

(2003) 06 OHC CK 0034

In the Orissa High Court

Case No : O.J.C. No's. 8414, 8420, 9613, 11266 and 12538 of 2000

Bijay Kumar Moharana and Others

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 17-06-2003

Acts Referred:

Industrial Disputes Act, 1947 — Section 10, 2, 25G

Citation : (2004) 1 LLJ 692 : (2003) 2 OLR 158

Hon'ble Judges : P.K. Tripathy, J

Bench : Single Bench

Advocate : I. Mohanty, S.K. Jee, Manoj Mishra, P.K. Das, D.K. Patnaik, L. Mishra, P.K. Nanda and B. Mishra, for the Appellant; Additional Government Advocate, for the Respondent

Judgement

P.K. Tripathy, J.—The above noted writ applications have been filed against the order of retrenchment as indicated in detail hereunder. Since the retrenched employees were working under the different Irrigation divisions and they have projected almost identical / common case as against the order of retrenchment, therefore, they have advanced similar argument. Thus, the cases are considered analogously and this judgment shall abide the result in all the aforesaid cases.

2. Forty two petitioners in O.J.C. No. 8414 of 2001 have challenged to the order of retrenchment, Annexure-3, i.e., Letter No. 2092-2133 dated June 29, 2001, signed by the Executive Engineer, Balasore Irrigation Division, Balasore (opposite party No. 3). It is mentioned in Annexure-3 that as per the decision of the Government of Orissa in the Department of Water Resources in their Letter No. 20222 dated May 25, 2001, the junior-most N. M. R. staff were to be retrenched following Section 25-G of the Industrial Disputes Act, 1947 (In short, "the Act") with effect from June 30, 2001, as their services were no more required. They were directed to receive their dues from the different divisions. It is also stated in Annexure-3 that in case of need of man-power in the same category in future the retrenched candidate will be given priority over the fresh recruits. It is

alleged in the writ applications that the principle of "last come first go" was not followed by the Authorities inasmuch as the petitioner No. 1 having been engaged as N.M.R. since June 1, 1985 was ordered to be retrenched whereas one Bhaskar Bhoi, who was engaged in the year 1990 has been retained. Petitioners have also stated that after completion of a project the surplus N.M.R. can be terminated or retrenched but since they are working in a working division, that principle should not be adopted. They have also stated that petitioners are working since 1985. Above all, petitioners' defence against the retrenchment is the report Annexure-2 issued by opposite party No. 3 to opposite party No. 2 regarding requirement of staff and there being no surplus. That letter was sent by opposite party No. 3 to opposite party No. 2 on September 25, 2000. It is noted in annexure-2 (Information part) that the Division maintained 30 Kms. of capital embankment, 60.50 Kms. of flood embankment, 123.95 Kms. of saline embankment, 317.95 Kms. of T.H. embankment and 250 Kms. of O.C.C. embankment, in total, a length of 782.50 Kms. It is further noted in that report that as per the norms of the yardstick there are still vacancies of 63 numbers of Khalasis, 16 numbers of Work-Sarkar, 2 numbers of Jeep-Drivers and 1 each of truck-helper and Chowkidar, Accordingly, including the petitioner as the N.M.R. employee, opposite party No. 3 on September 21, 2000 reported that there was no surplus staff. It is alleged that notwithstanding the aforesaid report of opposite party No. 3, the Government, as per the letter of the Addl. Secretary to Government to the Engineer-in-Chief, Water Resources, Bhubaneswar, declared 1894 numbers as surplus work-charged employees and 2692 as N.M.R. workers having no work for them. Accordingly. Government decision to make retrenchment of that number of persons was intimated with a direction to complete retrenchment by June 30, 2001.

