

(2002) 03 DEL CK 0044
In the Delhi High Court
Case No : CWP 2431 of 2001

Commissioner of Excise and Entertainment
Vs

APPELLANT

Ved Prakash and Others

RESPONDENT

Date of Decision : 15-03-2002

Acts Referred:

Citation : (2002) 63 DRJ 781 : (2002) 3 LLJ 940

Hon'ble Judges : S.B. Sinha, C.J.; A.K. Sikri, J

Bench : Division Bench

Advocate : Avnish Ahlawat, for the Appellant; V. Shekhar, S. Madhavan and S. Ganesh, for the Respondent

Final Decision : Allowed

Judgement

S.B. Sinha, C.J.—An order dated 12th December 2000 passed by the Central Administrative Tribunal in OA No. 933/99 allowing the Original Application filed by the respondents herein is in question in this petition.

2. The basic fact of the matter is not in dispute. The respondents had been working as Safaiwala in the Office of the Commissioner of Excise and Entertainment.

3. However, M/s Evershine House Keeping Services was engaged as contractor for doing the said job. According to the respondents, they had been working since 1995-96 continuously without break and thus they are entitled for temporary status having completed 240 days of service in a calendar year. The case of the petitioners, however, on the other hand was that the said respondents had never been appointed by the Commissioner of Excise and Entertainment and in fact, they were the employees of the said contractor.

4. The learned Tribunal, without deciding the question as to whether the respondents were employed by the petitioners or not, held that as the work in question is perennial in nature and not seasonal, their services were bound to be regularized. It was held:

"Thus, it is clear that the nature of work that was entrusted to a contractor is perennial and not seasonal. Section 12 of the Act specifically prohibits/abolishes the perennial nature of work to be entrusted to the contractors. It is not shown that the contractors are licensed contractor u/s 12 of the Act. In Secretary, H.S.E.B Vs. Suresh and Others etc. etc., , the Supreme Court, considering the scope of the Act, particularly Section 12 held that entrustment to a contractor of the work of perennial nature was not permissible, unless the contractor was a licensed u/s 12 of the Act. Since it is not shown that the contractor was a licensed contractor, it has to be held that the entrustment of the work of sanitation, etc. to the contractor is illegal and is liable to be set aside."

5. Regularisation, as is well-known is not a mode of recruitment. The respondents could not have been appointed in a civil post except in compliance of the provisions of the Recruitment Rules as also Article 14 and 16 of the Constitution of India. The respondents themselves contended that they would not be entitled to even raise an industrial dispute for the purpose of showing that they were in fact appointed by the petitioners herein and not by the contractors. A relationship of employer and employee would come into being by reason of entering into a contract of service which must be arrived at having regard to the provisions contained in Articles 14 and 16 of the Constitution as also upon compliance of the procedure contained in the Recruitment Rules. The learned Tribunal, in our opinion, is, thus, not correct in holding that only because the job in question is perennial in nature and nothing has been shown that the contractor is registered one, the services of the respondents should be directed to be regularized.

6. The respondents herein filed the afore-mentioned Original Application with a specific plea that they had been appointed by the petitioners. Such a question could not have been determined by the Tribunal. In any event, the Tribunal has not determined the said question.

7. In the absence of any finding that the respondents had been employed by the petitioner herein, the question of issuing any direction for their regularisation in service so as to make them holders of civil posts, in our opinion, would be contrary to Article 309 of the Constitution of India.

8. The question raised in this application is no longer re integra. In Steel Authority of India Ltd. and Others etc. etc. Vs. National Union Water Front Workers and Others etc. etc., , the apex court reversed its earlier decision in Air India Statutory Corporation, etc. Vs. United Labour Union and others [overruled], holding:

"71. By definition the term "contract labour" is a species of workman. A workman shall be so deemed when he is hired in or in connection with the work of an establishment by or through a contractor, with or without the knowledge of the principal employer. A workman may be hired: (1) in an establishment by the principal employer or by his agent with or without the knowledge of the principal

employer; or (2) in connection with the work of an establishment by the principal employer through a contractor or by a contractor with or without the knowledge of the principal employer. Where a workman is hired in or in connection with the work of an establishment by the principal employer through a contractor, he merely acts as an agent so there will be master-and-servant relationship between the principal employer and the workman. But where a workman is hired in or in connection with the work of an establishment by a contractor, either because he has undertaken to produce a given result for the establishment or because he supplies workmen for any work of the establishment, a question might arise whether the contractor is a mere camouflage as in *Hussainbhai, Calicut Vs. The Alath Factory Thezhilali Union, Kozhikode and Others*, and in *Indian Petrochemicals Corp'n. Ltd. and Another Vs. Shramik Sena and Others*, ; if the answer is in the affirmative, the workman will be in fact an employee of the principal employer; but if the answer is in the negative, the workman will be a contract labour."

9. In view of the decision of the apex court in *Steel Authority of India (supra)*, the impugned judgment cannot be sustained.

