U.P. State Electricity Board Vs Presiding Officer, Labour Court (I) and Another

Court: Allahabad High Court

Date of Decision: Jan. 9, 2004

Acts Referred: Electricity (Supply) Act, 1948 â€" Section 79C
Electricity Act, 1910 â€" Section 5
Industrial Disputes (Central) Rules, 1957 â€" Rule 43
Industrial Disputes Act, 1947 â€" Section 33C(2)
Uttar Pradesh Industrial Disputes Act, 1947 â€" Section 6N, 6Q

Citation: (2004) 2 AWC 1796

Hon'ble Judges: Rakesh Tiwari, J

Bench: Single Bench

Advocate: Ranjit Saxena, for the Appellant; S.N. Dubey, S.C., for the Respondent

Final Decision: Allowed

Judgement

Rakesh Tiwari, J.
Heard counsel for the parties and have perused the materials given on record.

2. The Petitioner has challenged the award dated 26.5.1996 passed by Labour Court (I) U.P. Kanpur in Adjudication Case No. 218 of 1997

which was enforced by publication on the notice board of the Labour Court on 19.12.1998.

3. Kanpur Electricity Supply Administration hereinafter called as K.E.S.A. is a unit of the U.P. State Electricity Board, which is a body corporate

duly constituted u/s 5 of the Electricity Act. It is engaged in generation and distribution of electricity in the area of Kanpur and revenue collection

for the same. The terms and conditions of its employees are governed by the Statutory regulations framed by the Board in exercise of its powers

u/s 79C of the Electricity Supply Act, 1948.

4. The U.P. State Electricity Board vide its order O. N. No. 34-MP/(OS)/SEB-88-100 (2)-No/1978, dated 13.1.1988 sanctioned filling of 350

posts of coolies (including the resultant vacant posts of coolies, etc. which may fall vacant due to promotion from amongst lower categories of staff

against the posts of lineman and meter reader etc. as a special case in relaxation of ban imposed vide B.O. No. 4840-NG (1)/SEB-213A/65,

dated 19.9.1978. The sanction was granted subject to the condition that these vacant posts of coolie shall be filled within the sanctioned strength

from amongst muster roll/retrenched muster roll employees who had continuously worked for more than 240 days in K.E.S.A. and were locally

available and suitable. Those having previous experience of the job for which they are to be employed, may also be considered only when the

sufficient number of muster roll/retrenched muster roll employees of K.E.S.A. are not available as stated above.

5. It is further stated by the Petitioner that in order to take up emergent day-to-day works for ensuring generation in Riverside Power House and

distribution of electricity and maintenance of supply, casual labour for 1 or 2 months were engaged for which no permanent record is maintained.

Further it is stated that for filling in on 350 posts of coolies sanctioned by the Board as stated above, various unions demanded that recruitment

may also be made from the wards of dependents of serving employees and also from the dependents of retired employees. After discussions with

the various unions, it was decided that the vacant posts of coolies in the establishment will also be filled from the eligible dependents of the

employees and dependents of the employees who are to retire if none of their dependent is employed in this administration.

6. The award has been challenged on the ground that Respondent No. 2 was engaged on daily wages to meet the exigencies of work due to the

fact that the permanent employees of the establishment had gone on an illegal strike which continued for some time and after the strike was over

Respondent was not engaged. It is submitted that the Labour Court has failed to appreciate that there was neither any evidence that Respondent

No. 2 was an employee of the U.P. State Electricity Board nor was its retrenched employee. It is also assailed on the ground that this dispute had

once been raised earlier and thereafter withdrawn. Thereafter if was again raised after 8 years without any explanation of delay.

7. It appears from the record that Respondent No. 2 raised industrial dispute with regard to his termination of services as temporary coolie. It was

registered as C.B. Case No. 133 of 1990. The terms of the reference was as to whether the action of the employers in not giving the employment

to the temporary coolie Sri Rais Khan S/o Sri Nanhe Khan on the basis of old services/experience is unjustified and illegal.

8. The aforesaid industrial dispute was referred to Labour Court (V) U.P. Kanpur, where it was registered as Adjudication Case No. 95 of 1992.

This case was transferred to Labour Court (II) where it was registered as Adjudication Case No. 123 of 1995. However, workmen moved an

application inter alia stating that since there is some typographical error in the case, he wants to withdraw the same. The Labour Court by the

award dated 4.3.1997 held that since the burden of proof for establishing his case was on the workmen and he has moved an application for

withdrawal, further adjudication is not necessary and the reference is decided against the employee holding that he is not entitled to any relief.

