A REGIONAL MANAGER, SBI.

v.

MAHATMA MISHRA

NOVEMBER 1, 2006

B [S.B. SINHA AND MARKANDEY KATJU, JJ.]

Labour laws:

Industrial Disputes Act, 1947—Section 25H—Temporary appointment C *for fixed period—Termination after 88 days—Correctness of—Held: Appointment of workman was as a casual worker for a fixed period—Thus, termination not illegal though employer was to comply with the Department Circular provisions of 1959 Act and the doctrine of equality—Workman having worked only for 88 days not entitled to permanent status, and such* D *not to be reinstated with full back wages—Thus, order of courts below set aside—However, amount obtained by worker as idle wages not to be refunded—Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959—Constitution of India, 1950—Articles 14 and 15.*

Appellant-Bank issued circular to the effect that temporary appointments E **were to be made for a maximum period of 90 days in the case of sub-staff and 180 days in case of temporary staff upon obtaining suitable number of names from employment exchange. Casual workers were to be engaged for work of casual nature only.**

Respondent was appointed on a temporary basis and his service were F **terminated after 88 days. Industrial dispute was raised. Labour Court held the termination illegal and directed re-instatement with full back wages. In writ petition, Single Judge of High Court held that the respondent having worked only for a period of 88 days was not entitled to a permanent status but since he had been paid idle wages for 20 years, it directed that reinstatement** G **to continue but without back wages. Hence the present appeal.**

Allowing the appeal, the Court

HELD: 1. An employee after termination of his service cannot get a benefit to which he was not entitled to if he remained in service. It is one

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thing to say that services of a workman was terminated in violation of mandatory provisions of law but it is another thing to say that relief of reinstatement in service with full backwages would be granted automatically. Even in a case where service of an employee is terminated in violation of Section 25-F the Industrial Disputes Act, he would not be entitled to grant of a permanent status. Regularisation does not mean permanence. [222-F-H] A B

2.1. In the instant case, it is not in dispute that the appointment of the respondent was made in violation of circular letter issued by the appellant Bank. Requirements of law as envisaged under Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959 and also not been complied with. Appellant being State within the meaning of Article 12 of the Constitution, a constitutional duty was enjoined to it to comply with the doctrine of equality as enshrine under Articles 14 and 16 thereof. [220-D-E] C

2.2. Respondent was appointed only for 88 days. Thus, the requirements, of section 6-N of the U.P. Industrial Disputes Act was not required to be complied with. The Labour Court although proceeded on the basis that section 25-H of the Industrial Disputes Act would be attracted, no reason has been assigned in support thereof. If the appointment of the respondent as a casual worker was for a fixed period and the termination of his services was in terms of contract of employment, section 25-H would not have any application. The Labour Court failed to show as to how the appellant can be said to have taken recourse to unfair labour practice. It committed a serious illegality in proceeding on the basis that retrenchment was illegal. [220-B-C-F; 222-D] D E

2.3. High Court rightly observed the respondent was not entitled to a permanent status. If he was not entitled to conferment of any permanent status having worked only for 88 days, he was not entitled to be reinstated in service and that too with full back wages. High Court failed to consider a vital aspect of the matter. Reinstatement in service can be directed provided the termination is illegal. No finding of fact has been arrived at that the termination of the service to the respondent was illegal. The question of directing an award reinstating him in service did not and could not arise. High Court committed a serious error in passing an order only on the basis of sympathy although it was held that the respondent was not entitled to any relief. Thus, the impugned judgment cannot be sustained and is set aside. However, respondent obtained idle wages for a long time, though he was not entitled thereto, keeping in view the fact and circumstances of this case, no direction is issued for refund of the said amount. [220-F-H; 223-G-H; 225-C] F G H

A *Regional Manager, State Bank of India* **v.** *Raja Ram* **[2004] 8 SCC 164;** *Regional Manager, SBI* **v.** *Rakesh Kumar Tewari,* **[2006] 1 SCC 530;** *Secretary, State of Karnataka and Ors.* **v.** *Umadevi 3 and Ors.,* **[2006] 4 SCC 1;** *Principal, Mehar Chand Polytechnic and Anr.* **v.** *Anu Lumba and Ors.,* **[2006] 7 SCALE 648;** *Maruti Udyog Ltd.,* **v.** *Ram Lal and Ors.,* **[2005] 2 SCC 638 and** *State of Bihar and Ors.* **v.** *Amrendra Kumar Mishra* **(2006) 9 SCALE 549, relied on.**

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CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4636 of 2006.

