(1999) 03 CAL CK 0003

Calcutta High Court

Case No: M.A.T. No''s. 3764 and 3765 of 1998

Calcutta Tramways Co. (1978) Ltd. and Others		APPELLANT
	Vs	
Ramesh and Others		RESPONDENT

Date of Decision: March 10, 1999

Acts Referred:

- Constitution of India, 1950 - Article 23

Citation: (1999) 2 ILR (Cal) 328 : (1999) 2 LLJ 1173

Hon'ble Judges: Satyabrata Sinha, J; S.N. Bhattacharjee, J

Bench: Division Bench

Advocate: Milan Chandra Bhattacharjee and Debabrata Karan, for the Appellant; Sk. Abu Sufian, for the Respondent

Final Decision: Allowed

Judgement

Satyabrata Sinha, J.

These two appeals are directed against a common judgment dated June 24, 1998 passed by the learned Single Judge of this Court in two writ applications filed by the respondents herein claiming, inter alia, issuance of a writ of mandamus directing the appellants herein to absorb them in permanent service

2. There were 15 petitions in C.O. No. 8686 (W) of 1992 and 13 petitioners in C.O. No. 9998 (W) of 1992. They filed writ applications, inter alia claiming that they although were working in a job which is perennial in nature, they were engaged for work for 89 days, whereafter their services used to be terminated for 15 to 20 days. The writ petitioners have contended that they had been working for 14 to 21 years with the appellant company. Such statements have been made in annexure ''A'' to the writ application.

3. The writ petitioners have themselves annexed to the writ applications various documents to show that they had been employed temporarily for a period of 89

days and as soon as the said date expired, their services had been discharged. Except certain documents of their discharge from service, the writ petitioners had not annexed their appointment letters as also any other document justifying the correctness of the statements made in annexure ''A'' to the writ application. The appellants on the other hand clearly stated:

"(a) Writ petition is not maintainable in as much as the writ petitioners were not engaged in terms of Recruitment Rules and there were no such sanctioned posts they were engaged on no work no pay basis for required period and they have never performed any job anywhere permanently, they were engaged for a particular period after completion of such particular job within such particular period, they were discharged. The discharge was never challenged by them. There is no permanent work to be done by engaging permanent employees, the construction work requiring job are entrusted to the contractors being appointed pursuant to public tender. Instance has been given by the writ petitioners in respect of M/s. D.N. Basu Roy who was entrusted with the job at Bipin Behari Ganguly Street, the said job was entrusted on public advertisement. Different litigations have cropped up with the company with regard to settlement of claim of such contractors and the suit and other connected matter are also pending in the Hon''ble Court.

(b) That the claim if any raised by the writ petitioners fall within the original side jurisdiction of the Hon''ble Court, as such the instant application in appellate side is not maintainable in law.

(c) That joint writ petition is also not maintainable inasmuch as the writ petitioners were engaged for a specific period to do specific job for a period of 89 days and they were engaged in different periods namely 1990, 1991, 1975, 1976, 1988, 1986, 1982, 1981, 1980 and writ petition as framed is not maintainable.

(d) Writ petitioners are guilty of laches and delay and they have come before the Hon''ble Court after long delay and on delay ground above writ petition is liable to be dismissed.

(e) That petitioners had no right to absorption and there were no sanctioned posts and they were not recruited according to Recruitment Rules and they were appointed on no work no pay basis for specific job, for specific time.

(f) They were never engaged as nominees nor excepting one, there was any document for such nomination and nominee system has been abolished from the company since 1991 and there is no appointment in the company on nomination basis. The writ petitioners have not produced any documents that they were even nominated by father and such nomination was accepted by the company excepting one. One writ petitioner cannot be clubbed with other. Moreover such nomination has not been accepted and acted upon by the company. However the same is not subject matter of the writ petition.

(g) Joint writ petition of different persons engaged in different years in respect of different jobs and discharged in different years is not maintainable and is liable to be rejected. There was no perennial nature of work. There was a very temporary need for temporary quantum of job when they were engaged on temporary basis. Each petition is not equally situated.

5. (a) The recruitment of 89 days'' men are made on the basis of necessity of work and discharged after covering 89 days. The work is not of perennial nature as the quantum of labour force varies on the basis of availability of work.

(b) There is no rule that workers engaged on temporary basis are permanently absorbed after retirement of his father.

(c) The quantum of work as assumed is not correct as it depends on availability of fund and other aspects like deposit of money by various other agencies. The contractors are engaged after necessary tender published in the newspapers and such works are not taken up departmentally.

(d) The contractors'' work are being carried out in CTC like any other Government organisation in West Bengal to take up works which shall not have any bearing on financial capability of the organisation.

(e) The breaking up of working spell of temporary workers is not at all artificial and workers are engaged as and when required.

