

(1998) 07 PAT CK 0043

In the Patna High Court

Case No : L.P.A. No's. 289 and 316 of 1997 and M.J.C. No. 126 of 1998

Engineering Products (India) Ltd. and Others

APPELLANT

Vs

Dandapani Maharana and Others

RESPONDENT

Date of Decision : 02-07-1998

Acts Referred:

Industrial Disputes Act, 1947 — Section 2, 25L, 25O, 25O(1)

Citation : (1998) 3 BLJR 2005 : (1999) 81 FLR 89 : (1999) 2 LLJ 584 : (1998) 3 PLJR 760

Hon'ble Judges : R.A. Sharma, J;A.K. Prasad, J

Bench : Division Bench

Advocate : Raj Biral and Tapen Sen, in LPA No. 289/1997 and P.K. Sinha, S. Bose, S. Ranjan and V.K. Sinha, in LPA No. 316/1997 and MJC No. 126/1998, for the Appellant; P.K. Sinha, S. Bose, S. Ranjan and V.K. Sinha, in LPA. No. 289/1997, for the Respondent

Final Decision : Dismissed

Judgement

R.A. Sharma, J.—Six persons (hereinafter to be called as the workmen) who were working in a project/scheme at Jamshedpur belonging to the Government of India undertaking known as the Engineering Projects (India) Limited (hereinafter referred to as the EPL) filed C.W.J.C. No. 1123/96 (R) before this Court seeking declaration that the continuous employment of employees described as Project duration employees and posting from project to project and location to location treating them as temporary employees for a considerable period is ultra vires Articles 14 16 and 21 of the Constitution as the same amounts to unfair labour practice. Prayer for appropriate direction to the respondents to regularise the services of the workmen was also made.

2. In sum and substance the relief claimed in the said writ petition was for a direction upon the respondents to regularise the services of the workmen. After the writ petition was filed services of four of the workmen i.e., writ petitioners Nos. 1,2,5 and 6 were terminated vide order dated June 29, 1996, issued by the

Project Incharge of the EPL due to tapering of office activities at TISCO COBP site. Thereafter, the workmen made an application for amendment of the writ petition challenging the termination of their services. This amendment was allowed by the learned Single Judge. The workmen moved the second amendment application also containing allegation/averments on the basis of which the above order of termination of the services of the four workmen was challenged. This application was also allowed.

3. The said writ petition has been allowed by the learned Single Judge on May 13, 1997 quashing the order of termination of the services of four workmen on the ground that the procedure as laid down u/s 250 of the Industrial Disputes Act (hereinafter referred to as the Act) was not followed by the EPL, while terminating their services on account of closure of project/unit in which they were working. However, the learned Single Judge declined to issue any direction to the respondent to regularise the services of the workmen and merely gave liberty to them to represent their case in this regard departmentally. Being aggrieved the EPL has filed LPANo. 289 of 1997 (R) challenging that part of the judgment of the learned Single Judge whereby the order of termination of the services of four workmen was quashed. The workmen have filed L.P.A. No. 316 of 1997 (R) against the other part of the judgment by which their prayer for direction to regularise their services was declined. The workmen have also filed a contempt case, being M.J.C. No. 126 of 1998 (R) against the EPL and their officials for non-compliance of the judgment of the learned Single Judge.

4. Both the appeals having been filed against the same judgment of the learned Single Judge, they have been heard together and are being disposed of by this common judgment.

As the non-compliance of the same judgment of the learned Single Judge, against which these two appeals have been filed, has led to filing of the contempt petition it has also been heard along with the appeals and is being decided by the same common judgment.

We have heard the learned counsel for the parties.

5. The learned counsel for the EPL at the threshold raised a preliminary objection regarding the maintainability of the writ petition filed by the workmen on the ground of alternative remedy of reference u/s 0 of the Act. On merit the learned counsel EPL has raised the following points.

(i) Chapter V-B of the Act is not applicable to the unit of the EPL at Jamshedpur where the workmen are working because it is > neither an industrial establishment as defined in Section 25L nor is it having hundred or more workmen on an average per working day for preceding 12 months at the relevant time

(ii) The EPL's unit at Jamshedpur was an undertaking set up "for other construction work" and, therefore, in view of the proviso to Section 250 of the

Act, the order of termination of the services of the workmen cannot be declared as illegal on the ground of non-compliance of the provision of Section 25O because the said provision is not applicable to such an undertaking.

