State Of U.P. & Ors vs Ashok Kumar Nigam on 13 December, 2012

Equivalent citations: AIRONLINE 2012 SC 655

Author: Swatanter Kumar

Bench: Sudhansu Jyoti Mukhopadhaya, Swatanter Kumar

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 9029 OF 2012
(Arising out of SLP (Civil) Nos. 35279 of 2009)

State of U.P. & Ors. … Appellants

Versus

Ashok Kumar Nigam … Respondent

WITH

CIVIL APPEAL NO. 9030 OF 2012
[Arising out of SLP(C) No. 24562 of 2010]

CIVIL APPEAL NO. 9031 OF 2012
[Arising out of SLP(C) No. 24563 of 2010]

CIVIL APPEAL NO. 9032 OF 2012
[Arising out of SLP(C) No. 24564 of 2010]

CIVIL APPEAL NO. 9033 OF 2012
[Arising out of SLP(C) No. 35561 of 2010]

CIVIL APPEAL NO. 9034 OF 2012
[Arising out of SLP(C) No. 35562 of 2010]

CIVIL APPEAL NO. 9035 OF 2012
[Arising out of SLP(C) No. 35569 of 2010]

CIVIL APPEAL NO. 9036 OF 2012
[Arising out of SLP(C) No. 35568 of 2010]

CIVIL APPEAL NO. 9037 OF 2012
[Arising out of SLP(C) No. 35567 of 2010]

CIVIL APPEAL NO. 9038 OF 2012
[Arising out of SLP(C) No. 35566 of 2010]

CIVIL APPEAL NO. 9039 OF 2012
[Arising out of SLP(C) No. 35565 of 2010]

CIVIL APPEAL NO. 9040 OF 2012
[Arising out of SLP(C) No. 9156 of 2011]

CIVIL APPEAL NO. 9041 OF 2012
[Arising out of SLP(C) No. 13788 of 2011]

CIVIL APPEAL NO. 9042 OF 2012
[Arising out of SLP(C) No. 20917 of 2011]

CIVIL APPEAL NO. 9043 OF 2012
[Arising out of SLP(C) No. 20918 of 2011]

CIVIL APPEAL NO. 9044 OF 2012
[Arising out of SLP(C) No. 11261 of 2010]

CIVIL APPEAL NO. 9045 OF 2012
[Arising out of SLP(C) No. 12993 of 2010]

CIVIL APPEAL NO. 9046 OF 2012
[Arising out of SLP(C) No. 18407 of 2011]

J U D G M E N T

Swatanter Kumar J.

1. Leave granted in all the Special Leave Petitions.

2. These appeals are directed against the judgment of the High Court of Judicature at Allahabad, Lucknow Bench. Though dated differently, the questions of law involved in all these appeals are identical based upon somewhat similar facts. SLP(C) No. 35569 of 2010 was filed against the order dated 24th September, 2008, SLP(C) No. 35568 of 2010 was filed against the order dated 29th September, 2008, SLP(C) No. 35565 of 2010 was filed against the order dated 14th September, 2009, SLP(C) No. 35566 of 2010 against the order dated 18th September, 2010, SLP(C) No. 35279 of 2009, SLP(C) No. 24562 of 2010, SLP(C) No. 24564 of 2010 and SLP(C) No. 35567 of 2010 against the order dated 14th October, 2009, SLP(C) No. 12993 of 2010, SLP(C) No. 24563 of 2010 and SLP(C) No. 35561 of 2010 against the order dated 16th November, 2009, SLP(C) No. 11261 of 2010 against the order dated 21st January, 2010, SLP(C) No. 35562 of 2010 against the order dated 9th April, 2010, SLP(C) No. 9156 of 2011 against the order dated 19th January, 2011, SLP(C) No. 20918 of 2011 and SLP(C) No. 13788 of 2011 against the order dated 28th April, 2011, SLP(C) No. 20917 of 2011 against the order dated 29th April, 2011 and SLP(C) No. 18407 of 2011 against the

order dated 26th April, 2011.