(f) It could not have ascertained that how a person can claim to have assurance from the company for a permanent job when he is engaged on temporary basis. It is absolutely incorrect that the company gave any assurance to the temporary workers for permanent berth in the company when there are no sanctioned posts.

(g) The extension of tram line does not mean extension of total service of the company as the total tram fleet is already reduced from 300 to 250. As such, the extension of tram service will not have any effect on recruitment procedure.

(h) There are no funds to create posts and to provide for any of the writ petitioners. Tram Company is now run by subsidy from the Government. There are no such posts, no such funds, no such provision of recruitment, as such there is no question of absorption"

4. The appellants have further stated that the writ petitioners had ceased to do any work for a long period and there does not exist any necessity for continuation of the writ petitioners. The respondents in the writ petition have also categorically stated that the writ petitioners do not have any legal right to be permanently absorbed. It has further been alleged:

"There is no question of artificial break, inasmuch as everything depends upon necessity of quantum of labour force on specified item of job, when job is not available, no question of retention, occasional job does not require permanent

employees to be appointed while occasional job, as per Government order, can be done and performed through contractor engaged on public advertisement."

The aforementioned statements made in the affidavit in opposition clearly show that a serious disputed question of fact has been raised in the matter.

5. Before the learned trial Judge, it appears, several decisions of the Apex Court, as also this Court had been cited to show that the writ petitioners had no right to be permanently absorbed in service. Despite the same, the learned trial Judge, inter alia, held that social justice demands that the writ petitioners be permanently absorbed. In support of the said contention, reliance has been placed on Rattan Lal and Others Vs. State of Haryana and Others, and Bhagwati Prasad Vs. Delhi State Mineral Development Corporation,

6. Mr. Bhattacharya, learned counsel appearing on behalf of the appellants, inter alia, submitted that the judgment on the face of it suffers from an error of law. According to the learned counsel, when it has categorically been stated in the affidavit in opposition that not only there had been no sanctioned post, but also there had been a ban imposed by the State of West Bengal in the matter of grant of appointment, the learned trial Judge must be held to have committed an error in passing the aforementioned judgment. In support of his contention, reliance has been placed on State of West Bengal and Others Vs. Bibhuti Bhusan De and Others,

7. Mr. Sufian, learned counsel appearing on behalf of the writ petitioners/respondents, on the other hand, sought to take refuge under Article 23 of the Constitution of India, and submitted that the writ petitioners were entitled to minimum wages. According to the learned counsel, only before the writ Court, the appellants had given out that appointments are made through Public Service Commission. It has been submitted that some of the writ petitioners had appeared at the interview, but they were not granted permanent appointments. By way of last refuge, strong reliance has been placed on a letter dated April 11, 1997 issued by Deputy Secretary, Government of West Bengal, Transport Branch addressed to the Chairman cum Managing Director, The Calcutta Tramways Co. Ltd., which is to the following effect: -

"I am directed to refer to your letter No. CMD/L/2/G - 126 and letter No. CMD/L/2/G-127 both dated November 26, 1996 on the subject noted above and request you to furnish two detailed categories reports to this Department in the matter of appointment of 69 and 351 casual workers who were engaged after August 3, 1979 upto December 31, 1991 and after December 31, 1991 respectively in CTC (1978) Ltd., with proper justification for regularisation for consultation with the Labour Department as per Memorandum No. 100-EMP dated March 13, 1996."

The contention of Mr. Sufian, therefore, is that keeping in view the hope and expectation generated in view of the aforementioned letter, the learned Trial Judge cannot be said to have erred in giving direction in the order under appeal.

8. Although, as noticed hereinabove, in the affidavit in opposition, the appellants had clearly stated that appointments had been made in violation of the Recruitment Rules, it has been pointed out by Mr. Sufian that no Recruitment Rules had been placed before the trial Court or before this Court. The question as to whether there exists any Recruitment Rules or not, so far as the appellant company is concerned, is not very material as it stands admitted that appointments are made through Public Service Commission. Even, in the absence of any Recruitment Rules, the appellant being a ''State'' within the meaning of Article 12 of the Constitution of India, is bound to fulfil the conditions laid down under Articles 14 and 16 thereof. In terms of the aforementioned provisions, all citizens of India, subject to any law, are entitled to be considered for appointment. It is not the case of the writ petitioners that prior to their engagement as temporary workmen for a limited duration, namely, for 89 days, any advertisement was issued or names of eligible candidates had been called for from the Employment Exchange. It appears that as and when exigencies arose, they had been given temporary appointments. By reason of grant of temporary appointments, no hope can be said to have generated in the mind of the writ petitioners that they would be permanently absorbed. It is now a well settled principle of law that regularisation or absorption is not a mode of recruitment. An appointment to a permanent service must be made either in terms of the Recruitment Rules or by transfer or by promotion. For the aforementioned purpose, there must exist a vacancy which is to be filled up. If there is no permanent vacancy, or there does not exist any sanctioned post, the question of filling them up in terms of the Recruitment Rules would not arise. It is now also a well settled principle of law that a person cannot be permitted to be appointed through back door and then claim a permanency in services. Reference in this connection may be made to the decision reported in State of U.P. and others Vs. U.P. State Law Officers Association and others, . It is also a well settled principle of law that even in a case where a workman has completed more than 240 days of work, his services, although cannot be terminated without following the provisions laid down u/s 25-F of the Industrial Disputes Act, the same by itself does not create any right in the concerned workman in being permanently absorbed in service. Reference in this connection may be made to Madhyamik Siksha Parishad, U.P. v. Anil Kumar Mishra, reported in (1994 II LLJ 997) (SC). The Apex Court has further held that mere prolonged or continuous service does not ripen into a regular service to claim permanent or substantive status. Reference in this connection may be made to State of Orissa and Another Vs. Dr. Pyari Mohan Misra, . These aspects of the matter has been considered by this Court in Birbhum Zilla Parishad and Ors. v. Nitya Hari Chatterjee and Ors. reported in 100 CWN 748.

