AFR

Court No. - 34

Case :- WRIT - A No. - 45224 of 2017

Petitioner :- Umesh Kumar Singh and others
Respondent :- State of U.P. and others
Counsel for Petitioner :- Awadhesh Kumar Malviya
Counsel for Respondent :- C.S.C.

Hon'ble Sudhir Agarwal,J.

1. Heard learned counsel for petitioners and perused the record.

2. Petitioners were engaged as Special Educator through Service Provider, namely, Omex Security Private Limited, under a particular scheme and have filed this writ petition seeking writ of mandamus directing the respondents to treat them as directly engaged through State authorities, not to interfere in their working as Special Educator and pay them monthly emoluments regularly.

3. Admittedly petitioners were engaged through Service Provider. Neither it is the case of petitioners that they were appointed by State authorities nor any letter of appointment issued by respondents authorities has been placed on record. An appointment commences with issuance of letter of appointment but in the case in hand, no letter of appointment has been issued by respondents. The petitioners at the best may have been appointed by a private agency and deployed to discharge duties in furtherance of an agreement of service executed between State-authorities and such Service Provider, i.e., Omex Security Private Limited in the case in hand, but that will not make petitioners employees of respondents.

4. The question is whether such engagement or employment of petitioners entitle them any legal right to claim continuance and renewal of their term with the respondents.

5. In order to hold an office or appointment in State, or where the funds are being released from State Exchequer for payment of salary

to the appointees, it goes without saying that State has to make appointments following the process of open recruitment, giving equal opportunity of consideration to all concerned. In other words, an appointment has to be made in such a case by State or its authority following procedure, which is consistent with Article 16(1) of the Constitution. It includes advertisement of vacancies i.e. notifying to the Employment Exchange, advertisement in newspaper or other means.

6. In **State of Orissa and Anr Vs. Mamata Mohanty, 2011 (3) SCC 436,** the Court said:

> *"....some appropriate method consistent with the requirements of Article 16 should be followed. In other words there must be a notice published in the appropriate manner calling for applications and all those who apply in response thereto should be considered fairly. Even if the names of candidates are requisitioned from Employment Exchange, in addition thereto it is mandatory on the part of the employer to invite applications from all eligible candidates from the open market by advertising the vacancies in newspapers having wide circulation or by announcement in Radio and Television …."*

7. The Court further said that no person can be appointed even on temporary or ad hoc basis without inviting applications from all eligible candidates. In that case, appointments were made after notifying vacancies to Employment Exchange and putting a note on the notice board. The Court condemned it and said:

> *"If any appointment is made by merely inviting names from the Employment Exchange or putting a note on the Notice Board etc. that will not meet the requirement of Articles 14 and 16 of the Constitution. Such a course violates the mandates of Articles 14 and 16 of the Constitution of India as it deprives the candidates who are eligible for the post, from being*

considered."

8. The Court went on to observe that a person appointed illegally or not employed after following procedure consistent with Articles 14 and 16, he shall not be entitled for salary. The Court said:

> *"A person employed in violation of these provisions is not entitled to any relief including salary. For a valid and legal appointment mandatory compliance of the said Constitutional requirement is to be fulfilled. The equality clause enshrined in Article 16 requires that every such appointment be made by an open advertisement as to enable all eligible persons to compete on merit."*

9. It is interesting to notice that in **State of Orissa and Anr Vs. Mamata Mohanty (supra),** Court also observed that if a person has continued to work, that by itself will not confer any right upon him since principle of holding over or concept of adverse possession is not applicable in service jurisprudence. Relying on its earlier decision in **Dr. M.S. Patil Vs. Gulbarga University and Ors., AIR 2010 SC 3783,** Court said:

> *"The concept of adverse possession of lien on post or holding over are not applicable in service jurisprudence. Therefore, continuation of a person wrongly appointed on post does not create any right in his favour."*

10. The above observations are attracted with full force in the case in hand where none of the petitioners have even been appointed by respondents and there is no compliance of Articles 14 and 16 of Constitution but since petitioners are simply continuing to discharge duties, on that basis, they cannot claim any right, legally or constitutionally, else it would be directly infringing constitutional mandates of Articles 14 and 16 of Constitution. Such an interpretation and such a consequence cannot be conceived by Court and therefore, this Court cannot take a view, which would confer an illegal and

unconstitutional benefit upon petitioners.

11. Even otherwise, at the best, engagement and employment of petitioners emanates from a pure and simple contract. Though there was no direct contract of petitioners with respondents yet assuming that contract of employment petitioners had with Service Provider, can be read as that with respondents, still I do not find that it can confer any right of continuance and renewal of their term. At the best, employment and engagement of petitioners is clearly in the realm of pure contract. If contract was for a fixed tenure, it comes to an end by efflux of time on expiry of period for which the same was executed. Even continuance of petitioners thereafter would not confer any right upon them particularly when it is not pursuant to any letter or appointment or agreement.