3. We have taken the case of Ashok Kumar Nigam (supra) i.e. Civil Appeal @ SLP(C) No. 35279 of 2009 as the lead case. Before we proceed to notice the facts giving rise to the present appeal in that case, it is necessary for us to notice that SLP (Civil) No. 9156 of 2011 has been directed against an interim order passed by the Division Bench of that High Court in Miscellaneous Bench No. 523 of 2003 titled "Pramod Sharma v. State of Uttar Pradesh". The interim order dated 19.1.2011 had directed that no regular appointment shall be made on the post Government Advocate in place of the appellant. Vide its judgment dated 10th February, 2011, the Division Bench of the High Court finally disposed of the interim application by staying the operation of the orders dated 24th December, 2010 and 28th December, 2010 passed by the respondents. It further directed that the appellant be allowed to continue as the District Government Counsel (Criminal) subject to any decision being taken afresh in accordance with the directive issued by the judgment of that Court passed in Writ Petition No.10038(MB) of 2009. In other words, the interim order had merged into the order of the High Court dated 10th February, 2011 against which as of now, no petition has been filed. Thus, the special leave petition No. 9156 of 2011 has been rendered infructuous and is accordingly dismissed as such.

4. Mr. Ashok Kumar Nigam, respondent herein was appointed as District Government Counsel on 17th September, 2004 vide a notification issued by the State Government. The term of the said respondent was renewed on 3rd March, 2006 for a period of one year and as such his term came to an end on 5th March, 2007. The respondent submitted his application for renewal of his term on 19th January, 2007. The District Judge, Lucknow on 26th February, 2007 gave his report and the District Magistrate also submitted his report on 5th March, 2007 recommending the renewal of the term of the respondent. However, the State Government, appellant herein, vide order dated 3rd April, 2008 refused his renewal which resulted in cancellation of engagement of the said respondent. The order dated 3rd April, 2008 can usefully be reproduced at this stage:-

> "From Acharya Suresh Babu Deputy Secretary Government of Uttar Pradesh To The District Magistrate Lucknow Nyay-Anubhag-3-Appointment Lkw, dated 3.4.2008 Sub: Renewal of Tenure of engagement of District Government Counsels at the District Level Sir, With reference to your Letter No. 855/JA(2)/Advocate-Renewal/07 dated 5.3.2007, I have been directed to say that after due consideration, the Hon'ble Governor had kindly ordered not to renew the tenure of engagement of Sh. Ashok Kumar Nigam, as District Government Counsel (Criminal), Lucknow.
>
> Accordingly, in the aforesaid background, the engagement order of Sh. Ashok Kumar Nigam, as District Government Counsel is hereby terminated.
>
> Please take necessary action at your end and forward your proposal from the panel of Advocates for being engaged as District Government Counsel against the consequential vacancy."

5. Aggrieved from the above order, the respondent filed writ petition before the High Court of Allahabad, Lucknow Bench. In the writ petition, the stand taken by the respondent was that in terms of the rule, the petitioner has a right to continue and in any case for consideration of renewal of his term, the impugned order does not state any reasons and, in fact, does not take into consideration the recommendations made by the District and Sessions Judge and the District Magistrate, who had recommended renewal of the term of the respondent. The High Court after hearing the counsel appearing for the parties, vide its judgment dated 14th October, 2009, allowed the writ petition, setting aside the order dated 3rd April, 2008 and even granting further relief to the appellant. The operative part of the High Court judgment reads as under:-

> "For the reasons stated above, the order impugned dated 03.04.2008 is hereby set aside.

We are informed that no person has yet been appointed or engaged in place of the petitioner, in view of the interim order passed by this Court, we, therefore, further provide that the petitioner shall be allowed to continue to discharge the functions and duties of the District Government Counsel, till the consideration of the renewal of his term in accordance with law.

