(2009) 05 DEL CK 0421

Delhi High Court

Case No: Writ Petition (C) No''s. 3321 of 2000

National Textile Corporation Ltd.	APPELLANT
Vs	
The Presiding Officer	RESPONDENT

Date of Decision: May 19, 2009

Acts Referred:

- Constitution of India, 1950 - Article 142, 21, 226, 227, 39
- Industrial Disputes Act, 1947 - Section 2, 25F

Hon'ble Judges: Kailash Gambhir, J

Bench: Single Bench

Advocate: Naveen Sharma, for the Appellant; H.K. Chaturvedi and Anjali Chaturvedi, for the Respondent

Final Decision: Dismissed

Judgement

Kailash Gambhir, J.
By way of this petition filed under Articles 226 & 227 of the Constitution of India, the petitioner seeks issue of an appropriate writ, order or direction to quash order of reference dated 22/8/1986; orders dated 17/5/1994 27/5/1996 and award of the labour court dated 1/9/1999 whereby petitioner was directed to reinstate respondent No. 3 with full backwages.

2. The brief conspectus of the facts as set out in the petition are as under:

The respondent joined the management/petitioner on 18.9.1979 and was doing the job of electrician to the entire satisfaction of the management. He was being paid wages at the rate of Rs. 13.60 per day. The respondent demanded the legal facilities from the petitioner/management but it did not pay any heed towards the demand of the workman. The respondent complained to the Labour Department and the management was called by the Labour Inspector on 18.2.1985 and thereafter when he reported for duty but was not taken on duty and his services were terminated without any rhyme or reason and without payment of any retrenchment

compensation. A demand notice dated 1.3.1985 was sent to the management but no reply was received. The reference was sent to the Labour Court and the impugned award was passed in favour of the respondent workman. Aggrieved with the said award the present petition has been preferred.

3. Mr. Naveen Sharma counsel for the petitioner contended that the award passed by the labour court is illegal and unjustified. He submitted that it is a settled law that the court of first instance should not shut the relevant evidence but make all efforts to see that the parties are given sufficient opportunity to place their evidence on record. The counsel pointed out that in the instant case, management witness Sh. Jagdish Prasad Goel, was under cross examination and his cross-examination was deferred for production of records at the request of respondent No. 3 but his evidence could not be concluded as presiding officer had relinquished the charge and no presiding officer was appointed. The counsel averred that thereafter, the said witness appeared but due to lawyers strike he could not be cross examined and in the meantime the witness retired from the service and thus, could not be produced before the court. The counsel maintained that since the records had to be produced by the witness under cross-examination, therefore, the order passed by the respondent No. 1 closing the evidence of the petitioner management and thereafter refusing to open the case on an application made by the petitioner are illegal, against settled principles of law and thus, are liable to be set aside. The counsel urged that the inferences drawn by the labour Court due to non-production of the records holding that respondent No. 3 workman had not abandoned his job after 18/2/1985 by believing the case put up by respondent No. 3 that he was not permitted to join the work thereafter is perverse and against the records. The counsel contended that the observations made in this regard by the respondent No. 1 in orders dated 17/5/1994 and 27/5/1996 are against the record, and the settled law and procedure, and the petitioner ought to have given further opportunity to produce its evidence in support of the case and in the absence of the said opportunity being given the said orders have resulted in miscarriage of justice and are liable to be set aside. The counsel submitted that the relevant extracts of the attendance roll for the month of January 1985 shows that respondent No. 3 came for work till 24/1/1985 and absented from work thereafter. The counsel urged that the entire case of respondent No. 3 that his services were terminated and he was not permitted to join work after 18/2/1985 is false and no relief could have been granted to respondent No. 3. The counsel maintained that the award is vague and has been made without any application of mind as there is no reference as to on which post respondent No. 3 was working and from which post he was allegedly terminated and on which post he must be reinstated. The counsel averred that the relief of reinstatement with backwages with continuity of service awarded by the learned tribunal has been granted mechanically and without appreciating the facts and circumstances of the case. The counsel urged that tribunal did not consider the abandonment of job by respondent No. 3 and the work being carried out by the said

respondent after leaving the job. The Court also did not consider whether any post of electrician existed against which respondent No. 3 could be accommodated or whether the said workman had necessary qualifications required for appointment on such post and mechanically granted relief of reinstatement with backwages and continuity of services. In this regard the counsel relied on the judgment of the Apex Court in Hindustan Steels Ltd., Rourkela Vs. A.K. Roy and Others, ; H.M.T. Limited Vs. Labour Court, Ernakulam and Others, . The counsel also contended that the respondent No. 3 workman was admittedly engaged as a daily wager and was neither regularized nor made permanent, therefore, in view of the decision of the Apex Court in Secretary, State of Karnataka and Others Vs. Umadevi and Others, , a daily wager has no entitlement for being regularized or to be re-instated in service.

