

(2005) 09 KL CK 0011
In the High Court Of Kerala
Case No : W.A. No. 1798 of 2002

G. Thankamani

APPELLANT

Vs

The Managing Directors, K.S.C.S.C. Ltd.

RESPONDENT

Date of Decision : 16-09-2005

Acts Referred:

Constitution of India, 1950 — Article 14, 16
Industrial Disputes Act, 1947 — Section 2(oo)

Citation : (2006) 1 KLJ 39

Hon'ble Judges : S. Siri Jagan, J;Rajeev Gupta, J

Bench : Division Bench

Advocate : P.V. Surendranath, for the Appellant; Benny Gervasis, George Poonthottam (SC), Roy Chacko (GP) and Joy George (SC), for the Respondent

Final Decision : Dismissed

Judgement

S. Siri Jagan, J.—This writ appeal arises from the judgment of the learned Single Judge in O.P. No. 13455/1998 whereby the learned Single Judge set aside the award of the Labour Court, Kollam in I.D. No. 42/1993, finding denial of employment by the 1st respondent-Management to the appellant-workman and directing her reinstatement in service with backwages. The facts leading to the impugned judgment are summarised hereunder. The appellant-workman was alleged to be engaged by the 2nd respondent-Manager of a Maveli Store of the 1st respondent-Kerala State Civil Supplies Corporation Limited on daily wages from 1984 onwards, and that she had completed 5 years of continuous service. Thereafter, she was denied employment in September, 1989. She raised an industrial dispute which was referred for adjudication to the Labour Court, Kollam, which adjudicated the dispute as I.D. No. 42/1993. On behalf of the Kerala State Civil Supplies Corporation Limited, it was contended that since the Corporation is a fully owned Government Company and they can make appointment to the establishment only in accordance with the prescribed procedure, there is no employer-employee relationship between the appellant and the management as the workman was not appointed following the prescribed

procedure. However, by Ext. P 1 award, the Labour Court held that there was denial of employment to the appellant by the management and, therefore, she was directed to be reinstated in service with full backwages. The said award was challenged by the management on the ground that helpers can be appointed in the Maveli Store only in accordance with helpers Service Rules, 1978 framed by the Corporation and since the Corporation is not competent to make appointments in violation of the Helpers Service Rules, 1978, even if the Manager of the concerned Maveli Store has engaged the workman on daily wages as alleged the same cannot result in any employer-employee relationship between the management and the workman and therefore no rights as a workman accrues to the appellant-workman. This contention was accepted by the learned Single Judge on the basis of the decisions of the Supreme Court in *Madhyamik Siksha Parishad, U.P. Vs. Anil Kumar Mishra and others etc.*, and *State of Himachal Pradesh Vs. Suresh Kumar Verma and another*, . Accordingly, Ext. P1 award was quashed and the original petition was allowed with costs of Rs. 2000/to be paid by the appellant-workman. This judgment is impugned in this writ appeal.

2. We have heard the learned counsel for the appellant-workman as also that of the management, namely, respondents 1 and 2.

3. The main argument of the appellant's counsel is that once the workman continues in service beyond 240 days in a calendar year, the services of such workman cannot be dispensed with except in accordance with the provisions of the Industrial Disputes Act (for short "the I.D. Act"). According to him, even if the mode of appointment is defective, that does not in any way affect the rights of the appellant under the I.D. Act and irrespective of defect in such appointment, if any, she is entitled to get her rights under the I.D. Act enforced through the machinery prescribed under the above Act, which alone has been done in this case. Therefore, Ext. P1 award is perfectly legal and valid, submits counsel. In support of his case, he relies on the judgment of the Constitution Bench of the Supreme Court in *Punjab Land Devt. & Reclamation Corpn. Ltd., Chandigarh & others v. Presiding Officer, Labour Court, Chandigarh & others*, 1990 11 LLJ 70. According to him, in that judgment, the Supreme Court has held that going by the definition in Section 2(oo) of the I.D. Act, retrenchment means termination by the employer of the service of a workman for any reason whatsoever except those expressly excluded in the Section. He would specifically refer to the fact that in one of those cases decided in that judgment, the services of certain workman of the management-Corporation were terminated on the ground that the Chairman had no power to appoint them and, therefore, that judgment is identical with the present case and going by the dicta laid down therein, the appellant-workman herein is also entitled to be reinstated with backwages because her case does not come under the exceptions in Section 2(oo) of the I.D. Act.