(iii) As the workmen were appointed on contract basis for fixed term/duration of the project, the termination of their services in terms of contract of service cannot be said to be retrenchment because their case is covered by Section 2(oo) (bb) of the Act on account of which procedure laid down in Section 25O is not required to be followed.

(iv) The project at Jamshedpur has been closed and the workmen cannot be employed over there.

(v) Section 25O of the Act is ultra vires.

The learned counsel for the workmen has disputed the above submissions. He has also placed reliance upon a decision of Division Bench of the Andhra Pradesh High Court, wherein the order of termination of service of workmen working in another scheme/unit of the EPL was quashed for non-compliance of Section 25O. Against the said decision it is admitted that the SLP has been dismissed.

Before taking up the questions about the merit of the case raised by the parties it is necessary to deal with the preliminary question raised by the learned counsel for the EPL regarding the maintainability of the writ petition filed by the workmen on the ground of alternative remedy. It is well settled that if there is an efficacious and adequate alternative remedy available to a person it is not open to him to file a writ petition straightaway challenging the order he is aggrieved by passing the alternative remedy. It is also well settled that remedy of reference under the Act is an efficacious and adequate alternative remedy for the workman who wants to challenge the order of employer on the ground of violation of the provisions of the Act. The learned counsel for the EPL in this connection has cited number of reported decisions, but it is not necessary to refer to all of them because the position is well settled. It is sufficient for the purpose of the present case to cite only two cases, one of the Full Bench of this Court and the other of the Apex Court.

In *Dinesh Prasad and Others Vs. State of Bihar and Others*, the following questions were referred to the Full Bench:

(i) Whether the statutory reference of an industrial dispute u/s 10 of the Industrial Disputes Act, is an adequate and efficacious legal remedy for the enforcement of the rights created under the said Act?

(ii) If so, whether such an alternative remedy and similar remedies under the Act should be exhausted before seeking the relief in the writ jurisdiction under Article 226 of the Constitution?

Both these questions were answered in affirmative by the Full Bench holding that the statutory reference of an industrial dispute under the Act is an adequate and

efficacious legal remedy for the enforcement of the rights/obligations created under the Act and the person aggrieved must exhaust the remedies provided under the Act before seeking relief in the writ jurisdiction unless the exceptional circumstances cry out for interference by the writ Court at the very threshold.

The Supreme Court in the Rajasthan State Road Transport Corporation and Another Vs. Krishna Kant and Others, has in this regard laid down as under:

Where, however, the dispute involves recognition, observance or enforcement of any of the rights or obligations created by the Industrial Disputes Act, the only remedy is to approach the forum created by the said Act.

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The policy of law emerging from Industrial Disputes Act and its sister enactments is to provide an alternative dispute resolution mechanism to the workmen, a mechanism which is speedy, inexpensive, informal and unencumbered by the plethora of procedural laws and appeals upon appeals and revision applicable to Civil Courts. Indeed, the powers of the Court and Tribunals under the Industrial Disputes Act are far more extensive in the sense that they can grant such relief as they think appropriate in the circumstances for putting an end to an industrial dispute.

In the instant case the workmen wanted enforcement of the rights/obligations created by Section 250 of the Act and therefore, their writ petition was not liable to be entertained because they had an adequate and efficacious alternative remedy of reference under the Act. No exceptional circumstances warranting interference by this Court under Article 226 of the Constitution at the very threshold and thereby short circuiting and circumventing statutory provision of the Act have been made out. But this preliminary objection does not appear to have been raised before the learned Single Judge. There is no mention/discussion about it in the judgment. Mr. Tapan Sen, the learned counsel for the EPL has stated at the bar that this point was raised before the learned single Judge and in his support he placed before us written "Note" containing the points and the case law in support thereof, which he filed before the learned Judge at the time of hearing of the writ petition. The said note does indicate that such a preliminary objection was raised. However, Mr. P.K. Sinha, learned counsel for the workmen has categorically stated that no such point was raised before the learned Single Judge on behalf of the EPL and it is for this reason that the learned Single Judge does not refer to and deal with it in his judgment.