4. Per contra, Mr. H.K. Chaturvedi, counsel for the respondent contended that the contentions raised by counsel for the petitioner are devoid of any merits. The counsel urged that in labour law unlike service law there is no distinction between a temporary employee and a permanent employee, which fact is further made clear from the definition of workman as defined in Section 2(s) of the I.D. Act. In this regard the counsel relied on the decision of this Court in Delhi Cantonment Board Vs. Central Govt. Industrial Tribunal and Others, . The counsel submitted that if the workman is illegally terminated then he is entitled to reinstatement and continuity in service with full backwages. In this regard the counsel relied on decisions in

1. Hindustan Steel Ltd. Vs. The Presiding Officer, Labour Court, Orissa and Others, .

2. Delhi Cloth and General Mills Ltd. Vs. Shambhu Nath Mukherji and Others,

3. Hindustan Tin Works Pvt. Ltd. Vs. The Employees of Hindustan Tin Works Pvt. Ltd. and Others, .

4. Avon Service (Production Agencies) Pvt. Ltd. v. Industrial Tribunal (1979) 3 SCR 45.

5. Gujarat Steel Tubes Ltd. and Others Vs. Gujarat Steel Tubes Mazdoor Sabha and Others, .

6. Surendra Kumar Verma and Others Vs. Central Government Industrial Tribunal-Cum-Labour Court, New Delhi and Another, .

7. Mohan Lal Vs. Management of Bharat Electronics Ltd., .

8. L. Robert D''souza Vs. Executive Engineer, Southern Railway and Another, .

9. Management of Delhi Transport Corporation New Delhi v. Ram Kumar and Anr. 1982 Lab. I.C. 1378.

10. Hari Mohan Rastogi Vs. Labour Court and Another, .

11. Management of Karnataka State Road Transport Corporation Bangalore etc. v. M. Boraiah and Anr. Etc. 1984 SLJ (SC 142).

12. H.D. Singh Vs. Reserve Bank of India and Others, .

13. O.P. Bhandari Vs. Indian Tourism Development Corpn. Ltd. and Others, .

14. Nicks (India) Tools v. Ram Surat and Anr. 2004 SCC (L&S) 1801

15. Bank of Baroda Vs. Ghemarbhai Harjibhai Rabari, .

16. R.M. Yellati v. The Assistant Executive Engineer 2005 IX A.D. (S.C.) 216.

17. Sonepat Cooperative Sugar Mills Ltd. Vs. Rakesh Kumar, .

18. Allahabad Jal Sansthan Vs. Daya Shankar Rai and Another, .

19. Delhi Cantonment Board Vs. Central Govt. Industrial Tribunal and Others, .

20. Sriram Industrial Enterprises Ltd. Vs. Mahak Singh and Others, .

The counsel maintained that the question of regularization is different from the question of reinstatement and continuity in service with full backwages and the same is not denied by the Apex Court in Uma Devis case (supra) and counsel relied on paras 42-46 of the said judgment.

42. The argument that the right to life protected by Article 21 of the Constitution would include the right to employment cannot also be accepted at this juncture. The law is dynamic and our Constitution is a living document. May be at some future point of time, the right to employment can also be brought in under the concept of right to life or even included as a fundamental right. The new statute is perhaps a beginning. As things now stand, the acceptance of such a plea at the instance of the employees before us would lead to the consequence of depriving a large number of other aspirants of an opportunity to compete for the post or employment. Their right to employment, if it is a part of right to life, would stand denuded by the preferring of those who have got in casually or those who have come through the backdoor. The obligation cast on the State under Article 39(a) of the Constitution is to ensure that all citizens equally have the right to adequate means of livelihood. It will be more consistent with that policy if the courts recognise that an appointment to a post in government service or in the service of its instrumentalities, can only be by way of a proper selection in the manner recognised by the relevant legislation in the context of the relevant provisions of the Constitution. In the name of individualising justice, it is also not possible to shut our eyes to the constitutional scheme and the right of the numerous as against the few who are before the court. The directive principles of State policy have also to be reconciled with the rights available to the citizen under Part III of the Constitution and the obligation of the State to one and all and not to a particular group of citizens. We, therefore, overrule the argument based on Article 21 of the Constitution.