10. Reliance on the decision of the apex court in *Secretary, H.S.E.B Vs. Suresh and Others etc. etc.*, is misplaced. That case arose out of an award passed by the industrial court wherein it had categorically been held as of fact that the purported appointment of the workman through a contractor was merely a cloak or facade. The apex court held that in a situation of that nature, the industrial court is entitled to pierce the veil of the contract with a view to finding out who the real employer is.

11. Even such a finding of fact had not been arrived at in the instant case.

12. In any event, there is no reason that only because an employee has worked for 240 days in a year, he would be entitled to be regularized in his service. This aspect of the matter has been considered by the apex court in *Madhyamik Siksha Parishad, U.P. Vs. Anil Kumar Mishra and others etc.*, wherein the apex court has held as follows:

"4. We are unable to uphold the order of the High Court. There were no sanctioned posts in existence to which they could be said to have been appointed. The assignment was an ad hoc one which anticipated spent itself out. it is difficult to envisage for them, the status of workmen on the analogy of the provisions of Industrial Disputes Act, 1947, importing the incidents of completion of 240 day"s work. The legal consequences that flow from work for that duration under the Industrial Disputes Act, 1947 are entirely different from what, by way of implication, is attributed to present situation by way of analogy. The completion of 240 days" work does not, under that law import the right to regularisation. It merely imposes certain obligation on the employer at the time of termination of the service. It is not appropriate to import and apply that analogy, in an extended or enlarged form here."

13. The learned counsel of the respondent however, has placed strong reliance upon a decision of the apex court in Gujarat Agricultural University Vs. Rathod Labhu Bechar and Others, . Therein again the question which arose for consideration was as to where the services of an employee who had been working for a long time should be regularized or not.

14. In the instant case, the said decision also cannot have an application in view of the fact that the relationship of an employer and employee is itself denied.

15. We may, however, point out that the apex court in a large number of decisions has clearly held that in the absence of any statute or statutory rules, services of an employee cannot be directed to be regularized. This aspect of the matter has been considered by this court in Prem Kumar v. UOI, in CWP 3056/1996 decided on 21st December 2001, wherein it was held:

Recently a Division Bench of the Andhra Pradesh High Court, of which one of us was a Member, in Superintending Engineer, HCC-I, CPWD, Hyd. Vs. Tekmalla Raja Sekhar and Others, noticed various decisions of different High Courts and held as under:

14. In Sohan and Another Vs. State of Haryana and Another, . a Division Bench of this Court has clearly held that regularization 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 petitioner must establish existence of a legal right in himself and a corresponding legal duty in the respondents.

15. It was further held in no uncertain terms that the Court cannot direct creation of more posts.

16. Recently in State of West Bengal v. Krishna Kumar Majumdar, 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 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.

17. Even in State of Haryana v. Piara Singh 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 Article 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 act fairly and gives a fair deal to its employees consistent with the requirements of Articles 14 and 16.

18. We may notice that it has clearly been held that even the definition of worker under the Factories Act can only be read for the said purposes only. It is for the appropriate Government to decide whether employment of contract labour should be prohibited or only regulated. The Court or the Tribunal has no say therein. [See *Sujan Benerjee v. Union of India*, *Ranjit Kumar Chanda v. State of West Bengal*] In *Union of India v. Shri Rajinder Singh* 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.

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

19. Referring to *W.B. Essential Commodities Supply Corporation v. M.D. Sarif, Director of Public Instructions W.B. v. Dr. Krishna Prasad Ghosh and Anr. and Swapan Kumar Benerjee v. Union of India*, it has been held in *Union of India v. Registrar*.

The question as to whether the petitioners had fulfilled the essential conditions for regularization or not, is essentially a question of fact. In law, nobody is entitled to claim regularization unless there exists a 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.

The decisions of Madhya Pradesh, High Court, Rajasthan High Court and the decree passed by a civil court, do not create a binding precedent. In those cases, the parties preceded on the basis as to whether the employee should have been confirmed upon expiry of the period of probation. The question of confirmation of an employee on the expiry of the period of probation or within a reasonable period arises, provided an appointment is made on a regular basis. When the

appointment itself is illegal the same was a nullity and thus the question of confirmation of their services on expiry of the period of probation would not arise. We, within utmost respect do not subscribe to the said view. It may be that SLP against the said decisions have been dismissed by the Supreme Court but by reason thereof, no binding precedent has been created. No right, far less, an enforceable right is accrued to the concerned employees which is enforceable by the High Court in exercise of its jurisdiction under Article 226 of the Constitution of India. It is trite that a writ of mandamus can be issued only when the petitioners plead and establish legal right in themselves and a corresponding duty in the respondents.

16. For the reasons afore-mentioned, the impugned judgment cannot be sustained which is set aside accordingly. The writ petition is, thus, allowed but in view of the facts and circumstances of this case, there shall be no orders as to costs.