9. Yet recently another Division Bench of this Court in West Bengal Board of Primary Education v. State of West Bengal, reported in 1997 (1) CLJ 165 has categorically held taking into consideration various decisions of the Apex Court that regularisation in service is not permissible. In the event, the petitioner contends that there had been

an unfair labour practice and in fact their services had been terminated unfairly, their remedy might have been to raise industrial dispute, but the writ Court cannot convert itself into an industrial Court. This aspect of the matter has also been considered by this Court in a decision reported in 1998 (2) CHN 241. In Sm. Bhagwati Prasad v. Delhi State Mineral Development Corporation, (supra) the question which arose was as to whether in terms of Article 39(d) read with Article 14 of the Constitution of India, the petitioners therein were entitled to equal pay for equal work. In Ratanlal and Ors. v. State of Haryana, (supra) the Apex Court although deprecated the practice of terminating services of ad hoc teacher during summer vacation keeping in view the provisions of Articles 14 and 16 of the Constitution of India it itself directed the State to make appointment as per Rules. Mr. Sufian has also relied upon Gujarat Electricity Board, Thermal Power Station, Ukai Vs. Hind Mazdoor Sabha and Others, . In the said case the Court was considering a matter under Contract Labour (Regulation and Abolition) Act. In the instant case no notification has been issued by the appropriate Government prohibiting the abolition of engagement of the contract labour. In Gujarat Electricity Board, the Apex Court itself has held-

"These decisions in unambiguous terms lay down that after the coming into operation of the Act, the authority to abolish the contract labour is vested exclusively in the appropriate Government which has to take its decision in the matter in accordance with the provisions of Section 10 of the Act. This conclusion has been arrived at in these decisions on the interpretation of Section 10 of the Act. However, it has to be remembered mat the authority to abolish the contract labour u/s 10 of the Act comes into play only where there exists a genuine contract. In other words, if there is no genuine contract and the so called is sham or a camouflage to hide the reality, the said provisions are inapplicable. When, in such circumstances, the concerned workmen raise an industrial dispute for relief that they should be deemed to be the employees of the principal employer, the Court or the industrial adjudicator will have jurisdiction to entertain the dispute and grant the necessary relief. In this connection, we may refer to the following decisions of this Court which were also relied upon by the counsel for the workmen."

The said decision arose out of a reference made in terms of Industrial Disputes Act. The Industrial Tribunal in that case arrived at a finding of fact as regards status of the concerned workmen vis-a-vis contract labour in the light of the notification issued u/s 10 of the Contract Labour (Regulation and Abolition) Act. The said decisions, therefore, are not applicable in the instant case. This aspect of the matter has also been considered by one of us in Raj Kumar Sardar v. Union of India, reported in 1999 (1) CLJ 125.

10. The question of granting relief on the basis of social justice or otherwise to a writ petitioner arises provided the same does not contravene any provision of law or the Constitution of India. No appointment can be made either in violation of the

mandatory provisions of the Recruitment Rules or Articles 14 and 16 of the Constitution of India. As even initially the petitioners could not have been appointed on permanent basis without complying with the principle laid down under Articles 14 and 16 of the Constitution of India, question of issuing a direction by this Court to confirm them in the said post which itself would be violative of the constitutional mandate, in our opinion, would not be justified in law. In the facts and circumstances of this case, Article 23 of the Constitution of India or the provisions of Minimum Wages Act cannot be said to have any application whatsoever. The argument of Mr. Sufian to the aforementioned extent is wholly misconceived as no case has been made and in any event, the relief sought for by the petitioners can be agitated before the appropriate forum constituted under the provisions of the Minimum Wages Act.

11. For the reasons aforementioned, we are of the opinion that the judgment of the learned trial Judge cannot be sustained. The appeals are allowed without any order as to costs.

S.N. Bhattacharjee, J.

I agree.