Municipal Council, Sujanpur vs Surinder Kumar on 5 May, 2006

Equivalent citations: AIRONLINE 2006 SC 317

Author: S.B. Sinha

Bench: S.B. Sinha, P.K. Balasubramanyan

```
           CASE NO.:
Appeal (civil)  2474 of 2006

PETITIONER:
Municipal Council, Sujanpur

RESPONDENT:
Surinder Kumar

DATE OF JUDGMENT: 05/05/2006

BENCH:
S.B. Sinha & P.K. Balasubramanyan

JUDGMENT:
```

S.B. SINHA, J.

J U D G M E N T (Arising out of SLP(C) No. 17977 OF 2004) Leave granted.

The appellant herein being aggrieved by and dissatisfied with the judgment and order dated 29.4.2004 passed by a Division Bench of the Punjab and Haryana High Court at Chandigarh in Civil Writ Petition No. 4988 of 2002 affirming the award dated 22.11.2001 of the Labour Court, Gurdaspur is before us. It is not in dispute that the Appellant herein is a statutory body and being a local authority, governed by the Punjab Municipal Act. The terms and conditions of service, including recruitment of its employees, are governed by statutory rules.

The respondent herein was appointed on 1.4.1994. He continued to work up to 31.7.1996. His services were terminated on 16.7.1997 by issuing a notice of termination. Questioning the validity and legality thereof, an industrial dispute was raised which culminated in a reference made by the appropriate governments under Industrial Disputes Act (`the Act') in exercise of its power under Section 10 (1)(c) thereof the following dispute to the Labour Court, Gurdaspur:

> "Whether termination of services of Shri Surinder Kumar, workman is justified and in order? If not, to what/exact amount of compensation is he entitled?"

A plea was raised in the said proceedings on behalf of the appellant herein that the respondent was appointed on a supervisory post and, thus, was not a `workman' within the meaning of Section 2(S)

of the Act.

It is not in dispute that the respondent was appointed on daily wages. Before the Labour Court, the appellant raised a plea that the respondent was appointed on the post of Supervisor, on the recommendation of one Shri R.S. Puri, M.L.A., Sujanpur and then a Minister in the Government of Punjab. The Labour Court by reason of the impugned award, inter alia, held that although the second respondent was appointed with the designation of a Supervisor and was expected to look after the development work being carried out by the appellant and other construction works under the Nehru Rojgar Yojana, he was merely discharging the duties of a workman.

It was held by the Labour Court that the respondent completed 240 days of work within a period of twelve months preceding his termination. The Labour Court proceeded on the basis that the workman having completed 240 days of work in a calendar year, it was the bounden duty of the Appellant to produce the entire relevant records but the same had not been done. It is not in dispute that the attendance records of March 1994 and from April 1994 to February 1996 were produced but the attendance registers from March 1996 onwards were not produced. It, however, does not appear from the impugned award that the respondent had called for the records from the office of the appellant.

The Labour Court upon arriving at a finding that in terminating the services of the respondent, the appellant had not complied with the statutory requirements contained in Section 25F of the Industrial Disputes Act as no compensation had been paid to him in terms thereof, the respondent shall be directed to be reinstated in service with full back wages and allied benefits from the date of termination i.e. July 1997 till actual reinstatement. A writ petition filed before the High Court by the appellant herein against the said award was dismissed.

Before the High Court, a specific plea was raised by the Appellant that the initial appointment of the respondent was contrary to the recruitment rules. The High Court's attention was further drawn to the fact that the respondent was appointed in a Supervisory capacity to look after the construction work of the MC building and other construction works under the Nehru Rojgar Yojana.

The High Court, however, rejected the said contentions of the Appellant relying on or on the basis of the findings of the Labour Court that the work for which the respondent was appointed had been existing. It opined that its jurisdiction in the matter of issuing a writ of certiorari is limited. It further refused to go into the question as regards the payment of entire back wages stating that the appellant herein had neither pleaded nor produced any evidence to show that the respondent was gainfully employed after termination of his service.

The High Court's jurisdiction to issue a writ of certiorari though is limited, a writ of certiorari can be issued if there is an error of law apparent on the face of the record. What would constitute an error of law is well known. In the Judicial Review of Administrative Action, IVth edition p.136, S.A De Smith has summed up the position:-

> "The concept of error of law includes the giving of reasons that are bad in law or (if there is a duty to give reasons) inconsistent, intelligible or, it would seem, substantially inadequate. It includes also the application of a wrong legal test to the facts found, taking irrelevant considerations into account and failing to take relevant considerations into account, exercising a discretion on the basis of any other incorrect legal principles, misdirection as to the burden of proof, and wrongful admission or exclusion of evidence, as well as arriving at a conclusion without any supporting evidence."

[See also S.N. Chandrashekar and Anr. v. State of Karnataka and Ors. 2006 (2) SCALE 248 and Bombay Dyeing & Mfg. Co. Ltd. v. Bombay Environmental Action Group & Ors., 2006 (3) SCALE 1].

The Labour Court and the High Court also proceeded wrongly on the premise that the burden of proof to establish non-completion of 240 days of work within a period of twelve months preceding the termination, was on the management. The burden was on the workman. [See U.P. State Brassware Corporation & Ors. v. Udit Narain Pandey, JT 2005 (10) SC 344 and State of M.P. v. Arjan Lal Rajak, (2006) 2 SCC 610].