9. It appears from the record that there was a strike in the establishment during the period of 16.1.1986 to 16.2.1986. He was engaged during the

strike period. It further appears from the record that the workmen did not raise any industrial dispute for more than 8 years after withdrawing his

case and order of Labour Court. He thereafter again raised dispute which was referred to Labour Court (I) U.P. Kanpur and was registered as

Adjudication Case No. 218 of 1997. This reference was sent to the Labour Court by the State Government without affording any opportunity of

hearing to the Petitioner U.P. State Electricity Board. The reference is as under:

10. The case of the Petitioner before the Labour Court was that the Respondent was neither a permanent employee nor was a retrenched

employee of the corporation. It was also submitted that as there was no relationship of master and servants between the Petitioner and the

Respondent, the provisions of Section 6Q of U.P. Industrial Disputes Act read with Section 6N of the U.P. Industrial Disputes Act and Rule 43

framed thereunder were not applicable.

11. The case of the workman was that he had been appointed in the Petitioner''s establishment w.e.f. 15.1.1986 and had worked up to 16.2.1988

on the post of Coolie/ Mazdoor but his name was kept on the muster roll and that he has worked for 240 days and termination of his service w.e.f.

16.2.1988 is illegal and against the provisions of Industrial Disputes Act. It was also submitted that he was not informed about the fresh recruitment

and as he had completed 240 days of service and is entitled to be appointed in the board on the post of coolie.

12. It is admitted to both the parties that the U.P.S.E.B. vide letter dated 13.1.1988 had directed for recruitment/appointment for all those persons

who had completed 240 days of service in the establishment on the post of coolie. It is also an admitted fact that the number of retrenched

employee was more than the posts available and as such a selection had taken place in which posts of coolie were filled up through selection on

basis of suitability. It is further submitted that in case of daily wager recruitment is not proper and at the most compensation could be awarded to

him.

13. It is submitted that the Labour Court has not considered the fatal effect of delay. It is not to be forgotten that the Petitioners were daily wager.

There is no evidence of their actual days of employment. Though the Labour Court has denied them back wages from the date of termination, but

has granted continuity of service. In case of Haryana Tourism Corporation AIR2003 SCW 5233, the Apex Court has held that in case of daily

wagers, their employment elsewhere cannot be rated out in view of nature of their duties. In such circumstances recruitment is not proper and

compensation be awarded. The Apex Court has considered the fatal effect of delay in a catena of cases, the leading case being Shalimar Works

Ltd. v. Their Workman 1959 SCC 1217.

14. In the later decision in The Nedungadi Bank Ltd. Vs. K.P. Madhavankutty and Others, , the Apex Court held that though no time limit is

prescribed, it does not mean that power to refer can be exercised at any point of time. The Court also held that though the order of reference is an

administrative order, it is subject to judicial review and Stale disputes cannot be referred. In this case the reference was made after seven years of

cause of action. The Court in paragraph 6 of its decision further held that it cannot be said that a complaint made after a lapse of seven years can

give rise to an industrial dispute or that industrial dispute could be apprehended and reference of such a dispute was bad both on ground of delay

and lack of industrial dispute existing or apprehended.

15. In one of the recent judgment on the point of delay in making reference was considered in Assistant Executive Engineer, Karnataka v.

Shivalinga, (2002) 1 LLJ 457SC , was considered without reference of dispute was made after more than nine years. There arose a serious

dispute or doubt about the relationship of employer and employee between the parties. The Hon''ble Supreme Court held that the long delay (9

years) would impede the maintenance of records and the reference was bad in these circumstances. In this case Labour Court had rejected the

reference, but the High Court allowed the writ petition. The Apex Court set aside the order of the High Court holding that a situation of that nature

would render the claim to have become stale and maintained the order of the Labour Court rejecting the belated reference on ground of delay. The

Labour Court did not apply its mind to this glaring and undisputed fact of delay and stale reference in the present case. After lapse of 8 years the

matter of engagement of daily wager had become stale. It is not disputed that the Respondent was engaged due to illegal strike in the

establishment. He was not appointed against any post hence cannot claim continuity of service. On strike coming to an end his services were no

longer required as the exigency no longer remained existing. The relief granted by the Labour Court of continuity of service of a daily wager is not

proper. The Respondent had claimed that he had worked during the period 16.1.1985 to 15.2.1988 and had actually worked for 240 days in

every calendar year. This fact was denied by the Petitioner. The Labour Court drew adverse inference against the employers as they were unable

to produce muster rolls of the relevant period which were summoned by the Respondent. The employers" case that the documents were not

available because it is not possible to maintain muster roll records of daily wager in the establishment for such long time as considerable number of

daily wagers are employed daily and these records are weeded out after 3 years and (ii) though the Respondent had earlier raised same industrial

dispute in Adjudication Case No. 123 of 1995 which was referred to Labour Court 2, Agra, but had been withdrawn. The Second reference

having been made after 8 years they had weeded out the records thereafter the Labour Court has mechanically drawn adverse inference and has

not at all considered the reason for non-production of the summoned documents. The position that employer has to maintain document for a period

of three years under the Factories Act and Rules framed thereunder is not disputed by the counsel for the Respondent. The reason for non-

production was plausible and deserved consideration by the Labour Court before drawing any adverse inference in this regard. Mere statement of

the Respondent that he had worked for 240 days is not enough. The workman has to prove that he had actually worked for 240 days in a year.

