

(1996) 12 OHC CK 0028

In the Orissa High Court

Case No : O.J.C. No"s. 112 and 176 of 1994

Dhananjaya Sahoo and Another and Madhusudan Pani APPELLANT

Vs

Managing Director, Orissa Construction Corporation Ltd. and RESPONDENT
Another

Date of Decision : 18-12-1996

Acts Referred:

Constitution of India, 1950 — Article 14, 16

Citation : (1997) 83 CLT 282 : (1997) 1 OLR 175

Hon'ble Judges : S.N. Phukan, C.J.;A. Pasayat, J

Bench : Division Bench

Advocate : C.A.R. Dora and V. Narasingh, for the Appellant; L. Pangari, N.C. Patnaik, S. Jena, S. Das and S.S. Sukla, for the Respondent

Judgement

S.N. Phukan, C.J.—By this common judgment and order, we propose to dispose of the aforesaid two writ petitions as the facts and the points of law involved in both of them are the same.

2. Petitioner No. 1 in OJC 112/94 was appointed as a mate on NMR basis in the year 1981. He continued as such up to the year 1987. Thereafter, he was retrenched from service and was again appointed in the said post on 2-4-1991. Similarly, petitioner No. 2 worked as a Pump Operator under the opposite party-Corporation from 5-10-1981 to 8-6-1985 and then as Helper Grade- I from 22-7-1985 to 14-6-1987 on NMR basis. He was retrenched and was again appointed as Helper. According to the petitioners, though their counterparts in the regular establishment of the opposite party-Corporation were getting higher emoluments, they were denied the benefit. The petitioners have claimed equal pay and allowances as are available to their counterparts in the regular establishment. They have also made a prayer for regularisation of their services.

3. Petitioner in OJC 176/94 was working as Helper Grade-II from 4-10-1931 to 15-6-1986. He was retrenched and again re-appointed in the same capacity on 1-3-1991. His grievance is similar, so also the prayer for relief.

4. The claim of the petitioners is based on a decision of the apex Court in *Managing Director, Orissa Construction Corpn. and Others Vs. Shyam Sundar Jena and Others* by which the Division Bench decision of this Court was approved with modification. This Court had allowed the writ petition of the workmen in the following terms:

"We would accordingly direct that the petitioners shall be paid salary and allowances as are paid to their counterparts in regular establishment with effect from the date they were respectively employed. If in the meanwhile, the scale of pay has been revised, they would also be entitled to the same revised scale of pay. Having considered the contention raised in the counter-affidavit, we also adopt the direction given in the aforesaid decision of this Court. We direct the Corporation to take appropriate steps to regularise the services of such of the petitioners who are in continuous service of the Corporation for more than 5 years."

The above direction was upheld by the apex Court with the clarification that the expression "counter-parts in regular establishment" means; the project where the workman are/were working. The direction of this Court regarding regularisation was modified to the extent that the workman who had put in five years of service would continue in, service of the management and their services would not be dispensed with. Further, the management would regularise them as and -when regular vacancies would be available. The workmen may be deputed to work in any of the projects under the control of the management where vacancies are available. It was further directed by the apex Court that the workmen who had served management for more than five years and whose services in the the meanwhile have been terminated shall be taken back in service with continuity of service.

5. In the counter-affidavit filed on behalf of the Orissa Construction Corporation Ltd., it has been stated that the Corporation is a contractor's establishment and it has to compete with other contractors/private builders in open tender. Therefore, it has to keep its establishment cost low and it cannot afford to have large number of employees unless they have adequate work-load. According to the opposite party-Corporation, the project works undertaken by the Corporation are of seasonal nature and, therefore, there is no need to absorb all the employees permanently. In view of the deteriorating financial condition, the Corporation in May/June, 1995 was constrained to terminate the services of about 200 temporary employees including 29. engineers. The Corporation had also requested the State Government to take back 68 engineering staff starting from the rank of Assistant Manager to General Manager. Therefore, it is not possible to absorb the petitioners and regularise their service, According to the Corporation, the services of the petitioners were terminated by following the provisions of Section 25F of the Industrial Disputes Act, 1947. As the petitioners are no more in employment, the question of regularisation of their services does not arise.-

As regards the petitioners in OJC 112/94, it has been stated that there is no post of Mate, Helper and semi-skilled worker existing under the regular establishment of the Corporation. These posts are required in the projects which are purely of temporary nature. Therefore, there is no justification to create such posts on regular basis. The Petitioners were employed as semi-skilled mate workers in Talcher Super Thermal Power Project and a list of regular staff position has been annexed as Annexure-B/1 to the counter-affidavit filed in that case. Regarding the petitioner in OJC 176/94, it has been stated in the counter-affidavit filed therein that the petitioner was employed as Helper Grade-II on NMR basis for execution of Talcher Super Thermal Power Project, C. W. System, Part-II Civil Works at Kaniha, and he was retrenched of the work completion the project.

6. We have heard learned counsel for the parties.

7. Learned counsel for the petitioners have placed reliance on a decision of this Court in Prabhu Sankar Babu Vs. State of Orissa and Others, . On perusal of the judgment of the Division Bench of this Court, we find that in that case no counter-affidavit was filed. Without knowing the case of the opposite parties therein, we are of the view that this decision cannot be made applicable to the case in hand. From the decision of the apex Court in Shyam Sundar Jena and others (supra), we do not find what were the facts of that case. Therefore, the above-mentioned decision cannot apply. Moreover, no ratio was laid down by the apex Court in this regard in the said decision.