We may further clarify that the renewal of the petitioner's term shall be considered in accordance with the relevant provisions of L.R. manual (unamended para 7.08 as the amendments made in L.R. Manual are subject matter of challenge in W.P. No. 7851 (M/B) of 2008 wherein the implementation of the amended provisions stand stayed) if he has not crossed the age of 60 years but if he has already attained the age of 60 years, but has not yet reached the age of 62 years then his case will be considered for extension of his term upto the age of 62 years and for that consideration, if any further formalities are to be completed or some certificates are needed, he shall be given an opportunity to furnish the same, so that his case may be considered in accordance with the relevant rules. Writ petition is allowed. Cost easy."

6. Aggrieved from the above judgment of the High Court, the State of Uttar Pradesh (appellant herein) has filed the present appeal before this Court. The challenge to the impugned order is, inter alia, but primarily on the following grounds:-

> A) In terms of the relevant rule, the State Government has discretion to terminate the term of the District Government Counsel (Criminal), and in any case, the term of the respondent had come to an end by efflux of time, and therefore, the High Court has exceeded its jurisdiction in setting aside the order dated 3rd April, 2008.
>
> B) At best, if allowing the writ petition, the High Court could set aside the impugned order, but could not direct that they be retained or continued till the age of 60 or 62 years as the case may be. The respondent would only have a right of consideration and nothing more, therefore, the judgment of the High Court suffers from apparent errors. The High Court gave no reasons much less valid reasons for setting aside the order dated 3rd April, 2008.

7. Opposed to the above contentions, it is contended on behalf of the respondents that the order dated 3rd April, 2008 was a non-speaking order and suffered from the vice of non-application of mind and was arbitrary and has correctly been set aside by the High Court. Reliance in this regard is placed upon the judgment of this Court in the case of Kumari Shrilekha Vidyarthi and Others v. State of U.P. & Ors. [(1991) 1 SCC 212]. Further, that the impugned order dated 3rd April, 2008 is contrary to the rules in force. The order of the High Court under appeal does not call for any interference.

8. Before we examine the merit or otherwise of the contentions, it will be appropriate for this court to notice the relevant rule. Chapter 7 of the Legal Remembrancer's Manual deals with District Government Counsel. In terms of Para 7.01, the District Government Counsel are legal practitioners appointed by the State Government to conduct in any court, other than the High Court, such civil, criminal or revenue cases on behalf of the State Government as assigned to them either generally or specially. Para 7.02 deals with the power of the government to appoint government counsels in the districts. As per this provision, the government was to ordinarily appoint District Government Counsel (Criminal), District Government Counsel (Civil) and District Government Counsel (Revenue) for each district, for which they have to make an application.

9. Under these rules, the appointments are to be made and renewal to be considered upon the recommendation of the District Officer and the District Judge. The rules even state the factors which are to weigh in the mind of the recommending authority while recommending or declining to recommend renewal of term of the government pleaders. Paras 7.6 to 7.8 read as under:-

> "7.06. Appointment and renewal – (1) The legal practitioner finally selected by the Government may be appointed District Government Counsel for one year from the date of his taking over charge.
>
> (2) At the end of the aforesaid period, the District Officer after consulting the District Judge shall submit a report on his work and conduct to the legal Rememberancer together with the statement of work done in Form no. 9. Should his work or conduct be found to be unsatisfactory the matter shall be reported to the Government for orders. If the report in respect of his work and conduct is satisfactory, he may be furnished with a deed of engagement in Form no. 1 for a term no exceeding three years. On his first engagement a copy of Form no. 2 shall be supplied to him and he shall complete and return it to the Legal Remembrancer for record.
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> (3) The appointment of any legal practitioner as a District Government Counsel is only professional engagement terminable at will on either side and is not appointment to a post under the Government. Accordingly the Government reserves the power to terminate the appointment of any District Government Counsel at any time without assisting any cause.

7.08. Renewal of term – (1) At least three months before the expiry of the term of a District Government Counsel, the District Officer shall after consulting the District Judge and considering

his past record of work, conduct and age, report to the Legal Remembrancre, together with the statement of work done by him in Form no. 9 whether in his opinion the term of appointment of such counsel should be renewed or not. A copy of the opinion of the District Judge should also be sent along with the recommendations of the District Officer.