From the Final Judgment and Order dated 20-2-2006 of the High Court of Judicature at Allahabad in C.M.W.P. No. 14605/1985

C

L. Nageshwara Rao, Sanjay Kapur, Shubhra Kapur, Rajiv Kapur and Arti Singh for the Appellant.

Pramod Swarup Pareena and Arneet Singh for the Respondent.

D The Judgment of the court was delivered by:

S.B. SINHA, J : Leave granted.

Respondent was appointed on a temporary basis in the year 1982 for a period of 88 days. His services were terminated. An industrial dispute was E raised by him which was referred to for adjudication before the Presiding Officer, Central Government Industrial Tribunal-cum—Labour Court, Kanpur by the State of Uttar Pradesh in the following terms:

> "Whether the action of the management of State Bank of India, Region III, the Mall Kanpur, in relation to their Jhanstongang Branch, Allahabad in terminating the services of Shri Mahatma Mishra, Ex-messenger with effect from 4.9.1982 and not considering him for further employment as provided under section 25-H of the Industrial Disputes Act, is justified. If not to what relief is the workman concerned entitled?"

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G Before the Industrial Court, the respondent *inter alia* relied upon a purported circular issued by the Personnel Department of the Appellant Bank wherein direction was issued that temporary appointments were to be made for a maximum period of 90 days in the case of sub-staff and 180 days in case of temporary staff upon obtaining suitable number of names from the H concerned employment exchange(s). Engagement of casual labour was directed

to be resorted to for work of casual nature only and such casual employees were not to be engaged as members of subordinate staff. A

Inter alia on the premise that the respondent was engaged as temporary messenger which, according to the Labour Court, was not of a casual nature but of permanent one and, furthermore, having regard to the fact that he was appointed on 3.5.1982 and his services were terminated on 3.9.1982, it was B opined that unfair labour practice had been resorted to by the management. The Labour Court further noticed that one Basudeo was appointed after termination of the services of the respondent. The Labour Court *inter alia* held that as no written notice was served on the respondent before terminating his services, the same was illegal and upon referring to the bipartite settlement C by and between the Bank and the workmen, it was held:

> "In the instant case before termination of Mahatma Misra two other persons worked as temporary messenger and after his termination several others were also appointed to work as temporary messenger. Thus, there was vacancy of permanent nature and had the workman D allowed to be continued after 88 days he could have acquired the status of permanent messenger and it was on that count that his services were terminated two days before which was an unfair (sic) on the part of the management bank.
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> Thus, in view of the discussion made above and the law discussed, E I hold that the action of the management bank of the State Bank of India in terminating the service of the workman concerned w.e.f. 4.9.1983 which in reality and admittedly 3.9.1982 and not considering him for further employment as provided under Section 25H of the I.D. Act is illegal. The effect is that he will be reinstated in service with full back wages." F

A writ petition was filed before the High Court. A learned Single Judge although opined that the respondent was not entitled to be granted a permanent status after having worked only for a period of 88 days but in purported interest of justice having regard to the fact that he had been paid idle wages G for a period of 20 years, it was directed:

> "Thus, the sum and substance of the matter is that it is not the absolute consequence of reinstatement that in every case, full back wages are to be granted, but that the issue of *grant of back wages* must be gone into and the grant, if any, of back wages must be given H

A proper consideration which shall of course vary from case to case.

In view of the above discussion, the writ petition is partly allowed. I modify the award of the Labour Court to the extent that no further back wages shall be paid to the respondent workman. However, his reinstatement shall continue."

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The approach of the Labour Court as also the High Court cannot be appreciated. The respondent was appointed only for 88 days. The requirements of Section 6-N of the U.P. Industrial Disputes Act was, thus, not required to be complied with. The Labour Court although proceeded on the basis that Section 25-H of the Industrial Disputes Act would be attracted, no reason has C been assigned in support thereof. If the appointment of the respondent as a casual worker was for a fixed period and the termination of his services was in terms of contract of employment, Section 25-H of the Industrial Disputes Act would not have any application. In a case of this nature, Section 25-H of the Industrial Disputes Act is not attracted. It is not in dispute that the D appointment of the respondent was made in violation of circular letter issued by the Appellant - Bank. Requirements of law as envisaged under Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959 had also not been complied with.

The appellant is a State within the meaning of Article 12 of the E Constitution of India. A constitutional duty was, thus, enjoined to it to comply with the doctrine of equality as enshrined under Articles 14 and 16 thereof.