8. In OJC 2342/93, which writ petition was filed by ten employees who were working on NMR basis under the Corporation, the Division Bench of this Court by order dated 23-6-1994 rejected the prayer of the petitioners for grant of "equal pay for equal work" and also for regularisation. It was clearly held that the work of the Corporation is of seasonal nature. Therefore, the Court refused to direct regular absorption in absence of permanent posts. A SLP was filed before the apex Court against the above order which was registered as SLP (Civil) No. 1711/95. By order dated 2-5-1996, the apex Court dismissed the petition by upholding the decision of this Court.

9. Reference has also been made to the order dated 14-7-1994 passed by a Division Bench of this Court in OJC 2089/94, which writ petition was filed by an employee of the Corporation against the order of his retrenchment from service. By the said order, the writ petition was dismissed.

10. Another writ petition registered as OJC 111/86 was filed by a retrenched employee of the Corporation and it was disposed of on 10-5-1993. We find from the judgment that the petitioner had rendered service for more than six years. But the petition was dismissed after considering various decisions of this Court as well as the apex Court. Of course, the Division Bench held that if in future, vacancy occurs under the Corporation to which the petitioner can be appointed having requisite qualification, then the Corporation may consider the case of the petitioner for being so appointed.

11. Reference may also be made to the order of this Court dated 25-7-1994 passed in another writ petition, namely, OJC 241/94. That petition was filed by three employees of the Corporation praying for regularisation of their services. It was, however, dismissed with the observation that the matter depends on a proper inquiry regarding availability of work, post in regular service, seniority position of the petitioners, etc. It was, however, observed that if the question of regularisation of service is taken up by the management, the case of the petitioners will be considered in accordance with the principles relevant for the purpose.

12. In *State of Haryana and others Vs. Piara Singh and others etc. etc.*, the apex Court, inter alia, held that ordinarily speaking, the creation and abolition of a post is the prerogative of the Executive and it is the Executive again that lays down the conditions of service, subject, of course, to a law made by the appropriate Legislature. According to the apex Court, the Court comes into the picture only to ensure observance of the fundamental rights, statutory provisions, rules and other instructions, if any, governing the conditions of service and 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 Article 14 and 16 of the Constitution. It was further held that while giving direction for regularisation, the Court must act with due care and caution and must first ascertain the relevant facts and must be cognisant of the several situations and eventualities that may arise on account of such directions. According to the apex Court, a practical and pragmatic view has to be taken inasmuch as every such direction not only tells upon the public exchequer but also has the effect of increasing the cadre strength of a particular service, class or category.

13. In *State of U. P. v. U. P. Madhyamik Shiksha Parishad Shramik Sangh* : AIR 1996 SC 108, the apex Court held that unless there are regular posts, direction for payment of equal wages on par with regular employees or regularisation of the services of daily wages employees cannot be given.

14. In *Surendra Kumar Vs. Phoolchand (dead) through and another*, it was held that the principle of equal pay for equal work is attracted only when two sets of employees are similarly situated and are discharging similar functions but yet are getting different scales of pay.

15. Situated thus, the legal position is very clear that it is purely the prerogative of the Executive to create posts considering the requirement and also to lay down the conditions of service. The role of the Court comes into play to ensure that rule of law is observed and the executive does not act arbitrarily. While issuing direction for regularisation, the Court has to act with due care and caution and unless posts are there, such direction cannot be given. While given such a direction, the Court must also ascertain all relevant facts and take into consideration the consequences that may follow on account of giving such direction. A practical and pragmatic approach must be made inasmuch as every

direction for regularisation would involve expenditure from public exchequer and would also increase the number of posts.

16. Coming to the case in hand, the opposite party-Corporation has specifically stated that the financial condition of the Corporation is deteriorating. It is a contractor's establishment and as it has to compete with others, it has to keep the establishment cost low. It has also been stated that in view of the above position, it is not possible to absorb the petitioners and regularise their services. As stated above, specific averments have been made that the petitioners were employed purely on temporary basis and their services were terminated by following the provisions of Section 25F of the Industrial Disputes Act, 1947.

17. In view of the above factual position, if a direction is given to regularise the services of the petitioners, it would amount to directing the opposite-party-Corporation to create posts and thereby increase its establishment costs. No rejoinder has been filed to the counter-affidavit to deny the above facts, and as the petitioners have been retrenched from service by following due procedure as laid down in Section 25F of the Industrial Disputes Act, 1947, the action of the opposite party-Corporation cannot be faulted. However, as they have been retrenched by invoking the provisions of Section 25F, they are entitled to get the benefit of Section 25H of the said Act.

18. For the reasons stated above, we dismiss the writ petitions and also vacate the interim orders. But we issue the following directions for giving the benefits of Section 25H of the Industrial Disputes Act, 1947, to the petitioners and other similarly situated persons:

(1) The opposite party-Corporation shall maintain a list of temporary NMR employees engaged in a particular project in a Division according to seniority, and if the work of the project is completed their services can be terminated in accordance with law and on the rule of "first come, last go" basis.

(2) A list of retrenched employees according to their seniority shall be maintained Divisionwise and it shall be displayed in the notice board of the Divisional and other offices of the Corporation.

(3) Whenever any new project is taken up by the Corporation, opportunity shall be given to the retrenched workmen and such retrenched workmen who offer themselves for re-employment shall be appointed and no outsiders shall be engaged in such project by ignoring the claim of retrenched employees.

A. Pasayat, J.

19. I agree.