6. Be that as it may it is not necessary for this Court to decide the question as to whether the preliminary objection mentioned hereinbefore was raised on behalf of the EPL before the learned Single Judge because the writ petition was entertained and has been decided on merit. Therefore, now the question is as to whether at the appellate stage writ should be dismissed on the ground of

alternative remedy when the learned Single Judge has entertained and decided it on merit. It is well settled that once the writ petition has been admitted/entertained it is not liable to be dismissed at later stage on the ground of alternative remedy. In the instant case as mentioned hereinabove, the writ petition was not only entertained but was also allowed on merit. In view of the facts and circumstances of the case, we are of the considered view that it will not be proper to dismiss the writ petition on the ground of alternative remedy at the appellate stage. The preliminary objection is accordingly rejected.

7. The first two submissions raised by the learned counsel for the EPL were not raised before the learned Single Judge. There is no discussion about them in the impugned judgment. The written "NOTE" containing the points and the case law in support thereof filed by the learned counsel for the petitioner before the learned Single Judge also does not refer to these points/submissionss. The said "NOTE" which is part of the record of the writ petition having been placed immediately after the photostat copy of the judgment of the learned Single Judge, is reproduced below -

"C.W.J.C. No. 1123 of 1996 (R)

Dandapani Maharana and Ors. v. EPL (Ltd.) and Ors.

Authorities cited by Respondents

(1) Where the Government Scheme under which the appointments were made was itself temporary, no order for regularisation of temporary service of such appointees can be made.

1988 (3) SCC 354

(2) Daily wagers engaged by the State Government on muster roll basis in Central Scheme and paid out of funds provided by the Central Government - Service of such daily wagers terminated on closure of the scheme - In such circumstances. HELD the High Court was not right in giving a direction to regularise them or to continue them in other places - TEMPORARY, TERMINATION - CONTINUANCE IN SERVICE

1996 (1) SCC 773

(3) Daily wages employees - Regular posts neither created nor existing - Direction for their regularisation cannot be allowed.

State of U.P. and others Vs. U.P. Madhyamik Shiksha Parishad Shramik Sangh and another, .

(4) Appointment on daily wage basis - is not appointment to post according to Rules -Termination of daily wagers due to coming to end of project employing them - Directions to re-engage them in any other work or to appoint them against existing vacancies - Cannot be given.

State of Himachal Pradesh Vs. Suresh Kumar Verma and another, .

(5) Employees appointed on contract basis for a limited and fixed duration on fixed pay - No work available in the Deptt. to keep them busy throughout - Cannot be directed to be absorbed.

Union of India and others Vs. Dinesh Kumar Saxena and others, .

(6) Statutory alternative remedy by way of raising a dispute cannot be bypassed.

Unreported Jt. of Delhi High Court in the case of Sri D.P. Singh v. Engineering Projects India Limited.

(7) Unreported Jt. of Bombay High Court in the case of Sri Jateshankar v. Engineering Projects India Limited.

(8) Appointment for fixed term - covered by Section 2(oo)(bb). It is not retrenchment. State of Rajasthan v. R.L. Gehlot 1997 FLR 38

(9) Termination effected under the stipulation contained in terms of the appointment under (sic) Section 25F not applicable.

M. Venugopal Vs. The Divisional Manager, Life Insurance Corporation of India, Machilipatnam, Andhra Pradesh and another, .

The first three questions mentioned in the NOTE relate to regularisation of service of the workmen. The 4th point is about the direction by the Court for reengagement of the daily wagers. Point Nos. 5,8 and 9 are about the termination of service of fixed term appointees under the contract. Point Nos. 6 and 7 deal with the alternative remedy. There is no mention about the first two submissions raised by the learned counsel for the EPL before us in the said NOTE. The question as to whether EPL and its undertaking is an industrial establishment as defined u/s 25L(a) and further whether it has hundred or more workmen on an average per working day for the preceding twelve months, are basically questions of facts. Similarly the question as to whether the EPL and its unit has been set up for, other construction work, is also a question of fact. Such questions cannot be allowed to be raised for the first time at the appellate stage. That apart, the relevant pleadings with regard to these two questions are also lacking.