12. Taking this view, this Court in **Vivek Kumar Misra & Anr. Vs. State of U.P. & Others, 2008 (4) ESC 2811,** said :

> *"From the nature of appointment of the petitioners, it is thus evident that it was a contract appointment for a fixed tenure with condition therein that the same may be renewed subject to good performance and mutual agreement. The existing contract being time bound, came to an end by efflux of time on expiry of the period for which the same was executed. Thereafter, continuance of the petitioners, if any, would not be pursuant to any letter of appointment or agreement. The right of the petitioners to continue in service in the absence of any letter of appointment is neither vested in them nor they can claim as an existing right moreso in the absence of an appointment letter issued by the employer. This Court cannot provide an appointment letter to the petitioners though the employer has chosen not to appoint them after the period of appointment is over. The appointment made for a limited period came to an end by efflux of time needs no order of termination. This is what*

has been held by the Apex Court in Director, Institute of Management Development, U.P. v. Pushpa Srivastava (Smt.) 1992(4) SCC 33 where dealing with a similar kind of contractual appointment, the Court held that it would end automatically by efflux of time."

13. In **Secretary, State of Karnataka and Ors. v. Uma Devi and Ors., JT 2006(4) SC 420**, in para 34 of judgment, a Constitution Bench has observed :

"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."

14. Learned Counsel for petitioners, however, submitted that on account of wide-spread unemployment and lack of bargaining power, petitioners are not in a condition to negotiate with respondents on equal terms and therefore, had no option but to agree whatever conditions are imposed upon them by respondents for giving employment. He said, if a condition of employment is ex-facie, unreasonable and exploitative, the same should not be adhered to and the respondents be directed to continue with the agreement.

15. In my view, submission cannot be accepted for more than one reason. However, instead of adding in my words, I find it appropriate to refer **Uma Devi (Supra)**, where rejecting a similar contention, the Constitution Bench, in para 36 of the judgment, has observed :

"*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 eyes open. It may be true that he is not in a position to bargain-not at arms 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 done, 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."

16. A Division Bench of this Court in **Alok Kumar Singh (Dr.) and 15 Ors. v. State of U.P. and Ors., 2002 (2) ESC 427 (All)** considering similar kind of tenure appointment on contract basis, has held that petitioners cannot claim right to continue in service beyond the period of appointment provided in the letter of appointment. This has been followed by a subsequent Division Bench in **Sarvesh Kumar Singh v. State of U.P. and Ors. writ petition No. 25849** decided on 11.5.2006; and **Amar Nath Tiwari v. State of U.P. and**

Ors. 2006(6) ADJ 678 : 2006(3) ESC 2015 (DB).

17. When an appointment, even if legal and valid, but contractual one, and is governed by certain terms and conditions thereof, parties are bound to adhere to those conditions and cannot travel beyond that. Once appointment is made for fixed tenure, it would come to an end automatically on expiry of period for which appointment was made. The termination is automatic by efflux of time on expiry of said period. The continuance of person thereafter would not be on the basis of said agreement pursuant whereto incumbent was appointed for a fixed tenure, it has already come to an end by efflux of time.

18. The consequences followed in a tenure appointment made clear in **Director, Institute of Management Development U.P. Vs. Pushpa Srivastava (Smt.), 1992(4) SCC 33,** where Court has said that tenure appointment comes to an end by efflux of time and it does not require even an order of termination after expiry of the period. The incumbent ceased to have right to work on the expiry of the period for which he is appointed.

19. The question whether petitioners have any right, legal, constitutional or otherwise, enforcible in a Court of law, to insist upon employer to continue them in employment. In the present case, petitioners' appointment was for a limited period. They were well aware of these terms and conditions and had entered into, with open eyes, in the contract. Once terms and conditions are laid down in the contract, it is not open to anyone to claim that some part of conditions would be binding and remaining must be ignored. If petitioners commence their work under a contract, which was for a fixed tenure, it has to come to an end, after efflux of time, and petitioners cannot claim that this tenure part must be ignored altogether. They also cannot claim renewal as a matter of right. If the petitioners are allowed to continue without there being any renewal of tenure and letter of appointment issued by employer, it would amount to

permitting petitioners to continue contrary to the terms and conditions of their engagement and also the scheme whereunder they were appointed. The scheme under which petitioners have been appointed and have taken partial advantage, they are bound to adhere thereto and cannot wriggle out of that part, which does not suit to them.

