereinabove was in the face of a stipulation in the letter No.DRD-15/75/2008/18, dated 27.10.2008 to the effect that the contractual engagement would be co-terminus with the NR EGA and in accordance with the provisions of Govt. of India Rules/Conditions framed thereunder. Nevertheless, the advertisement dated 19.12.2008 soliciting applications for appointment amongst others to the post of Accredited Engineer, in clear terms mentioned that the normal duration of contract would be 6(six) months in the maximum.

While the private respondents on being offered the contractual appointment as above, joined the respective posts and had been rendering their services, the Commissioner, Panchayat & Rural Development, Assam vide notification No.DRD-15/84/09/112 dated 19.05.2010 invited applications from eligible candidates to be engaged as Accredited Engineer (Diploma holders) on purely contractual basis under MGNREGA. The educational qualification was prescribed to be Diploma in Civil Engineering with the age limit between 18 years to 35 years as on 01.10.2010. Perceiving that the fresh process if accomplished, would spell their ouster from service as by then, they, though, academically qualified had been rendered over a

ged with the lapse of time, the private respondents approached this Court with the two writ proceedings referred to hereinabove seeking its intervention. They, not only did seek annulment of the new process initiated by the impugned advertisement dated 19.05.2010, they implored as well for a restraint on the State respondents against dislodging them from their continuing engagement. A direction to the State respondents to condone their over age was also prayed for.

The Respondent No.4, Project Director, District Rural Development Agency, Kamrup District in his affidavit while admitting the facts bearing on the process leading to the appointment of the private respondents as Accredited Engineers on contractual basis, emphasized that on the expiry of the initial term of six months they were re-engaged for another one month with a gap of one day in between. According to the answering respondent, the re-engagement of the private respondents as Accredited Engineers stood automatically terminated on the completion of the said period of one month and that this was communicated vide office letter No .KR/NREGA/36/2008-09/1745 dated 26.02.2010. It was highlighted as well in the affidavit that the performance of the most of the Accredited Engineers earlier engaged was not up to the mark due to lack of technical knowledge and skill as most of them were not diploma holders in Civil Engineering and that it greatly hampered the progress of works under the MGNREGS which was a flagship programme of the Govt. of India. The answering respondent also indicated that in the comprehension of the Panchayat and Rural Development, the works under the MGNREGS needed very active and dynamic incumbents and that with this objective in mind, the impugned advertisement No.DRD-15/84/09/112 dated 19.05.2010 had been issued and a fresh process in terms thereof was initiated. The respondent authority however admitted that the private respondents, though had fulfilled the academic qualification prescribed by the new advertisement, they were over aged. Admittedly, in the writ proceedings the appellants herein had not been impleaded.

The learned Single Judge by the judgment and order impugned sustained the challenge only on the ground that the appointments of the writ petitioners having been made under a scheme, those were co-terminus therewith and that the implied termination thereof sought to be occasioned by the impugned advertisement and the related process was impermissible in law. The advertisement as a whole was interfered with. The letter dated 07.05.2010 of the Joint Secretary, Panchayat & Rural Development Department preceding the said initiative was also set aside.

As meanwhile, the appellants herein had been selected in the new process and had been appointed as Accredited Engineers on contractual basis and detailed as well in their respective posts, they being aggrieved sought the leave of this Court to file the instant appeal which was granted to them.

Mr. Borbhuiya in the above backdrop has argued that as the appointments of the private respondents on contractual basis were visibly for a fixed term of 6 months and thereafter extended by one month terminable at the end thereof, the learned Single Judge erred in law and on facts in making it co-terminus with the scheme, which had never been intended by the State respondents. According to the learned counsel, as the administrative decision contained in the letter dated 07.05.2010 culminating in the impugned advertisement had not been challenged in the writ proceedings, the annulment thereof is per se erroneous. Mr. Borbhuiya has urged that the private respondents/writ petitioners being not eligible in terms of the advertisement and it being specific stand of the concerned departmental authority that their performance was not up to the desirable standard, interference with the fresh selection process and the appointment on the basis thereof does not accord with public interest.

Whereas, Ms. Sharma has endorsed the steps taken by the State respondents in initiating a fresh process and making appointments thereunder to promote the quality of performance to further the scheme, Mr. Nair with reference to the letter dated 27.10.2008 alluded hereinabove, has maintained that the view taken by the learned Single Judge is unassailable and therefore the appeals ought to fail. Contenting that admittedly the private respondents at all relevant times were qualified to be appointed under the new process as well, their request for condonation of the overage having been declined, without any justification, any interference

nce with their continuation of the service as on date in the same posts would result in irreparable prejudice to them.

We have duly extended our consideration to the pleadings and the documents available on record.