8. In order to decide the third submission of the learned counsel for the EPL, it is appropriate to examine the impugned order of termination of service of the workmen dated June 20, 1996, relevant extract of which is as under: -

".....

Due to tapering of office activities at TISCO COBP site the services of the following persons are terminated with effect from June 30, 1996"

According to CHAMBERS English Dictionary "tapering" means to become gradually smaller towards one end; to diminish slowly in size". It is admitted that the scheme/unit in question in which the workmen were working has been closed. In fact, one of the submissions of the learned counsel for the EPL is that

as the scheme/unit has been closed, question of reinstatement of the workmen does not arise. There is no doubt that the service of four workmen by the order impugned in the writ petition was terminated on account of the closure of the unit where they were working. Their service has not been terminated in terms of contract of appointment. The order of termination does not say so. It is not a case of retrenchment to which Section 2(oo) can be applied. In this connection reference may be made to H.P. Mineral and Industrial Development Corporation Employees Union v. State of H.P. and Ors., 1996 (7) SCC 139 wherein the Apex Court has held that the retrenchment as defined u/s 2(oo) of the Act does not cover termination of service as a result of closure of an undertaking.

9. The fourth submission also deserves rejection in view of the provisions of Sub-section (6) of Section 25O of the Act, which is reproduced below -

"Where no application for permission under Sub-section (1) is made within the period specified therein, or where the permission for closure has been refused the closure of the undertaking shall be deemed to be illegal from the date of closure and the workmen shall be entitled to all the benefits under any law for the time being in force as if the undertaking had not been closed down".

As the unit has been closed without the requisite permission as required under Sub-section (1) of Section 25O of the Act, the closure shall be deemed to be illegal and the workmen shall be entitled to all the benefits under law as if the undertaking has not been closed.

10. As regards the last submission, the learned counsel for the EPL has stated that the constitutional validity of Section 25O of the Act has been upheld by the Division Bench of this Court in Hindalco Industries Ltd. and Another Vs. Union of India (UOI) and Others against which SLP is pending before the Hon'ble Supreme Court. But the learned counsel cannot be allowed to raise this submission for two reasons, namely (i) no such point was raised before the learned Single Judge, and (ii) for raising such a point the EPL should have filed a writ petition challenging the validity of Section 25O of the Act but that has not been done. There are no appropriate pleadings in this regard also. It is not open to a party to challenge the validity of the statutory provision in such a manner.

For the reasons as above, the L.P.A. No. 289/97 (R) filed by the EPL is dismissed.

11. L.P.A. No. 316/97 (R) is also liable to be dismissed. The workmen have prayed for directions by this Court upon the EPL for their regularisation. Normally such a direction is not issued by this Court. Whether the workmen are or not entitled for regularisation of their services is a question to be decided by the employer itself at the first instance. The learned I Single Judge was, therefore, fully justified in not issuing any direction in this regard. The learned Single Judge has given liberty to the workmen to make representation in this connection before the employer. It is open to them to do so and if they make such a representation, the same is liable to be decided expeditiously in accordance with law.

12. The workmen have filed M.J.C. No. 126/1998 (R) on February 10, 1998 for initiating contempt proceedings against the opposite parties for non-compliance of the Judgment dated May 13, 1997 of the learned Single Judge passed in C.W.J.C. No 1123/96 (R). Against the said judgment of the learned Single Judge the EPL filed L.P.A. No. 289/97 (R) on May 22, 1997 in which on July 11, 1997 an interim order staying the operation of the said judgment was passed. On August 12, 1997, the Division Bench vacated the above interim order. It appears that inspite of the vacation of the interim order the judgment of I the learned Single Judge remained uncomplied with on account of which the workmen have filed this contempt petition.

It is true that the judgment of the learned single Judge ought to have been complied with by the EPL but since the EPL has challenged the said judgment by filing LPA No. 289/97 (R) which was directed to be listed for final hearing along with the connected L.P.A. 316/97 (R) we are of the view that it is not a fit case to take any action in contempt jurisdiction against the EPL and its officials. But we hope and trust that the judgment of the learned Single Judge as affirmed in these appeals shall now be complied with.

Both the appeals as well as M.J.C. No 126/98 (R) are, accordingly dismissed. No cost.