20. Even otherwise, assuming that petitioners' appointment was contractual and petitioners have continued to work, whether it can be enforced in a Court of law and that too in a writ petition. In other words, when right to continue is not based either on the statute or the Constitution or otherwise in law; then a writ of mandamus compelling the authorities to continue the petitioners in employment can be issued since for issuance of writ of mandamus, condition precedent is the existence of a legal right upon the aggrieved person and a legal obligation corresponding upon the authorities concerned. In **Uma Devi (Supra)** the Apex Court, considering the question as to when a writ of mandamus can be issued by the Court directing employer either to absorb the employee in permanent service or to allow him to continue, has held :

> *"In order to that a mandamus may issue to compel the authorities to do something, it must be shown that the statute imposes a legal duty on the authority and the aggrieved party had a legal right under the statute or rule to enforce it."*

21. Even otherwise, enforcement of contract of personal service in a writ jurisdiction is not permissible except of certain limited circumstances. The petitioners' appointment was not in a Department of Government and instead they were engaged by a private agency constituted for the purposes of implementation of a scheme launched for a fixed period. The scheme launched by the Government is under an executive order. It does not have the status of a statute or statutory order. The nature of the engagement of the petitioners, therefore, is not to be governed by status but is like an ordinary contract of service

between a master and servant. In **Roshan Lal Tandon v. Union of India and Ors., AIR 1967 SC 1889,** drawing distinction between the employment under a contract and status, it was held that there is no vested contractual right in regard to the terms of service where the employment is one of the status. The origin of Government service is contractual. There is an offer and acceptance in every case. But once appointed to the post or office, the Government servant acquires a status and his rights and obligations are no longer determined by consent of both parties, but by statute or statutory rules which may be framed and altered unilaterally by the Government. In other words, the legal position of a Government servant is more one of status than of contract. The hall-mark of status is the attachment to a legal relationship of rights and duties imposed by public law and not by mere agreement of the parties. The relationship between the Government and the Servant is not like an ordinary contract of service between a master and servant. The legal relationship is something entirely different, something in the nature of status. In the language of jurisprudence, status is a condition of membership of a group of which powers and duties are exclusively determined by law and not by agreement between the parties concerned.

22. Thus, in the cases where the appointment and conditions of service are governed by statute, the relationship is that of status and not mere a contract. However, in other cases, it is purely a contract of service resulting in a relationship of ordinary master and servant. In the present case, it cannot be said that the petitioners' employment is that of a status since it is not governed by statutory provisions in any manner. It is purely and simply an ordinary contract of service between master and servant. In such cases, where the contract of service is not governed by the statutory provisions, it is well-settled that contract of service cannot be sought to be enforced by seeking reinstatement or continuance in employment since such a relief is

barred under the Specific Relief Act. In **Executive Committee of U.P. State Warehousing Corporation, Lucknow v. C.K. Tyagi, AIR 1970 SC 1244,** considering question as to when such a relief is granted, Apex Court observed:

> *"Under the common law the Court will not ordinarily force an employer to retain the services of an employee whom he no longer wishes to employ. But this rule is subject to certain well-recognised exceptions. It is open to the Courts in an appropriate case to declare that a public servant who is dismissed from service in contravention of Article 311 continues to remain in service, even though by doing so the State is in effect forced to continue to employ the servant whom it does not desire to employ. Similarly under the Industrial Law, jurisdiction of the Labour and Industrial Tribunals to compel the employer to employ a worker whom he does not desire to employ, is recognised. The Courts are also investigated with the power to declare invalid the act of a statutory body, if by doing the act the body has acted in breach of a mandatory obligation imposed by statute,..."*

23. Again in para 25 of the judgment, the Court held:

> *"The position in law is that no declaration to enforce a contract of personal service will be normally granted. But there are certain well-recognized exceptions to this rule and they are: To grant such a declaration in appropriate cases regarding (1) a public servant, who has been dismissed from service in contravention of Article 311. (2) Reinstatement of a dismissed worker under Industrial law by Labour or Industrial Tribunals. (3). A statutory body when it has acted in breach of a mandatory obligation, imposed by statute."*

24. The above view has been reiterated in **Executive Committee of Vaish Degree College, Shamli and Ors. v. Lakshmi Narain and**

Ors., AIR 1976 SC 888 (paras 9, 10, 13 and 17)**; Smt. J. Tiwari v. Smt. Jawala Devi Vidya Mandir and Ors., AIR 1981 SC 122; Life Insurance Corporation of India v. Escorts Ltd. and Ors., AIR 1986 SC 1370** (paras 101, 102)**.** Similar view has been taken by this Court also in **A.K. Home Chaudhary v. National Textile Corporation U.P. Ltd., Kanpur, 1984 UPLBEC 81** and **B.M. Varma v. State of U.P. and Ors., 2004 (4) AWC 2866**.

25. At the last but not the least, it is also important to notice that privity of contract of petitioners is with Service Provider, a private agency, i.e., M/s Omex Security Private Limited, but no relief has been sought by petitioners against their Employer and even the Employer has not been made party in the writ petition. It is strange that petitioners are seeking relief against respondents though there is no privity of contract of petitioners with respondents. Therefore, even otherwise, petitioners cannot claim any benefit against respondents and entire writ petition is made on a misconception.

26. In view of discussions made hereinabove, I do not find any right vested in the petitioners to seek the reliefs as sought for.

27. The writ petition lacks merits. Dismissed.

Dt. 21.09.2017
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