The letter No.DRD-15/75/2008/18, dated 27.10.2008 referred to hereinabove deal with engagement of contractual staff under DRD for implementation of MNREGS. A plain reading thereof reveals inter alia that Accredited Engineers are to be appointed on contract basis vis- -vis the implementation of the aforementioned scheme and that such purely contractual engagement would be co-terminus with the MGNREGA or any Govt. of India Rules/ Conditions framed thereunder. The advertisement dated 19.12.2008 that followed however mentioned that normal duration of the contract would be for a maximum period of 6 months. As adverted to hereinabove, letters of appointment dated 27.08.2009 and the Clause - 2 of the contract agreement in no uncertain terms mentioned that engagement would be purely on contract basis for the period as mentioned in the order for contractual engagement unless terminated earlier. The authorities concerned reserved the right also to terminate the contractual agreement even before the expiry of the period as specified without assigning any reason. To reiterate, the letters dated 27.08.2009 mention that the engagement on contractual basis would be for a period of 6 months from the date of joining and that the contractual engagement of the incumbent would be governed by the terms of contract agreement.

A cumulative reading of the letters dated 27.10.2008, the letters of appointment dated 27.08.2009 and Clause - 2 of the contract agreement clearly evinces that the initial term of the engagement of the private respondents/writ petitioners as Accredited Engineers was for 6 months. They had also accepted the appointments as such without any demur. That the period of 6 months was thereafter extended by a timeframe of one month, on the expiry whereof, their engagement in the aforementioned capacity was contemplated to stand terminated is apparent from the letter dated 26.02.2010 of the Project Director, District Rural Development Agency, Kamrup.

On the date of the advertisement i.e. 19.05.2010 therefore, there was no subsisting appointment/engagement of the private respondents as Accredited Engineers under the aforementioned scheme. The impugned advertisement obviously emphasized on an upgradation of the academic qualification of the Accredited Engineers visualized for the aforementioned scheme. Whereas, in the first process Diploma in Engineering (Diploma Holder in Engineering) was a desirable qualification, in the new enterprise it was insisted upon to be an essential condition of eligibility. There is, however, no wrangle at the Bar that the private respondents/writ petitioners satisfied this criterion of academic qualification though however on the relevant date of the advertisement i.e. 19.05.2010 they were ineligible being over aged.

Mr. Nair has candidly admitted in course of the arguments in the writ proceedings that no leave was sought for from the Court to enable the writ petitioners to participate in the impugned process after securing condonation of their over age. Admittedly, therefore, the private respondents/writ petitioners had not taken part in the new process.

The Apex Court in MOHD. ABDUL KADIR AND ANOTHER versus DIRECTOR GENERAL OF POLICE, ASSAM AND OTHERS (2009) 6 SCC 611 was seized a fact situation, where the appellants therein, two ex-servicemen, had been employed under the Prevention of Infiltration of Foreigners Additional Scheme, 1987 (PIF Additional Scheme) as Sub-Inspectors after undergoing a selection process therefor. The appointment letters issued to them mentioned clearly that the appointments were purely on ad-hoc and temporary basis and that they would be discharged without assigning any reason or notice, in any contingency in future. No fixed term of such appointment was however mentioned.

The circular dated 17.03.1995 thereafter issued by the Inspector General of Police (Border), Assam laying down the procedure for appointment/continuation of ex-servicemen as ad hoc border staff stipulated that all appointments shall be for a contract period of one year. Their appointment having been terminated in compliance of the above clause, the appellants initiated writ proceedings before the

is Court. Though, they met initial success before the learned Single Judge, a Division Bench of this Court reversed the determination. The matter, in this back drop reached the Apex Court.

Their Lordships in the contextual facts observed that when the ad hoc appointment is under a scheme and is in accordance with the selection process prescribed thereby, there is no reason why those appointed under the scheme should not be continued as long as the scheme continues. It is precisely this observation that has been relied upon by the learned Single Judge to sustain the challenge of the private respondents/writ petitioners.

Having regard to the facts recited hereinabove, we are of the view that those are distinguishable from the one as obtained in the cited authority. In the case in hand, the contractual engagement was initially for a period of 6 months and thereafter extended by one month. The letters of appointments of the writ petitioners clearly mentioned this timeframe and was supplemented by the stipulations contained in the contract agreement executed by them without any cavil. There being a conscious departure from the letter dated 27.10.08 qua the term of such appointment and not objected to by the writ petitioners, they cannot be permitted to resile from this express condition of appointment limiting the tenure thereof.

Moreover, as indicated hereinabove, the contractual appointment/engagement of the private respondents/writ petitioners which was for a fixed period of 6 months to start with was extended thereafter by one more month, whereafter, the same got automatically terminated. The evaluation of the departmental authority of the attendant facts and circumstances necessitating initiation of a fresh process for upgrading the level of performance in the interest of better implementation of the scheme is also an additional dimension, which can by no means be considered as irrelevant or impertinent when viewed in the perspective of execution of a project of public interest. The analogy of the decision of the Apex Court in *MOHD. ABDUL KADIR AND ANOTHER versus DIRECTOR GENERAL OF POLICE, ASSAM AND OTHERS* (Supra) according to us cannot be drawn in the present facts and circumstances. We respectfully differ, therefore, from the conclusion arrived at by the learned Single Judge. In any view of the matter, the advertisement dated 19.05.2010 and the letter dated 07.05.2010 could not have been set aside as a whole. The appeals have merit and are allowed. The impugned judgment and order is set aside. The State respondents would take necessary follow up steps without undue delay. No costs.