4. Counsel for the management-respondents 1 and 2 would, on the other hand,

submit that the recruitment of helpers in the Corporation is governed by the Rules framed by the Corporation. Only employees appointed in sanctioned posts in accordance with the procedure prescribed under the Rules can claim any benefits as an employee or workman of the Corporation. In so far as the appellant-workman does not have a case that she was appointed after undergoing the selection procedure prescribed under the Rules, she cannot be said to be a workman having rights under the I.D. Act and, therefore, she cannot press into service the rights under the I.D. Act. On this around, counsel for the management argued for sustaining the judgment of the learned Single Judge.

5. The Kerala State Civil Supplies Corporation Limited is fully owned by the Government of Kerala. It is an instrumentality of the State. As such, the Corporation is bound by the mandates of Articles 14 and 16 of the Constitution of India. It goes without saying that the Corporation can make appointments to the services of the Corporation only in accordance with the principles contained in Articles 14 and 16 of the Constitution of India in so far as all citizens seeking employment under the Corporation are entitled to have equal opportunity to be considered for such appointments. Admittedly, the workman was not employed after complying with any procedure whatsoever ensuring equal opportunity to the countless unemployed persons who also may be entitled to be considered for such appointment. That being so, the appointment/engagement of the appellant-workman, if any, itself is *ab initio* void and she cannot sustain any claim based on such illegal appointment.

6. The Corporation has produced before us the Helpers Service Rules, 1978 framed by the Corporation laying down the conditions of service of the helpers employed by the Corporation. Rule 7 of the Rules specifically prescribes that recruitment shall be made by a sub committee of the Board of Directors. Lower and upper age limits are also prescribed. Rule 8 specifically states that the appointing authority shall be the Managing Director of the Corporation. The appellant has no case that she has been appointed by the Managing Director and that before such appointment, she has undergone any selection procedure. In fact, she could not even state her date of appointment or the date of denial of employment. Needless to say she did not possess any appointment order since, obviously, she was not issued one.

7. Of course, counsel for the appellant would raise a contention that under Rule 4, the Managing Director could delegate his powers to any officer authorized by him and, therefore, the appointment of the appellant by the manager of the Maveli Store should be deemed to have been on the basis of powers delegated to him by the Managing Director under Rule 4. The above contention cannot be accepted for two reasons. Firstly, the power of the Managing Director to delegate his functions to an officer was incorporated in the Rules only by an amendment dated 29-3-1986, which power was not available at the time of alleged appointment of the workman which is in 1984. Secondly, there is no evidence to show that the Managing Director had, in fact, delegated his power to appoint

personnel in the Maveli Store to the Manager of the Maveli Store.

8. The Constitution Bench decision of the Supreme Court *supra* relied on by counsel for the appellant is clearly not applicable to the present case. That was a case where apparently, the appointment was in compliance with the procedure, but appointment order was issued by the Chairman of the Company, who did not have the authority to appoint the workmen. That is a totally different situation. Here, firstly, there is no appointment as such even going by the case of the appellant. She was only engaged by the Manager of the Maveli Store on daily wages. In the decision of *Madhyamic Siksha Parishad's case (supra)*, the Supreme Court held as follows:

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 anticipatedly 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 days work. The legal consequences that flow from work from that duration under the Industrial Disputes Act, 1947 are entirely different from what by way of implication, is attributed to the present situation by way of analogy. The completion 240 days" work does not, under that law, import the right to regularisation. It merely imposes certain obligations on the employer at the time of termination of the service. It is not appropriate to import and apply that analogy, in the extended or enlarged form here.

