

Neutral Citation No. - 2023:AHC-LKO:47401-DB

Case :- SPECIAL APPEAL No. - 279 of 2022

Appellant :- Abdul Bari

Respondent :- State Of U.P.Thru.Prin.Secy.Agriculture Dep.Lko.And Others

Counsel for Appellant :- Jitendra Narain Mishra,Narendra Kumar Pandey

Counsel for Respondent :- C.S.C.,Avinash Chandra,Naresh Chandra Mehrotra

Hon'ble Printinker Diwaker, Chief Justice.

Hon'ble Jaspreet Singh,J.

1. Heard Sri Jitendra Narayan Mishra, learned counsel for the appellant and Sri N.C. Mehrotra, learned counsel for the respondents no. 2 and 3.
2. The instant intra-court appeal has been filed against the judgment dated 01.09.2021 passed in Writ Petition No. 18537 (SS) of 2019 whereby the writ petition filed by the appellant was dismissed on the ground that the controversy raised in the writ petition was squarely covered by the judgment passed by a Single Judge as well as a Division Bench in Special Appeal and noticing the same, the writ petition was dismissed.
3. The learned counsel for the appellant submits that the appellant was appointed on a vacant post of Junior Engineer of the Construction Division of Mandi Parishad on 13.05.1996 under 2% contingency fund limit. The State Government had taken a decision on 12.02.1999 to terminate the services of irregular appointments made in the Mandi Parishad between 01.04.1996 till 30.10.1997.
4. In so far as the case of the appellant is concerned, it would be seen that the Director of the Mandi Parishad had sent a letter indicating certain reasons for adopting the practice of making appointments other than in the

regular manner. Since it was the decision of the Director of the Mandi Parishad himself that services of such employees who were serving above the 2% limit of the total project cost shall be terminated, accordingly, the termination of the petitioner was not appropriate as the appellant was working within 2 % contingency fund limit. The appellant along with other persons had earlier filed a writ petition which went up till the Apex Court and came to be decided in the year 2006.

5. It is also urged that in Special Appeal bearing No. 316 of 2011, which was connected with other appeals which came to be disposed of by means of judgment dated 08.10.2018 wherein a direction was issued permitting the petitioner to move a fresh representation and a direction was issued to the Mandi Parishad to decide the same on its own merit.

6. In the aforesaid backdrop, the appellant had made a representation which has been incorrectly rejected and while the appellant assailed the same before the learned Single Judge in Writ Petition No. 18537 (SS) of 2019, the same has been dismissed by incorrectly holding that it was covered by the earlier judgment whereas the basic controversy as to whether the appellant was appointed within the 2% contingency fund limit has not been considered.

7. Sri N.C. Mehrotra, learned counsel appearing for the respondent nos. 2 and 3 submits that the issue can be seen from the perspective that the appellant was never appointed in accordance to any Rules or Regulations. It is urged that the appellant had merely submitted an Application Form for being engaged as Technical Grade-II in the Work Charge Establishment and wages were being paid from the contingency limit, however, neither there

was any selection to the said post nor the appellant was engaged with any post or vacancy.

8. It is further submitted that the aforesaid issue in respect of the persons similarly situate along with the petitioner had filed a Writ Petition bearing No. 1804 (SS) of 1999 seeking regularization. It has also been pointed out that the petitioners along with others had also filed another writ petition bearing No. 18537 (SS) of 2019 seeking regularization. However, the appellant had challenged the Government Order dated 17.03.1999 in the earlier Writ Petition bearing No. 1804 (SS) of 1999, however, the validity of the said Government Order was upheld by the Apex Court in *State of U.P. Vs. Neeraj Awasthi and others; 2006 (1) SCC 667*.

9. It is also urged that the appellant was appointed on 01.06.1996 i.e. after the cut-off date 01.04.1996. This was on account of the fact that the Government had taken a decision to dispense with the services of the employees who were appointed after the cut-off date. Needless to say that the aforesaid decision was upheld by a Division Bench dated 05.08.2015.

10. It is also urged that all the issues which are being raised by the appellant had already attained finality and are squarely covered in light of the earlier decision of this Court dated 01.03.2011 in leading Writ Petition No. 1282 (SS) of 1999 as well as a later decision of the Division Bench dated 05.08.2015. For the aforesaid reasons, the appeal deserves to be dismissed.

11. The Court has heard the rival submissions and also perused the material on record.

12. Few facts which are not in dispute are that the Government had taken a decision to dispense with the services of all the employees who were appointed after the cut-off date i.e. 01.04.1996. It is also not disputed that the appellant was appointed after the cut-off date on 01.06.1996. Another fact which is not disputed is that the appellant was not appointed in pursuance of any advertisement or vacancy but merely upon submitting an application he was appointed on Technical Grade-II.

13. The record further indicates that since large number of employees were retrenched and their services were terminated the matter including the issue of regularization of such employees who had been inducted without following the procedure reached the Apex Court in the case of Neeraj Awasthi (*supra*). At this stage, it will be relevant to notice paragraphs no. 31, 35, 36 and 37 of the *Neeraj Awasthi (supra)* aforesaid case which read as under:-

31. Regulation 2(e) defines “employee” to mean:

“every person appointed on whole-time basis in Classes ‘A’, ‘B’, ‘C’ and ‘D’ mentioned in Regulation 5, whether on contract basis, on deputation or otherwise but does not include persons employed on daily wages, work-charged and on part-time basis.”