(2) Where recommendation for the extension of the term of a District Government Counsel is made for a specified period only, the reasons thereof shall also be stated by the District Officer.

(3) While forwarding his recommendation for renewal of the term of a District Government Counsel –

(i) The District Judge shall give an estimate of the quality of the Counsel's work from the judicial stand point, keeping in view the different aspects of a lawyer's capacity as it is manifested before him in conducting State cases, and specially his professional conduct;

(ii) The District Officer shall give his report about the suitability of the District Government Counsel from the administrative point of view, his public reputation in general, his character, integrity and professional conduct.

(4) If the Government agrees with the recommendations of the District Officer for the renewal of the term of the Government Counsel, it may pass orders for re-appointing him for a period not exceeding three years.

(5) If the Government decides not to re-appoint a Government Counsel, the Legal Remembrancer may call upon the District officer to forward fresh recommendations in the manner laid down in para 7.03.

(6) The procedure prescribed in this para shall be followed on the expiry of every successive period of renewed appointment of a District Government Counsel."

10. From the above rules, it is clear that the government counsel has to be appointed and/or his term renewed upon recommendation of the District Judge and the District Officer and in accordance with the procedure prescribed under the above rules. It is only when the recommendations based upon stated criteria are unfavourable to the applicant in question that the government could decline renewal of the term. In the present case, we are not concerned with the appointment as such. All the cases in hand are cases of renewal of term.

11. The High Court in its judgment has noticed that the order dated 3rd April, 2008 clearly shows that the request for renewal has been rejected without considering the recommendation of the District Judge and District Magistrate. The High Court has even noticed in its judgment that in view of this fact it had called for the records and the records produced did not show proper consideration by the State Government before refusing to grant renewal of the term of the respondent. The High Court also noticed that the Government had taken enblock decision that the renewal in the cases of such Government counsel whose term have come to an end will not be granted. It was in pursuance

to this decision that the government refused to grant renewal to the respondent as well.

12. The High Court had examined the records and after being satisfied that the record produced did not exhibit proper application of mind or due consideration as per prescribed procedure and the action being arbitrary, had set aside the order dated 3rd April, 2008. There is nothing on record placed before this court by the appellant that could demonstrate that such view of the High Court suffered from any infirmity. The prescribed procedures under para 7.08 of the Manual requires the government to invite to invite opinion of the District Judge and District Officer, three months prior to the expiry of the term of the District Government Counsel. By amendment, proviso was added to para 7.03 to provide that District Magistrate shall always be free to nominate such person who may be found eligible but who had not submitted particulars for being appointed as such. As per the prescribed procedure, the office of Legal Remembrance was expected to consider the past record of work and conduct of the concerned District Government Counsel and then to send a report together with the statement of work done by such applicant. The High Court had clearly stated the principle that where there is conflict between the recommendation of the District Judge and the District Magistrate, primacy shall be given to the report of the District Judge. Thus, in our opinion, the onus is shifted to the State to show that it had acted in accordance with the prescribed procedure and its action does not suffer from the vice of discrimination and arbitrariness.

13. Total non-application of mind and the order being supported by no reason whatsoever would render the order passed as 'arbitrary'. Arbitrariness shall vitiate the administrative order. The rules provide a procedure and even require the State Government to consider the case for renewal of the government counsel whose term is coming to an end. The scheme of para 7.06 of the Manual is that appointment of a government pleader is to be made for a period of one year and at the end of the period, the District Officer in consultation with the District Judge is required to submit a report on the work and conduct to the legal remembrancer together with the work done in Form 9. It is only when his work or conduct is found to be unsatisfactory that it is so reported to the government for appropriate orders. If the report is satisfactory, the rule requires that he may be furnished with a deed of engagement in form I, for a term not exceeding three years, on his first engagement. In terms of para 7.06 (3), the Government reserves the power to terminate the appointment of any District Government Counsel at any time without assigning any cause. Firstly, one has to examine the entire scheme of para 7.06 (3). It cannot be read in isolation. The right of consideration for renewal for the specified period is a legitimate right vested in an applicant and he can be deprived of such right and be declined renewal where his work is unsatisfactory and is so reported by the specified authorities. It is difficult to comprehend that clause (3) of para 7.06 can be enforced in the manner as suggested. If it is construed, as suggested, that the government has an absolute right to terminate the appointment at any time without specifying any reason, it will be violative of Articles 14 and 16 of the Constitution of India and such rule shall be arbitrary, thus not sustainable in law. In the case of Delhi Transport Corporation v. D.T.C. Mazdoor Congress [1991 Supp. (1) SCC 600] while dealing with Regulation 9, which was worded similarly, this Court held as under:-