9. In *Suresh Kumar Verma's case (supra)* also the Supreme Court held thus:

2 It is settled law that having made rules of recruitment to various services under the State or to a class of posts under the State, the State is bound to follow the same and to have the selection of the candidates made as per recruitment rules and appointments shall be made accordingly. From the date of discharging the duties attached to the post, the incumbent becomes a member of the services. Appointment on daily wage basis is not an appointment to a post according to the Rules.

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4. Mr. Mahabir Singh, learned counsel for the respondents contended that there was an admission in the counter-affidavit filed in the High Court that there were vacancies and that, therefore, the respondents are entitled to be continued in service. We do not agree with the contention. The vacancies require to be filled up in accordance with the rules and all the candidates who would otherwise be eligible are entitled to apply for when recruitment is made and seek consideration of their claims on merit according to the Rules for direct recruitment along with all the eligible candidates. The appointment on daily wages cannot be a conduit pipe for regular appointments which would be a back-door entry, detrimental to the efficiency of service and would breed seeds of nepotism and corruption. It is equally settled law that even for Class IV employees recruitment according to rule is a pre-condition. Only work-charged

employees who perform the duties of transitory nature are appointed not to a post but are required to perform the work of transitory and urgent nature so long as the work exists. One temporary employee cannot be replaced by another temporary employee.

10. A Division Bench of this Court in the decision of Koodarani Service Co-op. Bank Ltd. v. Lissy, 1993 (2) KLT 706, dealt with a similar question wherein a Clerk was appointed in a Service Co-operative Bank on daily wages without complying with the procedure prescribed under the statutory rules. The employees raised an industrial dispute claiming violation of the provisions of the I.D. Act which ended in an award directing her reinstatement, which was upheld by a learned Single Judge. In that judgment, in paragraph 6, this Court held as follows:

6. In *The Workmen of the Bangalore Woollen, Cotton and Silk Mills Co. Ltd. Vs. The Management of the Bangalore, Woollen, Cotton and Silk Mills Co. Ltd.*, the Supreme Court took the view that termination of service of workmen when the employer has no option in law to continue them in service is not retrenchment. Their Lordships observed:-

It seems to us that a service cannot be said to be terminated unless it was capable of being continued. If it is not capable of being continued, that is to say, in the same manner in which it had been going on before, and it is therefore, brought to an end, that is not a termination of the service.

This statement of law applied on all fours to the facts before us. The services of Smt. Lissy as Clerk on daily wages was not capable of being continued. Her services were terminated because she could not be continued in the same manner in which she was engaged earlier. It was as a result of such supervening impossibility the bank was compelled to terminate her services. Such termination of service cannot amount to retrenchment as defined in the Act.

Further, dealing with the contention of the workman in that case, which is similar to those in this case, the Division Bench, in paragraph 9 of the judgment, held as follows:

9. Learned counsel representing Smt. Lissy submitted that even if the appointment of his client is vitiated, she should still be regarded as a workman, as a matter of fact since she has worked in the bank for nearly six years. We are not impressed with this argument. Her appointment was against the statutory rules. She cannot be continued in the post held by her. The management is having no volition to continue her in the service as daily rated employee. In these situations, we are clear in our mind that the termination of service of Smt. Lissy cannot be considered as retrenchment as defined in the Act. The result, therefore, is that the Labour Court was clearly in error in directing the bank to reinstate Smt. Lissy as Clerk.

We are of opinion that the said judgment applied on all force to the facts of this

case. In the above circumstances, we are in full agreement with the impugned judgment of the learned Single Judge and are of the opinion that the appellant-workman is not entitled to any reliefs in the industrial dispute. Accordingly, the learned Single Judge was perfectly correct in setting aside the award. Therefore, the writ appeal deserves to be dismissed and we do so. But, in the circumstances of the case, we delete the direction of the learned Single Judge directing the appellant-workman to pay costs of Rs. 2, 000/-.