The Labour Court committed a serious illegality in proceeding on the basis that retrenchment was illegal. It was not so. As was rightly observed F by the High Court, the respondent was not entitled to a permanent status. If he was not entitled to conferment of any permanent status having worked only for 88 days and that too in the year 1982, we fail to understand as to how he was entitled to be reinstated in service and that too with full backwages. The High Court although noticed the recent decisions of this Court in relation G to grant of backwages but it failed to consider a vital aspect of the matter, viz., reinstatement in service can be directed provided the termination is illegal. No finding of fact has been arrived at that the termination of the service of the respondent was illegal. The question of directing an award reinstating him in service did not and could not arise.

H The question came up for consideration before a Division Bench of this

Court in *Regional Manager, State Bank of India* v. *Raja Ram* [2004] 8 SCC 164 wherein it was held: A

> "It appears that the High Court as well as the Labour Court had proceeded on a fundamental misconception as to the nature of the right available to the respondent. The respondent was employed for a fixed period of 91 days. Assuming that such an employee could be B called a temporary employee for the purposes of the Sastry Award, the requirement as to service of notice of 14 days, would, in cases where an employee has been appointed for a fixed tenure, amount to an embargo on the employer terminating the services prior to the expiry of such period without giving a 14 days' notice. The non- C giving of the notice would not mean that the employee would thereby continue to serve beyond the period for which he was originally appointed. The exception to this principle is when an employee is appointed temporarily for successive fixed tenures with artificial breaks in between so as to deny the employee the right to claim permanent appointment. This action would be an unfair labour practice within D the meaning of the phrase in Section 2(ra) of the Act. Section 2(ra) says that unfair labour practice means any of the practices specified in the Fifth Schedule to the Act. The Fifth Schedule to the Act contains a list of unfair labour practices which have been classified under two heads, namely: (I) on the part of the employer and trade E unions of employers, and (II) on the part of the workmen and trade unions of workmen. The principle that we have referred to earlier finds place in Item 10 of Part I under which
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> "to employ workmen as 'badlis', casuals or temporaries and to continue them as such for years, with the object of depriving them of the F status and privileges of permanent workmen"
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> is an unfair labour practice. In other words, before an action can be termed as an unfair labour practice it would be necessary for the Labour Court to come to a conclusion that the badlis, casuals and temporary workmen had been continued for years as badlis, casuals G or temporary workmen, with the object of depriving them of the status and privileges of permanent workmen. To this has been added the judicial gloss that artificial breaks in the service of such workmen would not allow the employer to avoid a charge of unfair labour practice. However, it is the continuity of service of workmen over a period of years which is frowned upon. *Besides, it needs to be* H

A *emphasised that for the practice to amount to unfair labour practice it must be found that the workman had been retained on a casual or temporary basis with the object of depriving the workman of the status and privileges of a permanent workman.* There is no such finding in this case. Therefore, Item 10 in List I of the Fifth Schedule to the Act cannot be said to apply at all to the respondent's case and
B the Labour Court erred in coming to the conclusion that the respondent was, in the circumstances, likely to acquire the status of a permanent employee. Furthermore, both the High Court and the Labour Court appeared to have proceeded on the basis that the appointment of Ram Kumar after the employment of the respondent ceased, also on casual
C basis, was an unfair labour practice. If this view is to be upheld the respondent's appointment in place of Sooraj would equally be an unfair labour practice and therefore unsustainable."

Unfair labour practice is not to be readily inferred. Before a conclusion in that behalf is drawn, the conditions precedent therefor must be satisfied.
D The Labour Court failed to show as to how the appellant can be said to have taken recourse to unfair labour practice. It was not a case where the respondent was being appointed consistently for a number of years with artificial breaks. It was also not a case where the purport and object for such appointment was to violate the provisions of the Industrial Disputes Act.

E The question again came up for consideration before this Court in *Regional Manager, SBI* v. *Rakesh Kumar Tewari,* [2006] 1 SCC 530 wherein *Raja Ram* (supra) was followed.

Section 11-A of the Industrial Disputes Act confers a discretionary
F power in the Industrial Tribunal or the Labour Court, as the case may be. Although in a given case, the Industrial Tribunal or the Labour Court may grant appropriate relief, its discretion should be exercised judiciously. An employee after termination of his services cannot get a benefit to which he *was not entitled* to if he remained in service. It is one thing to say that services of a workman was terminated in violation of mandatory provisions
G of law but it is another thing to say that relief of reinstatement in service with full backwages would be granted automatically. Even in a case where service of an employee is terminated in violation of Section 25-F of the Industrial Disputes Act, he would not be entitled to grant of a permanent status. Regularisation does not mean permanence. [*See Secretary, State of Karnataka*
H *and Ors* v. *Umadevi (3) and Ors,* [2006] 4 SCC 1]