3. In his counter affidavit, opposite party No. 3 stated that petitioners have placed the fact in a distorted manner and put veil on truth inasmuch as the report, Annexure-2, referred to by the petitioners is not totally and absolutely factually correct. He has explained that the Executive Engineer took a Division as a unit and indicated about 83 vacancies in different posts. But subsequently the Circle was taken as a unit and on calculation it was found that there was number of surplus employees working in the Circle and accordingly termination notices were issued. So far as it relates to the principle of "last come first go", he has replied that the principle of last come first go was followed with respect to each category of workers working in the Circle and the number of surplus staff from each individual category was ordered to be retrenched by following the principle of "last come first go" and since petitioner No. 1 Bhaskar Bhoi does not belong to the same category, therefore, the comparison is not proper. He has further stated that review of the cases of surplus staff was made and the decision was taken as per Annexure-A. Paragraphs 4 to 6 of Annexure-A, in substance reveals that the Gradation List/Muster-Roll on the basis of seniority / date of engagement of the N.M.Rs. / job contract employees was not systematically prepared. Nineteen out of them had approached the Orissa Administrative Tribunal, Cuttack Bench in

O.A. No. 51/(e) of 1995. On April 17, 1999, in Lok Adalat their case was disposed of with a direction to consider their case in accordance with Finance Department Resolution No. 22764 dated May 15, 1997 and till then their services were not to be terminated. The list of N.M.Rs. maintained in the Circle is partially defective, therefore, it was to be properly worked out on the basis of seniority in the Circle after verification of records from the Section Offices, Sub-divisional offices and Offices of the Executive Engineers and that is to take some time. Opposite party No. 2 in that letter in the last paragraph needed assistance of surplus staff with the apprehension of mischief being committed by them if they would be retrenched at the commencement of the rainy season and when that zone is flood-prone area. That letter, as noted, was addressed to the Engineer-in-Chief on July 5, 2001.

4. In O.J.C. No. 8420 of 2001, 38 petitioners have challenged to the order of retrenchment passed by Executive Engineer, Mayurbhanj Irrigation Division, Baripada (opposite party No. 6) as against the order of retrenchment. Annexure-9 series, according to which notice of retrenchment with effect from June 30, 2001 was given in accordance with Section 25-F of the Industrial Disputes Act. Some of the petitioners in this case were the parties to the proceeding in the above noted O.A. No. 51 (C) of 1995 which was disposed of by the Tribunal on April 17, 1999.

5. In O.J.C. No.8538 of 2001, the sole petitioner is a work-charged employee and he has also put forth his grievance that the same retrenchment order, Annexure-9 by which Executive Engineer, Mayurbhanj Irrigation Division, Baripada (opp. party No. 6) has issued the order of retrenchment with effect from June 30, 2001.

6. In O.J.C. No. 9613 of 2001, the sole petitioner has stated himself to be a N.M.R. employee and challenges to the same order of retrenchment which has been annexed as Annexure-8 in this writ application.

7. In O.J.C. No. 11266 of 2001 eight N.M.R. employees have challenged to the order of retrenchment passed by Executive Engineer, Mayurbhanj irrigation Division, Baripada (opp. party No. 4) with effect from June 30, 2001 and that order has been annexed as Annexure-8. It appears from Annexure- 10 that as against eight persons the order of retrenchment was withdrawn on June 30, 2001 and on that date order, Annexure-11, dated June 30, 2001 was passed with respect to 12 Nos. of N.M.Rs. which includes the petitioners and Annexure-12 was passed on July 30, 2001 with respect to petitioner No. 1 and they have challenged to the said orders of retrenchment.

8. No separate counter affidavit has been filed by the opposite party members so far as the aforesaid four O.J.Cs. are concerned. Learned counsel for the State adopted the same pleas as in the counter affidavits in the two other cases and petitioners have no objection to that.

9. In O.J.C. No. 12538 of 2000, all total 104 N.M.R. employees have challenged

to the order of retrenchment. Annexure-7, in which 163 persons have been shown as surplus staff. On the same plea they have prayed to quash Annexure-7 and not to declare them as surplus staff. They have also claimed for their continuance and regularisation in accordance with the Finance Department Resolution No. 22764, dated May 15, 1997. In the counter affidavit filed on behalf of opposite party No. 6, while challenging to the maintainability of the writ application, similar defence has been taken by the State regarding calculation of the surplus staff of the Circle and not of individual Divisions and justifying the action of the Government in declaring such persons as surplus staff and passing orders for retrenchment.

10. When the stand of the parties remains at that, petitioners insisted for their continuance until regularisation and accordingly to quash the order of retrenchment. Learned counsel for the State of Orissa put forward maintainability of the O.J.Cs. as a seal against any remedy and financial crisis of the State and no capacity to bear the burden as the other circumstance to. protect the order of retrenchment.

