

R-81

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on : 13.12.2010
% Judgment delivered on: 15.12.2010

+ **R.S.A.No.94/2000 & C.M.Nos.842/2000 & 11043/2004**

DELHI JAL BOARD

.....Appellant
Through: Ms.Kanika Agnihotri &
Ms.Shikha Tandon, Advocates.

Versus

ANISH KUMAR

.....Respondent
Through: Mr.Ashok Aggarwal, Advocate.

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

INDERMEET KAUR, J.

1. This appeal has impugned the judgment and decree dated 27.11.1999 which has reversed the finding of the trial judge dated 31.5.1996. Vide judgment dated 31.5.1996 the suit of the plaintiff Anish Kumar seeking permanent injunction had been dismissed. Vide impugned judgment dated 27.11.1999 the suit was decreed.

2. Briefly stated the factual matrix of the case are as follows:

(i) Plaintiff was selected for the post of Sewer Cleaning Machine (SCM) driver in the pay scale of Rs.950-1400 by the defendant MCD/defendant corporation after sponsorship of his name by the employment exchange. Six candidates were selected; name of the plaintiff was at Sl.No.5. Plaintiff was posted as SCM driver with effect from 4.1.1990; appointment letter was issued by the Joint Director (CSE 1st), Town Hall, Delhi.

(ii) Plaintiff was the only candidate sponsored by the employment exchange; other candidates were departmental appointees. The appointments were temporary but the appointment of the plaintiff was against a vacant post.

(iii) Plaintiff had been attending to his duties regularly, diligently and honestly; there was no adverse entry against him.

(iv) On 17.9.1990 plaintiff was served with an office order dated 10.9.1990 informing him that his services including those of Babu Ram and Bimal Kumar had been terminated and they would be relieved with effect from 30 days from the issuance of the said order i.e. with effect from 10.10.1990. This order was issued by Mr.R.S.Godbole, Administrative Officer. Said order is illegal and violative of Section 95 of the Delhi Municipal Corporation Act (hereinafter referred to as 'the DMC Act').

(v) In this order of removal of the plaintiff, Chander Pal Singh at Sl.No.6 was allowed to continue in service; policy of the department was discriminatory; no reasonable opportunity of hearing had been afforded to the plaintiff before inflicting such a severe punishment upon him. Present suit was accordingly filed.

(vi) Defendant had contested the suit. It was stated that eight persons were appointed although there were five vacancies; three persons were selected in excess. Their services were discontinued. Services of junior most SCM drivers were discontinued by giving 30 days notice. No person junior than the plaintiff had been allowed to continue. Services of the plaintiff had been discontinued in accordance with the Rules and Regulations of the Department; suit is liable to be dismissed.

(vii) On the pleadings of the parties following issues were framed:

- (i) Whether the office order dt.10.9.1990 terminating the services of the plaintiff was illegal, unlawful and discriminatory, if so, to what effect?
- (ii) Whether the plaintiff is entitled to the relief claimed?
- (iii) Relief.

(viii) Trial judge held that the plaintiff has been appointed purely against a temporary post. The office order dated 28.12.1989 had been signed by the Administrative Officer under the authority of the Director. The order terminating his services on 10.9.1990 had been issued by R.S.Godbole, Administrative Officer again under the authority of the Director. It was thus clear that both the orders i.e. the order appointing the plaintiff and the order terminating him had been issued by the Administrative Officer who was acting under the authority of the Director. Plaintiff has no substantive right to any post. Suit was dismissed.

(ix) In appeal the impugned judgment reversed the finding of the trial judge. Testimony of PW1 & DW1 was re-appreciated. It was held that DW1 has admitted in his cross examination that the plaintiff Anish Kumar was appointed against a vacant post. His services were terminated in suspicious circumstances as the plea of the defendant was contrary; on the face of it the order of terminating his services i.e. Ex.P-6 was discriminatory and illegal.

3. This is a second appeal. The following substantial question of law were formulated on 9.2.2007 which read as follows:

- 1. Whether the services of the respondent be validly terminated?
- 2. Whether the respondent has got any substantial right to continue in the post?

4. On behalf of the appellant it has been urged that the judgment of the trial judge is illegal and arbitrary. Plaintiff/defendant was appointed through the employment

exchange on a temporary post and this was clear from his appointment letter which states that his services could be terminated after giving him 30 day notice which was given to him. He has no substantive right to the post of SCM driver.

5. Counsel for the appellant has placed reliance upon a judgment of the Supreme Court reported in AIR 1992 SC 1593 State of Punjab & Ors. vs. Surinder Kumar & Ors., JT 2008 (3) SC 221 Divisional Manager, Aravali Golf Club & Anr. vs. Chander Hass & Anr. and another judgment of the Apex Court reported in (2010) 5 SCC 475 Md.Ashif & Ors. vs. State of Bihar & Ors. It is submitted that an adhoc appointee cannot as a matter of right seek selection to a substantive post. A post can also not be created where there is no vacancy.