This aspect of the matter has been considered by this Court in *Principal, Mehar Chand Polytechnic & Anr.* v. *Anu Lumba & Ors.* [2006]7 SCALE 648 wherein it was observed:

"In *Umadevi* (supra), it was stated :

"There have been decisions which have taken the cue from the Dharwad case and given directions for regularization, absorption or making permanent, employees engaged or appointed without following the due process or the rules for appointment. The philosophy behind this approach is seen set out in the recent decision in *The Workmen* v. *Bhurkunda Colliery of Central Coalfields Ltd.*, though the legality or validity of such an approach has not been independently examined. But on a survey of authorities, the predominant view is seen to be that such appointments did not confer any right on the appointees and that the Court cannot direct their absorption or regularization or re-engagement or making them permanent"

See also *State of U.P.* v. *Neeraj Awasthi and Ors.*, [2006] 1 SCC 667.

Yet again in *National Fertilizers Ltd. & Ors.* v. *Somvir Singh,* [2006] 6 SCALE 101, it was held:

"Regularization, furthermore, is not a mode of appointment. If appointment is made without following the Rules, the same being a nullity the question of confirmation of an employee upon the expiry of the purported period of probation would not arise..."

It was further opined :

"It is true that the Respondents had been working for a long time. It may also be true that they had not been paid wages on a regular scale of pay. But, they did not hold any post. They were, therefore, not entitled to be paid salary on a regular scale of pay. Furthermore, only because the Respondents have worked for some time, the same by itself would not be a ground for directing regularization of their services in view of the decision of this Court in *Uma Devi* (supra)."

Furthermore, the High Court, in our opinion, committed a serious error in passing an order only on the basis of sympathy although it was held that the respondent was not entitled to any relief.

In *Maruti Udyod Ltd.* v. *Ram Lal and Ors.*, [2005] 2 SCC 638, it was

A observed :

"While construing a statute, "sympathy" has no role to play. This Court cannot interpret the provisions of the said Act ignoring the binding decisions of the Constitution Bench of this Court only by way of sympathy to the workmen concerned.

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In *A. Umarani* v. *Registrar, Coop. Societies* this Court rejected a similar contention upon noticing the following judgments: (SCC pp. 131-32, paras 68-70)

"68. In a case of this nature this Court should not even exercise its C jurisdiction under Article 142 of the Constitution of India on misplaced sympathy.

69. In *Teri Oat Estates (P) Ltd.* v. *U.T., Chandigarh* 18 it is stated: (SCC p. 144, paras 36-37)

D '36. We have no doubt in our mind that sympathy or sentiment by itself cannot be a ground for passing an order in relation whereto the appellants miserably fail to establish a legal right. It is further trite that despite an extraordinary constitutional jurisdiction contained in Article 142 of the Constitution of India, this Court ordinarily would not pass an order which would be in contravention of a statutory provision.

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37. As early as in 1911, Farewell, *L.J. in Latham* v. *Richard Johnson & Nephew Ltd. observed:* (All ER p. 123 E)

"We must be very careful not to allow our sympathy with the infant plaintiff to affect our judgment. Sentiment is a dangerous will o' the F wisp to take as a guide in the search for legal principles."

70. Yet again, recently in *Ramakrishna Kamat* v. *State of Karnataka* this Court rejected a similar plea for regularisation of services stating: (SCC pp. 377-78, para 7)

'We repeatedly asked the learned counsel for the appellants on what G basis or foundation in law the appellants made their claim for regularisation and under what rules their recruitment was made so as to govern their service conditions. They were not in a position to answer except saying that the appellants have been working for quite some time in various schools started pursuant to resolutions passed H by Zila Parishads in view of the government orders and that their

cases need to be considered sympathetically. It is clear from the order of the learned Single Judge and looking to the very directions given, a very sympathetic view was taken. We do not find it either just or proper to show any further sympathy in the given facts and circumstances of the case. While being sympathetic to the persons who come before the court the courts cannot at the same time be unsympathetic to the large number of eligible persons waiting for a long time in a long queue seeking employment.'

[See also *State of Bihar & Ors.* v. *Amrendra Kumar Mishra,* (2006) 9 SCALE 549]

For the reasons aforementioned, we are of the opinion that the impugned judgments cannot be sustained which are set aside accordingly. The respondent, however, has obtained idle wages for a long time. Although he was not entitled thereto, keeping in view the fact and circumstances of this case, we do not direct refund of the said amount. The appeal is allowed. No costs.

N.J. Appeal allowed.