11. In course of hearing, when the Government have projected about deficiency of fund and surplus of the N.M.Rs., it has not stated through any of the opposite party; members as to why such surplus employment was given. This Court was given to understand that no process of recruitment was undertaken while giving employment to those N.M.Rs./work-charged employees and in such established Divisions under the Circle employment was provided without following any norms or acceptable methods of recruitment. The Court can take judicial notice of acute unemployment problem prevailing in the Country and the State of Orissa is no exception to that. While thousands and thousands of unemployed youth are in search of employment and when rules, regulations, circulars, etc, are in plenty to regulate fair competition, grant of equal opportunity to all eligible persons to compete in the selection process and when principle of reservation in service of different categories of persons is prevalent the unconstitutional method of getting an entry into a service either as daily wager, N.M.Rs. or work-charged employees through back door, to the information and knowledge of the State, sooner or later, is an unfortunate state of affair. The State which should be a model employer through its officials are providing employment from the back door. It may be giving employment to some at the cost of depriving many such persons to get employment even for temporary purposes though they deserve it in a better manner, be it a case of necessity, qualification, capability or rights are concerned. Thus, in a case of such employment the Rules / Regulations/Circulars/ Instructions and Guidelines, etc. issued by the Government have been rendered dead letters of law by its own officials. Therefore it is high time that the State Government should think either to implement its rules, regulations and circulars, etc. in letter and spirit and the authorities violating it should not only be proceeded against by taking appropriate disciplinary action but also the State Government should come forward with appropriate law, if so needed, to provide substantive punishment to erring officials / appointing authorities, so that

transfer from the post or retirement from service will not come to their rescue in cases of breach of rules, regulations, etc. relating to any kind of employment. Even if employment is provided, as D.L.r., N.M.R., etc. in violation of rules, regulations and instructions, etc. of the Government, yet the Government countenanced the same either by resorting to retrenchment or regularisation. When the State and the Country is governed by people's representatives, people's interest should not be sacrificed nor it should be ignored by the Government. Democracy and discipline are supposed to be co-existing and one is not present when the other is absent. This Court feels that at least now the Government should feel the point of saturation in the matter to take a positive stand to avoid back door entry into service and stopping of any kind of employment without providing fair opportunity of competition to all eligible persons.

12. In the case at hand, report of the Superintending Engineer vide his letter bearing No. 6103/WE, dated July 5, 2001, indicates that when the State Government decided to consider the surplus staff not in individual Divisions but Circlewise, it should have come up with a comprehensive gradation list providing opportunity to the concerned N.M.Rs. / work charged employees to have their say and to produce relevant documents relating to their dates of employment, if there is any inaccuracy in that and to finalise that gradation list even circlewise and thereafter to take steps relating to retrenchment. The Government, as a matter of principle, has adopted "last come first go" as the basis for retrenchment and there is no wrong in that because, that is the only accepted norm which can render justice in the case of retrenchment. But, without finalising the gradation list Government should not have taken hasty decision for retrenchment of any particular N.M.R. or group of N.M.Rs./work charged employees. Therefore, the matter should be reviewed in that respect before passing any order of retrenchment.

13. Once a person comes within the meaning of the term "workman" as defined in Section 2(s) of the Industrial Disputes Act, any matter relating to his employment, regularisation, service conditions or retrenchment should be taken up in the forum of Industrial Tribunal. When such a remedy is available to the workman the Writ Court should be slow to act because of availability of alternative remedy in the case at hand, when there is mass retrenchment, petitioners could have negotiated with the Government or could have raised the dispute. As per the settled principle of law, when such a dispute is raised option does not lie with the State Government to make or not to make a reference u/s 10 or 12 of the Act, as the case may be, but the State Government is bound to make a reference for proper appreciation of facts and law relating to order of retrenchment by the Tribunal constituted under the Act. Therefore, in view of that position, it will not be proper for this Court to make a fact finding inquiry when the relevant facts between the parties on certain relevant contention are in dispute.

14. By virtue of order of stay, order of retrenchment have been stayed. As back as in the first week of July, 2001 the Superintending Engineer in paragraphs 4, 5 and 6 of his letter dated July 5, 2001 had reported to the E.I.C. regarding finalisation of the gradation list of the Circle relating to N.M.R. employees.