Equally well settled is the principle that the burden of proof, having regard to the principles analogus to Section 106 of the Evidence Act that he was not gainfully employed, was on the workman. [See Manager, Reserve Bank of India, Bangalore v. S. Mani & Ors., (2005) 5 SCC 100] It is also a trite law that only because some documents have not been produced by the management, an adverse inference would be drawn against the management. [See S. Mani (supra)] Apart from the aforementioned error of law, in our considered opinion, the Labour Court and consequently the High Court completely misdirected themselves insofar as they failed to take into consideration that relief to be granted in terms of Section 11A of the said Act being discretionary in nature, a Labour Court was required to consider the facts of each case therefor. Only because relief by way of reinstatement with full back wages would be lawful, it would not mean that the same would be granted automatically.

For the said purpose, the nature of the appointment, the purpose for which such appointment had been made, the duration/tenure of work, the question whether the post was a sanctioned one, being relevant facts, must be taken into consideration.

It is not disputed that the appointment of the respondent was not in a sanctioned post. Being a 'State' within the meaning of Article 12 of the Constitution of India, the Appellant for the purpose of recruiting its employees was bound to follow the recruitment rules. Any recruitment made in violation of such rules as also in violation of the constitutional scheme enshrined under Articles 14 and 16 of the Constitution of India would be void in law. [See M.V. Bijlani v. Union of India & Ors., (2006) 4 SCALE 147, State of Punjab v. Jagdip Singh & Ors., 1964 (4) SCR 964 and Secretary, State of Karnataka v. Uma Devi, 2006 (4) SCALE 197].

If a post is not a sanctioned one, again, appointment therein would be illegal. In M.P. Housing Board & Anr. v. Manoj Shrivastava [(2006) 2 SCC 702], this Court stated the law in the following

words:-

> "A person with a view to obtain the status of a "permanent employee" must be appointed in terms of the statutory rules. It is not the case of the respondent that he was appointed against a vacant post which was duly sanctioned by the statutory authority or his appointment was made upon following the statutory law operating in the field.
>
> The Labour Court unfortunately did not advert to the said question and proceeded to pass its award on the premise that as the respondent had worked for more than six months satisfactorily in terms of clause 2(vi) of the Standard Standing Orders, he acquired the right of becoming permanent. For arriving at the said conclusion, the Labour Court relief only upon the oral statement made by the respondent.
>
> It is one thing to say that a person was appointed on an ad hoc basis or as a daily-wager but it is another thing to say that he is appointed in a sanctioned post which was lying vacant upon following the due procedure prescribed therefor.
>
> It has not been found by the Labour Court that the respondent was appointed by the appellant herein, which is "State" within the meaning of Article 12 of the Constitution, upon compliance with the constitutional requirements as also the provisions of the 1972 Act or the Rules and Regulations framed thereunder."

Yet again, in Haryana State Agricultural Marketing Board v. Subhash Chand & Anr. [(2006) 2 SCC 794], this Court held:-

> "In P. Ramanatha Aiyar's Advanced Law Lexicon, 3rd Edn., Vol. 4 at p. 4470, the expression "status" has been defined as under:
>
> "Status" is a much discussed term which, according to the best modern expositions, includes the sum total of a man's personal rights and duties (Salmond, Jurisprudence 253, 257), or, to be verbally accurate, of his capacity for rights and duties. (Holland, Jurisprudence 88) The status of a person means his personal legal condition only so far as his personal rights and burdens are concerned. Duggamma v. Ganeshayya, AIR at p.101 [Evidence Act (1 of 1872), Section 41] 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. (Roshan Lal Tandon v. Union of India).
>
> The word "privilege" has been defined, at p. 3733, as under:
>
> `Privilege is an exemption from some duty, burden, or attendance to which certain persons are entitled; from a supposition of law, that the stations they fill, or the offices they are engaged in, are such as require all their care; that therefore, without

> this indulgence, it would be impracticable to execute such offices, to that advantage which the public good requires.
>
> A right or immunity granted as a peculiar benefit; advantage or favour; a peculiar or personal advantage or right, especially when enjoyed in derogation of a common right.
>
> * * * Immunity from civil action may be described also as a privilege, because the word `privilege' is sufficiently wide to include an immunity.
>
> * * * The word `privilege' has been defined as a particular and peculiar benefit or advantage enjoyed by a person .. `Privileges' are liberties and franchises granted to an offence, place, town or manor, by the King's great charter, letters patent, or Act of Parliament.
>
> In view of the aforementioned definitions of the expressions "status" and "privilege" it must be held that such "status" and "privilege" must emanate from a statute. If legal right has been derived by the respondent herein to continue in service in terms of the provisions of the Act under which he is governed, then only, would the question of depriving him of any status or privilege arise. Furthermore, it is not a case where the respondent had worked for years. He has only worked, on his own showing, for 356 days whereas according to the appellant he has worked only for 208 days. Therefore, the Fifth Schedule of the Industrial Disputes Act, 1947 has no application in the instant case. In view of the above, the dispensing with of the engagement of the respondent cannot be said to be unwarranted in law."

[See also BHEL v. B.K. Vijay & Ors., (2006) 2 SCC 654].

In the instant case, the respondent was appointed in violation of the rules. He was appointed at the instance of a Member of the Legislative Assembly who was a minister at the relevant time. No appointment could have been made at his instance. No authority howsoever high may be cannot direct recruitment of persons of his choice.

Having regard to the factual circumstances of this case, we are of the opinion that grant of monetary compensation would sub-serve the interests of justice.

We, therefore, allow the appeal and set aside the directions of the Labour Court and direct that in place of the respondent being reinstated with back wages, the Appellant would pay monetary compensation to him, quantified at Rs.50,000/-. We make no order as to costs.