
(2009) 07 AHC CK 0281

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 20647 of 2008

Ganga Ram and others

APPELLANT

Vs

State of U.P. and others

RESPONDENT

Date of Decision : 01-07-2009

Acts Referred:

Uttar Pradesh Industrial Disputes Act, 1947 — Section 6H(1)

Citation : (2009) 122 FLR 696

Hon'ble Judges : Rakesh Tiwari, J

Bench : Single Bench

Advocate : Bushra Maryam, for the Appellant; J.P. Pandey, Subhash Chandra Srivastava and A.K. Mehrotra S.C., for the Respondent

Final Decision : Disposed Of

Judgement

Rakesh Tiwari, J.—Heard Counsel for the parties.

This writ petition has been filed praying for a writ of mandamus commanding the respondent Nos. 2 and 3 to absorb the petitioner-workmen in the vacancies available in the respondent-corporation pursuant to directions contained in the judgment and orders dated 23.2.2004 and 14.9.2004 passed in Writ Petition No, 13110 of 2001.

2. In the aforesaid writ petition No. 13110 of 2001, the Court had considered the statement of Jwala Singh and held as under;

From the statement of Jwala Singh, it is clear that the workers have failed to prove that they were ever employed by the petitioner-corporation and any wages were paid to them by it. The statement also proves that these workers were not employed according to the recruitment rules of by competent authority of the corporation. Even if they were working, they were employed by junior engineer as helpers and he used to pay them Rs, 300/- per month. There is no evidence that Rs. 300/- as wages were paid by the corporation to its regular employees, There is also no evidence to show the nature of duties performed by them. If

they were working as helpers as stated by Jwala Singh, they were not working on any post of skilled labour etc, Sri Jwala Singh could also not tell as to how these persons come to be engaged on sub-stations. The statement of Jwala Singh therefore does not prove the case of the workers at all.

Mendhu P.W.-2 appearing as witness for the workers also does not say that he was ever engaged by the corporation or was paid wages by it. According to him he was collie and carried the ladders and was paid by Junior Engineer. Similarly Rajmani, Gangaram and Kameshwar Nath Sharma have also not stated that they were ever engaged by the corporation and says that no appointment letter was issued to them by the corporation or were ever paid wages by it. All of them have specifically stated in their oral evidence before the Court that they were engaged by the Junior Engineers who used to pay them Rs. 300/- per month. It is also admitted fact that they never received any benefits such as uniform, overtime etc. from the corporation and they also denied any claim having made by them in respect of these facilities. In view of these fact the finding of the Labour Court that these workers have to be regularised by the corporation by creating posts is perverse and beyond jurisdiction.

Learned Counsel for the respondent-workers submits that the Labour Court has power to create posts and modify or substitute new terms of employment.

There is no dispute to this preposition but the question is whether creation of posts is creating conditions of employment. The terms and conditions of employment can be carried or modified by the Labour Court but this stage comes only after a person comes in employment creation of post lies within the sole discretion of employer, He may create a post or bon fide abolish a post. Creation of post is not a term and condition of employment. The Labour Court cannot direct creation of post to accommodate any person, That is the function of management. The Apex Court in the case of a project employee whose services came to an end on ending of project, held that direction to re-engage such employee could amount to creation of post which is beyond the jurisdiction of Court, Right and duties of a person as workers arise after a person is taken as workman and relationship of master and servant comes into existence, On creating a post no such relationship comes into existence, It is unilateral right of employer to create a post or not.

So far as question of equal pay for equal work is concerned, the petitioners submit that the Labour Court cannot direct that daily wagers be paid the wages or pay scale allowed to regular employees.

In State of Haryana Vs. Jasmer Singh and others, it was again held by the Supreme Court that daily wage employees cannot claim wages of regular employees in service and cannot even claim even minimum pay scales.

The benefits of equal pay for equal work cannot be given to these workers who were never recruited according to rules. Appointment of these workers has been denied by the corporation but the period of engagement as helpers by Junior

Engineers of the corporation has not been denied by the petitioner. It has been proved in evidence that these helpers were engaged by Junior Engineers. Since the respondents have been working since long with the Junior Engineers in connection with the work of petitioner corporation, they should be considered for absorption by the corporation on suitable posts by giving them preference as directed by the Labour Court, on vacant posts available or which fell vacant after the date of the award and which may fall vacant hereinafter, 1. State of Haryana Vs. Jasmer Singh and others, It has come in evidence that there are seventy vacancies in which they can be adjusted. They will be entitled to pay and allowance from the date of their absorption: The corporation is directed to complete this process within three months from today.

