Kamalesh Kumar Singh Vs State of Uttar Pradesh

Court: Allahabad High Court

Date of Decision: Sept. 28, 2004

Acts Referred: Constitution of India, 1950 â€" Article 311
Industrial Disputes Act, 1947 â€" Section 2, 25F

Hon'ble Judges: R.B. Misra, J

Bench: Single Bench

Advocate: R.M. Vishwakarma and Dinesh Dwivedi, for the Appellant; C.S.C., for the Respondent

Final Decision: Dismissed

Judgement

R.B. Misra, J.

Heard learned counsel for the petitioner and the learned Standing counsel.

1. In this petition prayer has been made for directing the respondents to regularize the service of the petitioner as IVth class employee and to pay

the salary.

2. According to the petitioner he was deployed in the year 1985 to the class IV post as daily wager and had continued for some time and he is

entitled to be regularized.

3. Counter affidavit has been filed which reveals that the petitioner was deployed as Waterman on the payment of Rs. 30/- per month from time to

time in the need of work and his emoluments was enhanced to Rs. 150/- per month. The deployment was made absolutely in necessity and

requirement of work and when work was not available, the petitioner could not be deployed. According to the respondents, the petitioner being a

daily wager has no right to the post as the daily wagers are deployed on contractual basis on a particular day which commences in the morning and

came to an end in the evening. Their deployments have not been made according to the procedure prescribed for as a regular employee. The

petitioner who has come by back door entry, his engagement and deployment could be dispensed with in the same way. According to the learned

counsel for the petitioner in similar situation two other persons have given benefit. On this aspect, if inadvertently some reliefs have been granted to

some other persons, the same could not be extended to the present petitioner.

4. Non-renewal of contractual employment and dispensation of engagement at any stage without any reason in terms of appointment does not

amount to retrenchment u/s 2(oo) of Industrial Disputes Act as held by the Supreme Court in Escorts Limited v. Presiding Officer, (1997) 11 SCC

521 while following an earlier decision of Supreme Court in M. Venugopal Vs. The Divisional Manager, Life Insurance Corporation of India,

Machilipatnam, Andhra Pradesh and another, . Later on it was considered and followed when similar view was taken by the Supreme Court in

State of Rajasthan and others Vs. Rameshwar Lal Gahlot, , where termination of appointment after expiry of specified period held valid and not

attracting Section 25F of Industrial Disputes Act, 1947 unless the termination was found to be malafide or in colourable exercise of powers.

Similar view was also taken by the Supreme Court in Executive Engineer v. Madhukar Purshottam Kolharkar, (2000) 2 LLJ 1410SC .

5. Undisputedly, the petitioner was a daily wager. The daily wagers have no right to the post in view of Himanshu Kumar Vidyarthi and Others Vs.

State of Bihar and Others, and Sheo Pujan Vs. Deputy Director of Consolidation and Others, because appointment of daily wagers are made by

not complying or observing the procedural formalities in consonance to any rules, regulations or by observing the procedures prescribed for the

recruitment. The engagement of daily wager commences in the morning and comes to an end in the evening of every day. There is a contractual

deployment for every day. It is upto the employer to allow to continue the employment or disengage the daily wager at any time in absence of

work. The daily wager has no right or protection under Article 311 of the Constitution of India. State of Assam and Others Vs. Shri Kanak

Chandra Dutta, ; 1998 LIC 1088 (AP) para 16 (Jagdev v. State of U.P.) and 1999 (82) FLR 76 para 8 & 10 (Channey Lal v. Director Malaria

Research Centre, New Delhi).