> "202. Thus on a conspectus of the catena of cases decided by this Court the only conclusion that follows is that Regulation 9(b) which confers powers on the authority to terminate the services of a permanent and confirmed employee by issuing a notice

terminating the services or by making payment in lieu of notice without assigning any reasons in the order and without giving any opportunity of hearing to the employee before passing the impugned order is wholly arbitrary, uncanalised and unrestricted violating principles of natural justice as well as Article 14 of the Constitution. It has also been held consistently by this Court that the government carries on various trades and business activity through the instrumentality of the State such as Government Company or Public Corporations. Such Government Company or Public Corporation being State instrumentalities are State within the meaning of Article 12 of the Constitution and as such they are subject to the observance of fundamental rights embodied in Part III as well as to conform to the directive principles in Part IV of the Constitution. In other words the Service Regulations or Rules framed by them are to be tested by the touchstone of Article 14 of Constitution. Furthermore, the procedure prescribed by their Rules or Regulations must be reasonable, fair and just and not arbitrary, fanciful and unjust. Regulation 9(b), therefore, confers unbridled, uncanalised and arbitrary power on the authority to terminate the services of a permanent employee without recording any reasons and without conforming to the principles of natural justice. There is no guideline in the Regulations or in the Act, as to when or in which cases and circumstances this power of termination by giving notice or pay in lieu of notice can be exercised. It is now well settled that the 'audi alteram partem' rule which in essence, enforces the equality clause in Article

14 of the Constitution is applicable not only to quasi-judicial orders but to administrative orders affecting prejudicially the party-in-question unless the application of the rule has been expressly excluded by the Act or Regulation or Rule which is not the case here. Rules of natural justice do not supplant but supplement the Rules and Regulations. Moreover, the Rule of Law which permeates our Constitution demands that it has to be observed both substantially and procedurally. Considering from all aspects Regulation 9(b) is illegal and void as it is arbitrary, discriminatory and without any guidelines for exercise of the power. Rule of law posits that the power is to be exercised in a manner which is just, fair and reasonable and not in an unreasonable, capricious or arbitrary manner leaving room for discrimination. Regulation 9(b) does not expressly exclude the application of the 'audi alteram partem' rule and as such the order of termination of service of a permanent employee cannot be passed by simply issuing a month's notice under Regulation 9(b) or pay in lieu thereof without recording any reason in the order and without giving any hearing to the employee to controvert the allegation on the basis of which the purported order is made.

203. It will be profitable to refer in this connection the observations of this Court in the case of Union of India v. Tulsiram Patel where the constitutionality of provisions of Article 311 particularly the second Proviso to clause (2) of the said article came up for consideration. This Court referred to the findings in Roshan Lal Tandon v. Union of India wherein it was held that though the origin of a government service is contractual yet when once appointed to his post or office, the government servant acquires a status and his rights and obligations are no longer determined by the consent of both the 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 the public law and not by mere agreement of the parties. It has been observed that Article 14 does not govern or control Article 311. The Constitution must be read as a whole. Article 311(2) embodies the principles of natural justice including audi alteram partem rule. Once the application of clause (2) is expressly excluded by the Constitution itself, there can be no question of making applicable what has been so excluded of seeking recourse to Article 14 of the Constitution."