6. Arguments have been countered. It is submitted that the impugned judgment suffers from no infirmity. Court has appreciated all the contentions which have now been urged before this court and after a re-appreciation of the oral and documentary evidence held that the plaintiff is entitled to a decree in his favour. Department was blowing hot and cold; it was not clear of its stand; suit of the plaintiff was rightly decreed.

7. Counsel for the respondent has placed reliance upon AIR 1979 SC 429 The Manager, Government Branch Press & Anr. vs. D.B.Belliappa, AIR 1986 SC 1626 Jarnail Singh & Ors. vs. State of Punjab & Ors., AIR 1983 SC 494 Ajit Singh & Ors. vs. State of Punjab & Anr. and (1992) 2 LLJ 460 (Delhi) Lt. Col.A.K.Dogra (Retd) vs. Indian Railway Construction Company Ltd. & Anr. to support his submission that admittedly the record of the respondent was unblemished; there being no complaint against

him; it was a fit case for regularization; his service could not have been terminated in the manner in which it had been done so.

8. Record has been perused.

9. Ex.P-4 dated 28.12.1989 is the appointment letter issued to the plaintiff/respondent Anish Kumar. It clearly states that the appointee has been appointed temporarily to the post of SCM driver in the pay scale of 950-20-1150-EB-25-1400 with usual allowances on the terms and conditions attached and printed overleaf. Clause 2 of the condition printed overleaf clearly states that the employee can be terminated by giving a 30 day notice. This appointment letter had been issued by G.K.Malik, Administrative Officer (G) under the authority of the Director (A&P). Ex.P-5 dated 4.1.1990 is the posting order posting Anish Kumar at Najafgarh zone, shown against a vacant post. There is no doubt that in Ex.P-5 posting of Anish Kumar makes a reference to a vacant post but the department has explained this to be a typographical error. It has relied upon the terms and conditions of the employment of the plaintiff which are clearly stipulated in Ex.P-4 which gives option to the Department to terminate his services by giving a 30 day notice as the appointment of the appointee were purely temporary. In the written statement, the defence of the department all-along had been that eight persons had been appointed against five vacancies; three persons had been selected in excess; thereafter in view of their non-requirement, their services were discontinued.

10. Anish Kumar had been appointed as a SCM driver in terms of the office order dated 28.12.1989; he along with seven other persons was selected against five vacant posts; these officials were

recruited in excess of the sanctioned posts on the basis of wrong information regarding vacant posts of SCM drivers. The junior most SCM drivers were discontinued vide office order dated 10.9.1990 by giving them a 30 day notice. This document is Ex.P-6. PW-1 the plaintiff has admitted that he was a General category candidate. He has admitted that his appointment was on a temporary basis. DW1 was an official witness of the defendant department; he has deposed that eight persons were recruited as SCM drivers; in his cross-examination he admitted that he has not brought the record in the court to show that how many vacancies fall in the general category and how many in the category of SC/ST. This version had been relied upon in the impugned judgment to draw a conclusion that department had deliberately not produced the record to shield and protect their own acts. It is relevant to point out that it was also not the case of the plaintiff that he had been appointed against a vacant post. In his cross examination PW1 had admitted that he knew that his appointment was on a temporary post. It was not against a sanctioned vacancy.

11. The law regarding regularization of employees has been authoritatively laid down by a Constitutional Bench of Apex Court reported in (2006) 4 SCC 1 Secretary, State of Karnataka & Ors. vs. Uma Devi (3) & Ors. A distinction between an irregularity and an illegality in the making of an appointment has been drawn; where the due process of appointment had been deviated from, the Court can regularize the same. This decision was followed by the Supreme Court in (2009) 6 SCC 611 Mohd.Abdul Kadir & Anr. vs. Directorate General of Police, Assam & Ors. where the court held that the employees who were recruited in connection with a

scheme could not claim continuance or regularization in service even if they had worked on an adhoc basis for as long as two decades. In the judgment of Divisional Manager, Aravali Golf Club (supra) the Supreme Court had held that the creation and sanction of posts is the prerogative of the Executive or the Legislative Authorities and the Court cannot arrogate itself to this executive or legislative function and direct the creation of posts in any organization.

12. Admittedly, in this case there was no sanctioned post against which the respondent had been appointed. It was a temporary post. He had been terminated in accordance with the terms and conditions of his appointment. His appointing officer and terminating officer as evident from Ex.P-4 and Ex.P-6 were both by the Administrative Officer under the direction of the Director. The respondent had no substantive right to continue in the post. Judgments relied upon by the counsel for the respondent have no applicability in this factual scenario. The findings in the impugned judgment holding otherwise are liable to be set aside. Appeal is allowed. Suit of the plaintiff stands dismissed. Pending applications are disposed of.

INDERMEET KAUR, J.

DECEMBER 15, 2010

rl