15. The State Government runs the State as well as makes payment to all the persons employed/engaged, be it permanent or temporary, and also undertakes developmental work with the help of resources from the state exchequer. Therefore, Government has to consider the work-load as well as the paying capacity, i.e., to bear the burden of employment and to make a balance between the same. For example, even if a particular project, office or department for smooth functioning needs 100 employees, but if the State Government has no paying capacity beyond 160% of the required strength, then it has to minimise its work if possible and to maintain the man-power accordingly by reducing the strength. There cannot be an imposition on the State Government to spend money for the N.M.Rs./work-charged employees at the cost of any other thing required for the society and the State exchequer is not meant for only distribution of salary and emoluments but also for the development of the State in every field. This Court as well cannot overlook or ignore that obligation of the State.

16. In the aforesaid facts and circumstances, therefore, this Court disposes of the writ applications with the following directions and observations.

(i) The gradation list in the Circle if completed in the meantime, that may be circulated to each of the smallest unit in the Circle within a period of one week and any objection by any N.M.R etc. relating to the date of employment be furnished by such person if he disputes about the same or any other person who has a stake over him, within a period of one week thereafter. For the said purpose the list of each category with the initial date of employment and the period in which such persons were in employment be circulated to each smallest unit for displaying at the office notice board or for circulation among the employees whichever is convenient to the Authorities. The writ petitioners in the above noted writ applications may also apply before the immediate authority for getting such information within a period of one week.

(ii) If any such objection is received, that shall be forwarded to the Superintending Engineer through competent Authority with the relevant observation of the concerned officers under whom such N.M.R./ workcharged employees were working and receiving payment. The Junior Engineers, Sub-Divisional Officers, Executive Engineers shall attend to that job if necessary by verifying records and to submit a consolidated list by the Executive Engineers within a period of two weeks after the expiry of the aforesaid period of two weeks. In other words, within a period of four weeks from the date of this judgment the aforesaid process should be completed and all objections and recommendations should reach on the table of the Superintending Engineer;

(iii) Within a week thereafter the Superintending Engineer in consultation with the concerned Executive Engineers shall finalise the list in accordance with the seniority of the employees in each category and the number of persons who are found to be excess or surplus. In that respect there shall not be any outside advice or interference by any other officers, be it subordinate to the Executive Engineer or superior to the Superintending Engineer;

(iv) The Superintending Engineer shall make his report available to the Engineer-in-Chief in detail and the Engineer-in-Chief along with the Commissioner-cum-Secretary to Government of Orissa in the concerned Departments shall process the matter at the Government level and to complete the same within a period of two weeks. In that respect the list which shall be published or the decision which the State shall take, shall be final relating to retrenchment, if any, and at that stage the principle of "last come first go" shall be scrupulously followed by the opposite parties;

(v) Any person/N.M.R/work-charged employee if shall feel aggrieved by that order, then it is open to him/them to approach the appropriate authority in accordance with law.

(vi) In the matter relating to retrenchment the State Government shall adhere to the relevant provisions of the Industrial Disputes Act.

(vii) Till the aforesaid exercise is completed by the O.P. members the impugned order of retrenchment shall remain stayed.

17. If the opposite party members or any of the authorities under the State Government shall not be able to complete the aforesaid exercise within the stipulated time, then they may take their own time for that purpose subject to approval and control of the Government. But, till the aforesaid exercise is completed the aforesaid impugned order of retrenchment shall remain suspended and thereafter the order of retrenchment, if any, passed by the Government shall supersede the impugned order of retrenchment.

18. It is made clear that this Court has expressed no opinion relating to the stand of the Government for retrenchment of surplus staff, but all that this Court has desired to express that people should not be defrauded by giving back door employment and to be kicked out from the Job after employment of 10 to 12 years on the ground of surplusage when they have no scope of getting further employment because of age bar or otherwise. Therefore, to protect its subject, responsibility of the Government is to think about the welfare of the people and therefore not to put them to undue harassment. Similarly, petitioners should bear in mind that their entry into service or employment as N.M.R. /work-charged employee without regular process of recruitment has no force of selection made in regular process of recruitment. Be that as it may, the aforesaid manner of reprocessing the matter for reconsideration of the order of retrenchment will cater to the need of fair play.

19. All the writ applications are disposed of accordingly. A free copy of this judgment be handed over to learned Additional Government Advocate in course of the day so I that he shall impart appropriate advice to the Government for timely action as per the aforesaid observation and directions.