14. Thus, in our opinion it was not permissible for the government to take recourse to Para 7.06 (3) in the manner in which it has done and in any case, the said rule can hardly be sustained in law.

15. The order dated 3rd April, 2008 is even liable to be quashed on another ground, that it is a non-speaking order also suffering from the vice of non-application of mind. As already discussed, the government has taken an enblock decision, without recording any reason, not to renew the term of any of the government counsel. That itself shows that there is no application of mind. In the case of Kumari Shrilekha (supra), this Court expressed the opinion that it would be alien to the Constitutional Scheme to accept the argument of exclusion of Article 14 in contractual matters. The arbitrary act of the State cannot be excluded from the ambit of judicial review merely on the ground that it is a contractual matter. The expression 'At any time without assigning any cause', can be divided into two portions, one "at any time", which merely means the termination may be made even during the subsistence of the term of appointment and second, "without assigning any cause" which means without communicating any cause to the appointee whose appointment is terminated. However, "without assigning any cause" is not to be equated with "without existence of any cause".

16. Further, this Court in the case of Assistant Commissioner, Commercial Tax Department, Works Contract and Leasing v. Shukla and Brothers [(2010) 4 SCC 785], impressed upon the need for recording of appropriate reasons in orders and held as under:-

> "11. The Supreme Court in S.N. Mukherjee v. Union of India while referring to the practice adopted and insistence placed by the courts in United States, emphasised the importance of recording of reasons for decisions by the administrative authorities and tribunals. It said "administrative process will best be vindicated by clarity in its exercise". To enable the courts to exercise the power of review in consonance with settled principles, the authorities are advised of the considerations underlining the action under review. This Court with approval stated: (SCC p. 602, para 11) '11. ... 'the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained'.'
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> 12. In exercise of the power of judicial review, the concept of reasoned orders/actions has been enforced equally by the foreign courts as by the courts in India. The administrative authority and tribunals are obliged to give reasons, absence whereof could render the order liable to judicial chastisement. Thus, it will not be far from an absolute principle of law that the courts should record reasons for their conclusions to enable the appellate or higher courts to exercise their jurisdiction appropriately and in accordance with law. It is the reasoning alone, that can enable a higher or an appellate court to appreciate the controversy in issue in its correct perspective and to

> hold whether the reasoning recorded by the court whose order is impugned, is sustainable in law and whether it has adopted the correct legal approach. To subserve the purpose of justice delivery system, therefore, it is essential that the courts should record reasons for their conclusions, whether disposing of the case at admission stage or after regular hearing."

17. The order dated 3rd April, 2008, which we have reproduced above, clearly shows non-application of mind and non-recording of reasons, which leads only to one conclusion, that the said order was an arbitrary exercise of power by the State. We cannot find any fault with the reasoning of the High Court in that behalf. But we do find some merit in the contention raised on behalf of the appellant State that the High Court should not have directed appointments while regulating the age, as has been done by the High Court in operative part of its judgment. There is right of consideration, but none can claim right to appointment. Para 7.06 states that renewal beyond 60 years shall depend upon continuous good work, sound integrity and physical fitness of the counsel. These are the considerations which have been weighed by the competent authority in the State Government to examine whether renewal/extension beyond 60 years should be granted or not. That does not ipso facto means that there is a right to appointment upto the age of 60 years irrespective of work, conduct and integrity of the counsel. The rule provides due safeguards as it calls for the report of the District Judge and the District Officer granting renewal.

18. Thus, for the above-recorded reasons, while declining to interfere in the judgment of the High Court, we direct that the government shall consider cases of the respondents in these petitions for renewal in accordance with the procedure prescribed and criteria laid down under Paras 7.06 to 7.08 of the LR Manual. The consideration shall be completed as expeditiously as possible and, in any case, not later than three months from today.

19. Subject to the above observations, all the appeals are dismissed without any order as to costs.

.....J. (Swatanter Kumar) .....J. (Sudhansu Jyoti Mukhopadhaya) New Delhi, December 13, 2012