43. Normally, what is sought for by such temporary employees when they approach the court, is the issue of a writ of mandamus directing the employer, the State or its

instrumentalities, to absorb them in permanent service or to allow them to continue. In this context, the question arises whether a mandamus could be issued in favour of such persons. At this juncture, it will be proper to refer to the decision of the Constitution Bench of this Court in Rai Shivendra Bahadur (Dr.) v. Governing Body of the Nalanda College34. That case arose out of a refusal to promote the writ petitioner therein as the Principal of a college. This Court held that in order that a mandamus may issue to compel the authorities to do something, it must be shown that the statute imposes a legal duty on the authority and the aggrieved party had a legal right under the statute or rule to enforce it. This classical position continues and a mandamus could not be issued in favour of the employees directing the Government to make them permanent since the employees cannot show that they have an enforceable legal right to be permanently absorbed or that the State has a legal duty to make them permanent.

44. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in S.V. Narayanappa111, R.N. Nanjundappa212 and B.N. Nagarajan8 and referred to in para 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of the courts or of tribunals. The question of regularisation of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases abovereferred to and in the light of this judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularise as a one-time measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of the courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date. We also clarify that regularisation, if any already made, but not sub judice, need not be reopened based on this judgment, but there should be no further bypassing of the constitutional requirement and regularising or making permanent, those not duly appointed as per the constitutional scheme.

45. It is also clarified that those decisions which run counter to the principle settled in this decision, or in which directions running counter to what we have held herein, will stand denuded of their status as precedents.

46. In cases relating to service in the Commercial Taxes Department, the High Court has directed that those engaged on daily wages, be paid wages equal to the salary and allowances that are being paid to the regular employees of their cadre in government service, with effect from the dates from which they were respectively appointed. The objection taken was to the direction for payment from the dates of engagement. We find that the High Court had clearly gone wrong in directing that

these employees be paid salary equal to the salary and allowances that are being paid to the regular employees of their cadre in government service, with effect from the dates from which they were respectively engaged or appointed. It was not open to the High Court to impose such an obligation on the State when the very question before the High Court in the case was whether these employees were entitled to have equal pay for equal work so called and were entitled to any other benefit. They had also been engaged in the teeth of directions not to do so. We are, therefore, of the view that, at best, the Division Bench of the High Court should have directed that wages equal to the salary that is being paid to regular employees be paid to these daily-wage employees with effect from the date of its judgment. Hence, that part of the direction of the Division Bench is modified and it is directed that these daily-wage earners be paid wages equal to the salary at the lowest grade of employees of their cadre in the Commercial Taxes Department in government service, from the date of the judgment of the Division Bench of the High Court. Since, they are only daily-wage earners, there would be no question of other allowances being paid to them. In view of our conclusion, that the courts are not expected to issue directions for making such persons permanent in service, we set aside that part of the direction of the High Court directing the Government to consider their cases for regularisation. We also notice that the High Court has not adverted to the aspect as to whether it was regularisation or it was giving permanency that was being directed by the High Court. In such a situation, the direction in that regard will stand deleted and the appeals filed by the State would stand allowed to that extent. If sanctioned posts are vacant (they are said to be vacant) the State will take immediate steps for filling those posts by a regular process of selection. But when regular recruitment is undertaken, the respondents in CAs Nos. 3595-612 and those in the Commercial Taxes Department similarly situated, will be allowed to compete, waiving the age restriction imposed for the recruitment and giving some weightage for their having been engaged for work in the Department for a significant period of time. That would be the extent of the exercise of power by this Court under Article 142 of the Constitution to do justice to them.

5. I have heard learned Counsel for the parties and perused the record.

6. The main aim of the statute of Industrial Disputes Act as is evident from its preamble and various provisions contained therein is to regulate and harmonise relationship between employers and employees for maintaining industrial peace and social harmony. The provisions of the Act deserve interpretation keeping in view interests of both the employer, who has put his capital and expertise into the industry and the workers who by their labour equally contribute to the growth of the industry. The Act under consideration has a historical background of industrial revolution inspired by the philosophy of Karl Marx. It is a piece of social legislation. Opposed to the traditional industrial culture of open competition or laissez faire, the present structure of industrial law is an outcome of long-term agitation and struggle

of the working class for participation on equal footing with the employers in industries for its growth and profits. In interpreting, therefore, the industrial law, which aims at promoting social justice, interests both of employers, employees and in a democratic society, most importantly the interest of society i.e. people at large, who are the ultimate beneficiaries of the industrial activities, have to be kept in view.

