

(2001) 10 AP CK 0039

In the Andhra Pradesh High Court

Case No : Writ Appeal No's. 115 and 157 of 2001

A.P. State Electricity Board and Others

APPELLANT

Vs

P. Sarveswara Rao and Others

RESPONDENT

Date of Decision : 08-10-2001

Acts Referred:

Contract Labour (Regulation and Abolition) Act, 1970 — Section 10

Citation : (2001) 10 AP CK 0039

Hon'ble Judges : S.B. Sinha, C.J.;V.V.S. Rao, J

Bench : Division Bench

Advocate : K. Sesharajyam, for the Appellant; V. Venkataramana, for the Respondent

Final Decision : Allowed

Judgement

S.B. Sinha, C.J.—These two appeals being interconnected are directed against a judgment and order dated 20.7.2000 passed by a learned single Judge of this Court.

2. The learned single Judge having regard to the contention raised on behalf of the petitioner-respondents herein to the effect that those contract labourers working in the Board for Railway Siding of the Vijayawada Thermal Power Station had been absorbed, directed absorption of the petitioners in accordance with the rules.

3. It is not in dispute that a notification in G.O. Ms. No. 41 Labour, Employment, Training and Factories (Lab.II) Department, dated 23.9.1996 has been issued by the appropriate Government in exercise of its power u/s 10(1) of the Contract Labour (Regulation and Abolition) Act, 1970 (for short "the Act") abolishing employment of contract labour in relation to 33 categories. The contention of the appellants is that the job of the petitioners does not come within the purview of B.P.Ms.No.37, dated 18.5.1997 as they are not covered by the categories mentioned in G.O.Ms.No.41. This gives rise to a disputed question of fact. In Air

India Statutory Corporation, etc. Vs. United Labour Union and others [overruled], it has been held that when a notification was issued u/s 10(1) of the Act, the concerned workmen have a right to be regularised. The said decision has since been overruled by a five Judge bench of the apex court in SAIL v NATIONAL UNION WATER FRONT WORKERS 2001 (1) ALT 366 This Court in Writ Appeal No.964 of 2001 and also in Writ Appeal No. 547 of 2001, dated 6.6.2001 held that a writ court cannot convert itself into an industrial court. The right of a contract labour to be regularised arises out of a notification issued u/s 10(1) of the Act. In the event there exists a dispute as to whether the cases of the petitioners fall within the purview thereof or not must be determined by a Tribunal where evidence, both oral and documentary, can be led.

4. Where there exists a disputed question as to whether the concerned workman comes within the purview of the notification or whether the contention of the said contract labour is that the principal employer is in effect and substance is his employer, an industrial dispute should be raised. An industrial dispute is to be raised where a finding has to be arrived at on the basis of the material which may be brought on record to show that there exists a relationship of employer and employee between the principal employer and the contractor although a contractor has been appointed by way of camouflage or a smoke and screen. In such a situation, it may be permissible for the labour court to pierce the veil and find out as to who is the actual employer. In the instant case a dispute has arisen as to whether the job of the petitioners falls within the prohibited category or not. Such a disputed question of fact could not have been adjudicated upon in a writ proceedings. A dispute has also been raised by the appellants herein to the effect that the job of employees who were working in the Vijayawada railway siding is not similar. From the perusal of the judgment passed by the learned single Judge it appears that the matter has been considered only on the ground of discrimination without arriving at a finding of fact as to whether in fact the persons in Vijayawada railway siding are similarly situate to that of the petitioners. It is now trite that regularisation is not a mode of recruitment and a right to maintain a writ petition claiming regularisation must arise out of a statute or a statutory rule or a scheme having the force of a statute.

5. In SECRETARY, A.P. SOCIAL WELFARE RESIDENTIAL EDUCATIONAL INSTITUTIONS SOCIETY v P. VENKATA KUMARI, 2001 (2) CHN 31 a Division Bench of this Court has clearly held that regularisation is not a mode of appointment and in absence of any statutory rules the part-time employees, ad hoc employees and NMRs did not derive any legal right whatsoever to continue in service and no such direction can be issued inasmuch as for the purpose of obtaining a writ of or in the nature of mandamus the employee must establish existence of a legal right in himself and a corresponding legal duty in the employer.

6. Recently in State of Haryana and others Vs. Piara Singh and others etc. etc., , it was held:

.... An appointment on regular post must be made in terms of the Recruitment Rules having regard to the principles adumbrated under Articles 14 and 16 of the Constitution of India. In the instant case, as indicated hereinbefore, neither any appointment has been made nor any averment has been made by the writ petitioner that such appointment has been made in accordance with the Recruitment Rules or in consonance with the principle laid down under Articles 14 and 16 of the Constitution of India. Such appointment, therefore, cannot be encouraged. Furthermore, a finding of fact has been arrived at by the competent authority that the writ petitioners were appointed on contractual basis and that too for a period of 2 years at one point of time.

7. Even in *STATE OF HARYANA v. PIARA SINGH* 2001 (3) SLR 245 (Cal) the apex court has clearly held that when an employee is appointed on ad hoc basis the same itself is a pointer to the effect that no regular post is available. The said principle should be applied also in relation to NMR. It has been held in the said case thus:

Ordinarily speaking, the creation and abolition of a post is the prerogative of the Executive. It is the Executive again that lays down the conditions of service subject, of course, to a law made by the appropriate legislature. This power to prescribe the conditions of service can be exercised either by making Rules under the proviso to Art 309 of the Constitution or (in the absence of such Rules) by issuing Rules/instructions in exercise of its executive power. The court comes into the picture only to ensure observance of fundamental rights, statutory provisions, Rules and other instructions, if any, governing the conditions of service. The main concern of the court in such matters is to ensure the Rule of law and to see that the executive acts fairly and gives a fair deal to its employees consistent with the requirements of Articles 14 and 16.

8. In *West Bengal Essential Commodities Supply Corporation Ltd. Vs. Md. Sarif*, it has been held:

An employee must be appointed upon compliance of the provisions of the Recruitment Rules. When a particular status is conferred upon an employee, the same cannot be changed unless there exists any statutory provision therefore.

A regular appointment can only be made in terms of the Recruitment Rules and subject to the candidate's possessing the requisite qualification and also subject to existence of any sanctioned post.

9. An employee is borne in the cadre only when he is appointed upon fulfilling the requirement therefore in a sanctioned post.

10. Referring to *W.B. ESSENTIAL COMMODITIES SUPPLY CORPORATION v MD SARIF* 2000 (2) CLT 141, *DIRECTOR OF PUBLIC INSTRUCTIONS, W.B. v DR KRISHNA PRASAD GHOSH & ANR* 2000 LIC 255 : 1999 (5) SLR 807 (Cal) and *SWAPAN KUMAR BANERJEE v UNION OF INDIA* 2001 (3) SLR 148 (Cal) , it has been held in *UNION OF INDIA v REGISTRAR*, 2001 (5) Scale 626:

The question as to whether the petitioners had fulfilled the essential conditions for regularisation or not is essentially a question of fact. In law, nobody is entitled to claim regularisation unless there exists any statutory provision in this regard. Only because a person has worked for more than 240 days, the same by itself would not be a ground for direction to regularize the service of the concerned employee.

11. For the reasons aforementioned, we are of the opinion that the remedy of the respondent-writ petitioners would be to raise an appropriate dispute and to ventilate their grievance before an appropriate court. Accordingly the Writ Appeals are allowed. There shall be no order as to costs.