Chapter IV of the Establishment Regulations provides for recruitment and appointment. Regulation 9 specifies the appointing authority in respect of the posts shown in column 1 of the table. Regulation 10 provides for the source of recruitment inter alia providing that 85 per cent posts in lowest grade in Class ‘C’ shall be filled by direct recruitment and 15 per cent by promotion from Class ‘D’ and all the posts in Class ‘D’ shall be filled by direct recruitment. Regulation 11(1) provides for constitution of a Selection Committee for the purpose of recruitment to Class ‘A’ and ‘B’ posts whereas Regulation 11(2) provides for constitution of a Selection Committee for recruitment to Class ‘C’ and ‘D’ posts. Regulation 12 empowers the appointing authority to determine the number of vacancies in all the classes to be filled during the course of the year as also the number of vacancies to be reserved for candidates belonging to Scheduled Castes and Scheduled Tribes and other categories under Regulation 8. The other sub-regulations contained in Regulation 12 provide for the mode and manner in which such vacancies shall be filled up. Chapter V lays down the conditions of service by way of appointment, probation, confirmation and seniority. Chapter VI provides for superannuation, pay, allowances and other service conditions.

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35. Both the Service Regulations and the Establishment Regulations, as noticed hereinbefore, are applicable respectively to the employees of the Board as also the Market Committees. The said Regulations provide for detailed procedure for appointment and the terms and conditions therefor. No appointment, thus, can be made in violation of the provisions of the statute and the statutory rules.

36. Submission of the learned counsel appearing on behalf of the employees is that the procedures prescribed by reason of the Regulations are applicable to the regular employees. It is so. The question which, however, falls for consideration is as to whether any appointment can be made dehors the provisions of the Act and the Rules. Our attention has been drawn to the definition of "employee" which does not include persons employed on daily wages, work-charged and/or part-time basis. If the expression "employee" does not bring within its fold any person employed on daily wages, work-charged or on part-time basis, the same would mean that the persons so appointed would not be employees within the meaning of the said Regulations. It would, therefore, not be correct to contend that the Market Committee or the Board has the jurisdiction to appoint anybody on daily wages, work-charged or on part-time basis dehors the Rules. The power to make appointments by the Committee or the Board whether contained in Section 23 or Section 26-F of the Act are statutory in nature. In the absence of any power conferred upon them to appoint any employee dehors the provisions of Sections 23 and 26-F and the Regulations framed thereunder, indisputably would mean that such appointments are dehors the Act and the Rules. The Rules also provide that any appointment made by the Committee under sub-section (1) of Section 23 shall be intimated within 30 days of such appointment to the Director or to such other officer as may be authorised by the Director in this behalf. It implies that although the Market Committee may have power to make appointments, such appointments can be made in relation to the posts created therefor by the Board wherefor requisite intimation has to be given to the Director or the officer authorised in this behalf. We may assume that for meeting the exigencies of situations it may be possible for the Committee or the Board to appoint a person on ad hoc basis. Such ad hoc employees, however, being not "employees" within the meaning of the provisions of the Act and the Regulations, a legal relationship between the employer and the employee would not come into being. As no legal relationship of employer and employee comes into being, evidently, such persons do not derive any status. They a fortiori derive no legal right to continue in service subject, of course, to compliance with the provisions of any other Act or the Rules conferring certain benefits to them. (See State of M.P. v. Dharam Bir [(1998) 6 SCC 165 : 1998 SCC (L&S) 1459] .)

37. Sections 23 and 26-F of the Act categorically mandate that all appointments must be made in terms of the provisions of the Regulations. The terms and conditions of such services are also required to be prescribed by the Regulations, the logical corollary whereof would be that permanent status is required to be given to a person who is not otherwise an employee of the Board or the Market Committee, as the case may be. It is required to be done in terms of the Regulations only.

14. From the conjoint reading of the aforesaid paragraphs, it would be clear that the persons who were not regularly appointed, they could not derive any benefits as per the Rules governing regular appointees.

15. In the aforesaid circumstance where the appellant has not been regularly appointed and claimed that he had been appointed under the 2% contingency limit, even this aspect was considered by the Department itself by a detailed order wherein the entire sequence of events as well as the various litigations between the employees and the department were noticed alongwith its facets and it was concluded that the termination of the services is in accordance with the policy.

16. The learned Single Judge while dismissing the writ petition has also noted paragraph 54 of the judgment dated 01.03.2011 passed in leading Writ Petition No. 1282 (SS) of 2019 wherein the issue regarding appointment within the 2 % contingency limit was also noticed.

17. The issue apparently raised by the appellant is covered with the earlier decision of this Court in Rakesh Kumar Srivastava Vs. State of U.P. and Others. Moreover, since the appointment of the appellant is after the cut-off date and a conscious decision has been taken by the Government to dispense with the services of all such persons who were appointed after the cut-off date and that being a policy decision is not open as it has attained finality. The appellant had another opportunity of getting his rights re-examined by the Authority which has been done vide order dated 28th December, 2018 which is detailed order and this order was further scrutinized by the learned Single Judge who has encapsulated the controversy and finding that it was covered by the earlier decisions of the Court. Moreover, a person who has not been appointed in service as per the applicable rules cannot claim right to continue in service as a matter of right. The employer is within his rights to determine the requisite work

force it requires and thus it cannot be forced upon the employer. The exercise of retrenchment/termination has been taken as per policy decision and there appears to be no illegality or arbitrariness to persuade this Court to intervene.

18. We are satisfied that the decision rendered by the learned Single Judge does not suffer from any error to persuade this Court to intervene in the Special Appeal, accordingly, the appeal is *dismissed*.

Order Date :- 19.07.2023

Asheesh

(Hon'ble Jaspreet Singh,J.) (Hon'ble Printinker Diwaker, C.J.)