6. In Himanshu Kumar Vidyarthi and Others Vs. State of Bihar and Others, the Supreme Court has held that every department of Government can

not be treated as ''Industry'' and dispensation of service of persons engaged on daily wages under the Government department, therefore, is not a

retrenchment. In Himanshu Kumar Vidyarthi (supra) the services of the writ petitioners, who were appointed as daily wagers as Assistant Drivers

and Peon in Cooperative Training Institute under the State Government, were terminated and the contention of the writ petitioners that they were

retrenched from service in violation of provisions of Section 25F of the Industrial Disputes Act, 1947 was rejected by the Supreme Court and it

was held as under:-

Every department of the Government cannot be treated to be industry. When the appointments are regulated by the statutory rules, the concept of

industry to that extent stands excluded. The petitioners were not appointed to the posts in accordance with the rules but were engaged on the basis

of need of the work. They are temporary employees working on daily wages. Their disengagement from service cannot be construed to be a

retrenchment under the Industrial Disputes Act. The concept of retrenchment therefore cannot be stretched to such an extent as to cover these

employees. Since the petitioners are only daily-wage employees and have no right to the posts, their disengagement is not arbitrary.

7. The daily wagers/ muster roll employees can not be regularised unless the posts are in existence or the vacancies are available. To entertain the

claim for regularisation means to provide appointment to a post after regularising the service of an employee. The position of daily wager is entirely

different inasmuch the daily wager holds no post in view of AIR 2003 SC 3382 (State of Haryana and Anr. v. Tilak Raj and Ors.); Madhyamik

Siksha Parishad, U.P. Vs. Anil Kumar Mishra and others etc., ; 1996 (9) SCC 34 , (State of U.P. v. U.P. Madhyamik Shiksha Parishad Shramik

Sangh and Ors.) (para 3 and 4); as well as State of Orissa v. Dipti Malapatr .

8. In M/s. Angile Insulations Vs. M/s. Davy Ashmore India Ltd. and another, , the question regarding regularization of adhoc appointees came up

for consideration before the Supreme Court. It was held that normal rule would be regular appointment through the prescribed agency but

exigency of administration may sometime call for an adhoc and/ or temporary appointment to be made. Such adhoc or temporary appointee, the

Supreme Court held, if allowed to continue for a fairly long span, the authorities must consider his case for regulaization provided he is eligible and

qualified according to the rules and service record and appointment does not run counter to the reservation policy of the State. Direction given by

the High Court in that case for regularization of every adhoc or temporary employees who had been continued for one year was held to be totally

''untenable'' and ''unsustainable''. In the case of Piara Singh (supra) the Court noted that the normal rule is recruitment through the prescribed

agency but due to administrative exigencies, an ad hoc or temporary appointment may be made. In such a situation, this Court held that efforts

should always be made to replace such ad hoc or temporary appointment by regularly selected employees, as early as possible. The temporary

employees also would get liberty to compete along with others for regular selection but if he is not selected, he must give way to the regularly

selected candidates. Appointment of the regularly selected candidate cannot be withheld or kept in abeyance for the sake of such an ad hoc or

temporary employee. Ad hoc or temporary employee should not be replaced by another ad hoc or temporary employee, he must be replaced by

only regularly selected employee. The ad hoc appointment should not be a device to circumvent the rule of reservation.

9. In 1999 (82) F.L.R. 76 (Channey Lal and Ors. v. Director, Malaria Research Centre, New Delhi and Anr.), where the petitioners deployed on

daily wages were orally asked not to come to work even after more than three years of deployment and on their claim for regularisation on the

ground that the writ petitioners have acquired right to be considered for regularisation by virtue of having worked more than 240 days without any

break in a calendar year and they were entitled to the protection of Article 311 of the Constitution, this Court following the decision of Himanshu