7. As regards the issue that since the management witness under cross-examination retired from his service and was not brought before court and for this the tribunal ought to have given opportunity to the management for producing the relevant records and to give additional evidence, I do not find that there is any merit in this contention. The tribunal has in unequivocal terms mentioned in the order dated 17/5/1994 that the management was given 15 opportunities to produce the relevant record but it failed to avail the said opportunities and in such circumstances it was left with no option but to close the management evidence and discharge the witness. The reason given by the counsel that management witness Sh. Jagdish Prasad Goel, was under cross examination and he alone could have brought the records is unsatisfactory. If the said witness had retired then why did not the management authorise another person to produce the relevant record before the court. The management was rightly not allowed to produce additional evidence at a later stage when it had been given 15 opportunities for the same purpose but it remained negligent and callous in its approach in pursuing the case. Furthermore, the petitioner being a government undertaking must be having a legal department and therefore, the petitioner could have produced some other witness since the exigency for appointment of another authorized person had risen due to retirement of the earlier representative. Be that as it may, the said reasoning of retirement of the witness under cross-examination had not been given before the labour court as is manifest from the record and the same has been raked up at this stage itself. I do not find that the tribunal erred in this regard in closing the evidence and denying the opportunity to lead additional evidence. Therefore, the said contention of the counsel for the petitioner is without any merit.

8. As regards the contention of the counsel for the petitioner that the award is vague and has been made without any application of mind as there is no reference as to on which post respondent No. 3 was working from which he was allegedly terminated and on which post he must be reinstated, I feel that the same is also devoid of any merit. In the award dated 1/9/1999, the tribunal has in unequivocal terms mentioned that the workman had produced and proved Exs. WW1/1 to 7, certificates issued by the management as regards his being working as an electrician. Thus, it is manifest that the tribunal made an award directing reinstatement of the workman on the post of an electrician.

9. As regards the contention of the counsel for the petitioner that the respondent No. 3 workman was admittedly engaged as a daily wager and was neither regularized nor made permanent and, therefore, in view of the decision of the Apex

Court in Secretary, State of Karnataka and Others Vs. Umadevi and Others, , a daily wager has no entitlement for being regularized or for being re-instated in services by the order of the labour court. This argument of the counsel for the petitioner also falls face down. It is no more res integra that in labour law unlike service law there is no distinction between a temporary employee and a permanent employee. In this regard this Court observed as under in Delhi Cantonment Board Vs. Central Govt. Industrial Tribunal and Others, :

5. In service law there is an important difference between a temporary employee and a permanent employee. A permanent employee has a right to the post whereas a temporary employee does not, vide State of U.P. v. Kaushal Kishore Shukla. However, there is no such distinction in industrial law. It may be noted that the Industrial Disputes Act makes no distinction between a permanent employee and a temporary employee (whether a probationer, casual, daily wage or adhoc employee).

6. The definition of ''workman'' in Section 2 of the Industrial Disputes Act states that a workman means:

any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person-

(i) who is subject to the Air Force Act, 1950 (45) of 1950), or the Army employee of a person, or

(ii) who is employed in the police service or as an officer or other employee of a person, or

(iii) who is employed mainly in a managerial or administrative capacity, or

(iv) who being employed in a supervisory capacity, draws wages exceedings one thousand six hundred rupees per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature.

7. A perusal of the above definition shows that there is no distinction in industrial law between a permanent employee and a temporary employee. As long as the person is employed to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, he is a workman under the Industrial Disputes Act, and will get the benefits of that Act.

8. Thus, it has been held in Chief Engineer (Irrigation) Chepauk, Madras v. N. Natesan (1973) II LLJ 446 (447) (Mad.) and in Management of Crompton Engineering Co.(Madras) Private Ltd. v. Presiding Officer, Additional Labour Court (1974) I LLJ 459 (Mad.) that even a temporary employee falls within the definition of workman. Similarly in Elumalai Vs. Management of Simplex Concrete Piles (India) Ltd. and Another, and Tapan Kumar Jena v. General Manager, Calcutta Telephones (1981) Lab.I.C. (NOC) 68 (Cal.) it was held that a casual employee is also a workman. In other words, every person employed in an industry, irrespective of whether he is temporary, permanent or a probationer is a workman vide Hutchiah Vs. Karnataka State Road Transport Corporation, , provided he is doing the kind of work mentioned in Section 2(s).

9. Since the respondents were workmen under the Industrial Disputes Act, Section 25F of the Act had to be complied with if they had put in 240 days of service in the year prior to the date of termination of service. Respondents had admittedly put in over 240 days of service. Hence the termination of their service was illegal, since compliance of Section 25F is a condition precedent to the termination of service vide The State of Bombay and Others Vs. The Hospital Mazdoor Sabha and Others, , National Iron and Steel Co. Ltd. and Others Vs. The State of West Bengal and Another, , Mohanlal v. Management of Bharat Electronics Ltd. 1981 LIC 806 (815) SC, Avon Services Production Agencies (P) Ltd. Vs. Industrial Tribunal, Haryana and Others, . etc.

10. In the light of the above discussions, clearly, the direction of the Labour Court directing reinstatement with continuity of service and full back wages does not suffer from any infirmity and is not hit by the decision of the Apex Court in Uma Devis case (Supra).

11. In view of the foregoing discussion, there is no merit in the present petition. The same is hereby dismissed.