16. It appears that the Respondent was well aware of this fact that there was no evidence of master and servant relationship or not be able to

prove his case, withdrew Adjudication Case No. 123 of 1995 regarding his alleged termination of service. Filing the case after 8 years is a strong

indication that he waited for the documents may now be available hence raised the dispute a second time.

17. A daily wager employee has no right to hold a post. They are engaged for exigencies of work and have no right of regularisation. The Apex

Court in Surendra Kumar Sharma Vs. Vikas Adhikari and Another, , has held:

The Court can take judicial notice of the fact that such employment is sought and given directly for various illegal considerations including money.

The employment is given first for temporary periods with technical breaks to circumvent the relevant rules and is continued for 240 or more days

with a view to give the benefit of regularisation knowing the judicial trend that those who have completed 240 or more days are directed to be

automatically regularized. A good deal of illegal employment market has developed resulting in a new source of corruption and frustration of those

who are waiting at the employment exchanges for years. Not all those who gain such back door entry in the employment are in need of the

particular jobs. Though already employed elsewhere, they join the jobs for better and secured prospectus. That is why most of the cases, which

come to the Courts, are of employment in Government departments, public undertakings or agencies. Ultimately it is the people who bear the

heavy burden of surplus labour. The other equally injurious effect of indiscriminate regularisation has been that many of the agencies have stopped

undertaking casual or temporary works though they are urgent and essential for fear that if those who are employed on such works are required to

be continued for 240 or more days have to be absorbed as regular employees although the works are time bound and there is no need of the

workmen beyond the completion of the works undertaken. The public interests are thus jeopardized on both counts. (SCC pp. 111-12, para 23).

18. The burden of proof lay heavily on him. The onus could not have been shifted on the Petitioner unless the initial burden was discharged by the

Respondent that he had actually worked for 240 days in a year. It is settled law that the claimant has to prove his case. I am supported in view by

the law laid down by the Apex Court in Range Forest Officer v. S. T. Hadimani 2002 (2) AWC 1268 (SC): 2002 (94) FLR 622 (SC), in which it

has been held that:

The Tribunal was not right in placing the onus on the management without first determining on the basis of cogent evidence that the Respondent had

worked for more than 240 days in the year proceeding his termination. It was the case of the claimant that he had so worked but this claim was

denied by the Appellant. It was then for the claimant to lead evidence to show that he had in fact worked for 240 days in the year preceding his

termination. Filing of an affidavit is only his own statement in his favour and that cannot be regarded as sufficient evidence for any Court or Tribunal

to come to the conclusion that a workman had, in fact, worked for 240 days in year. No proof of receipt of salary or wages for 240 days or order

or record of appointment or engagement for this period was produced by the workman. On this ground alone, the award is liable to be set aside.

19. The Labour Court has committed a manifest error in law and on face of record in drawing adverse inference for holding that the Respondent

had actually worked for 240 in a year, which burden was not discharged by him.

20. In Surendra Kumar Sharma Vs. Vikas Adhikari and Another, , the Apex Court had cautioned against the injurious effect of such indiscriminate

regularisation and held that the Court can take judicial notice of the fact that such employment is sought and given for various illegal considerations

including money.

21. For all these reasons the writ petition succeeds and is allowed. The impugned award of the labour court is quashed. No order as to costs.

22. In connected Writ Petition No. 52662 of 1999 as has been filed against the order of the labour court, Kanpur Nagar in Misc. Case No.

27/1999. A claim application u/s 33C(2) of Industrial Disputes Act was filed by the workmen Rais Khan for realization of a sum of Rs. 5052.30

as a revised pay scale of a regular employee for the period of 22.12.1998 to 31.12.1998 passed by the Labour Court in Writ Petition No. 8207

of 1999. The order was passed ex parte. An application for recall was filed but the Court refused to recall its ex parte order.

23. As has been held above the Writ Petition No. 8207 of 1999 has been allowed as a consequence thereof. The order passed by the labour

court u/s 33C(2) consequent to the award cannot be sustained. Even otherwise also the Labour Court has acted as material irregularity in not

recalling its impugned order passed ex parte. The labour court held that in the award given in Adjudication Case No. 218 of 1997 the workman

was directed to be reinstated on the post on same status on which he was working before his termination. Sri Rais Ahmad was working as daily

wager at the rate of 25 per day. There is no mention in the award that he has to be paid regular pay scale, in spite of noting this fact. The Labour

Court by the impugned order held that payment to the workman treating him to be an employee of daily wage was illegal and he was entitled to

revised pay scale. No reason has been given by the Labour Court why the workman is entitled to revised pay scale of regular employee

particularly in view of fact he has no existing right and even the award on the basis of which he claims such relief was silent and the workman had

not been awarded regular pay scale of permanent employee. This writ petition is also allowed and impugned order given by the labour court u/s

33C(2) is quashed.