Kumar Vidhyarhi v. State of Bihar, 1997 (76) F.L.R. 237 has held that the daily wagers working as a workman deployed in a project does not

hold civil post under the State and have no right to the post, these daily wagers can not be said to work on temporary or permanent basis and are

not entitled to the protection of provisions of Article 311 of the Constitution, and since the daily wagers have no right to the post as such the

concept of retrenchment can not be extended to such daily wage employee and disengagement of such daily wager can not be said to be arbitrary

in view of Himanshu Kumar Vidhyarthi (supra). The disengagement of deployment of daily wager, who is engaged for a day, is not a termination of

service. Since the daily wage labour is engaged only on the basis of a contract lasting for a day and each engagement is a fresh, non-engagement or

disengagement is not held to be arbitrary. In view of Smt. Pushpa Agarwal Vs. Regional Inspectress of Girls Schools and Another, the principle of

retrenchment as provided under Central Industrial Disputes Act and Rules framed thereunder is also attracted in respect of a workman governed

under the U.P. Industrial Disputes Act and the Rules framed thereunder.

10. In State of Assam and Others Vs. Shri Kanak Chandra Dutta, , the Supreme Court (Constitution Bench) has also held that casual labourer is

not holder of civil post.

11. This Court (D.B.) in 1992 A.C.J. 1366 (Zakir Hussain v. Engineer-In-Chief, Irrigation Department, U.P. Lucknow) has held that daily wager

has no right to the post and there must be regular or permanent post and funds must be available for payment of salary and the daily wagers are to

be qualified for appointment to the post and by virtue of only having worked for three years they can not claim regularisation as a matter of right

and the regularisation cannot be made as a thumb of rule, and this Court relegated the matter for adjudication and avail the alternative remedy for

claiming the relief in reference to Section 25F of the Industrial Disputes Act.

12. In State of U.P. Vs. Labour Court, Haldwani and another, , it was held that the engagement of daily wager in the Irrigation Department comes

to an end every evening. Refusal to employ him from a particular day, his disengagement was not under the provision of Section 25F of Industrial

Disputes Act. It was observed in para 6 of the above case as below:-

Employment to government service in the Irrigation Department is regulated by statutory rules. Presently, the respondent No. 2 was not employed

in accordance with the rules. For engaging a person casually on day to day basis the statutory rules are not required to he followed under which the

posts have to he advertised and only the best from the market have to be picked up keeping in view reservation provided from certain classes.

Thus, every eligible person has an opportunity to participate in the recruitment process. This is not so in the case of daily wager in whose case even

regularisation regarding age, medical fitness, character roll etc. are not observed. Therefore, daily and casual workers who are engaged in

disregard of all rules cannot be allowed to enter government service through the back door and the Labour Court cannot be allowed to be used as

a legal means for such back door entry. The anomalous situation that the impugned award creates can be seen from the fact that till before his

alleged retrenchment the respondent No. 2 was on engagement from day today. The impugned award makes him a permanent employee with the

necessary consequence that he would have to be paid salary for all the 365 days as regular employee and the other benefits of regular employment

can also not be denied to him. Thus, the award put him, in as much better position that he was before the alleged retrenchment. Such a result is not

conceived.

13. Since the petitioner was appointed as daily wager and the appointment of the petitioner as daily wager was not made by adopting any

procedure for appointment. The appointment of the petitioner was on consolidated salary till completion of a project and after completion of

project, the work was no available. In absence of work, petitioner can not be said to be deployed. Non-renewal of contractual deployment of the

petitioner is neither illegal nor retrenchment in view of the judgment of the Supreme Court in Escorts Limited v. Presiding Officer, (1997) 11 SCC

521 .

14. I have heard learned counsel for the parties. I find that the petitioner''s service was disengaged for lack of work as the daily wagers have no

right to the post, they have no protection of Article 311 of the Constitution as the same is made by back door entry and given employment each

day on contractual basis and they are not deployed according to any procedure, norms. The services of the daily wagers who had worked

continuously against the existing vacancies, provided the daily wagers are in possession of required qualification of a regular employee, could be

considered in consonance of prevailing Rules of regularisation and in absence of any scheme, Government order, Rules for regularization, their

services could not be considered. In the present case the petitioner is not covered by any Rules of regularization, therefore, this Court could give

no direction as prayed for.

The writ petition is dismissed.