The award of the Labour Court in so far as it directs creation of post is quashed. The workers in the reference shall be entitled to regular salary of the post from the date they are absorbed/regularised in service according to the observations made in the preceding paragraph of the judgment.

The writ petition partly allowed. No order as to costs.

The aforesaid judgment and order dated 23.2.2004 was modified by order dated 14.9.2004 as under:

In view of the aforesaid facts and changed circumstances, the application for extension of time limit is disposed of with direction that the action of filling up of the post by appointment of the senior most respondent- workman be initiated within a month and rest of the respondent- workmen concerned in the award shall be appointed strictly in accordance with their seniority as and when the post for them are available. The time limit of three months imposed in the judgment and order dated 23.2.2004 is accordingly extended/modified to enable the petitioner to fill up the vacancies from the respondent-workers as and when the same are available in future as directed.

3. Aggrieved by the aforesaid order dated 14.9.2004, the petitioner workmen approached the Apex Court by filing Special Leave To Appeal (Civil) No. (S) 727/2005 which was dismissed by the Apex Court by the following order:

The SLP is dismissed.

S.L.P. (C) 15714//2005 filed by the employers against the aforesaid order dated 14.9.2004 was also disposed of by the following order:

In view of dismissal of SLP (C) No. 727/2005, it will be open to the High Court to decide the application moved by the U.P. Power Corporation Ltd. For withdrawal of money. The SLP is disposed of in above terms.

The S.L. Ps. filed by the petitioners as well as respondent-corporation having been dismissed by the Apex Court, judgment and order dated 23.2.2004 and 14.9.2004 passed by this Court, became final.

4. It is in the aforesaid backdrop that present writ petition has been filed by the

petitioners for their absorption in service, on the ground that instead of absorbing them pursuant to judgment and orders dated 23.2.2004 and 14.9.2004 passed by the High Court in Writ Petition No. 13110 of 2001 filed by the employers challenging the validity and correctness of the award of Labour Court dated 11.7.2000 in Adjudication case No. 27 of 1996 and Special Appeals of the parties having been dismissed, a news item has been published by U.P. Power Corporation in "Dainik Jagran" dated 23.2.2008 advertising 590 posts of workmen, for which selection process has already commenced. As interim relief, the petitioners have also prayed for a direction to the respondents to keep 24 posts vacant during pendency of the writ petition so that judgment and order dated 23.2.2004 and 14.9.2004, may be got complied with.

It appears from the arguments advanced by the Counsel for parties as well as the record that petitioners want this Court to implement the award in terms of the judgment and order dated 23.2.2004 and 14.9.2004 passed by the High Court.

5. According to the respondents, 78 vacancies were available at the time of judgment reference of which has been given by the petitioner in Writ Petition No. 13110 of 2001, but those vacancies stood abolished after coming into force of the U.P. Electricity Reforms Act, 1999 which received assent of the President on June 23, 1999, published in U.P. Gazette, Extra dated July 7, 1999 and no vacancy remained but this point was not canvassed by them before the High Court at the time of hearing.

6. It also appears from record that Annexure R.A.-2 dated 1.9.2008 alleged to have been issued by the concerned Division does not bear any signature of the Executive Engineer incharge of the division where the petitioners claim to be working. It has been disputed as not authentic by the respondents.

In paragraph No. 3(iii) and 3(iv) of the supplementary counter affidavit, it is averred that in case of operating staff a report regarding status of posts available either due to the promotion, retirement or transfer is submitted to the Chief Engineer (Hydel), U.P. Power Corporation at Lucknow by the every division through its Managing Directors and the Chief Engineer (Hydel), Lucknow on the basis of requirement of entire U.P. Sends requisition to Electricity Service Commission, Lucknow and Electricity Service Commission advertises posts as required and selection is made through a selection committee amongst the members of the entire U.P. in accordance of relevant Service Regulations. It is made clear that no appointment or absorption in U.P. Power Corporation is made except through the Electricity Service Commission, Lucknow. So far as news paper cutting attached as R.A.-3 is concerned, it is stated that on an enquiry made from Electricity Service Commission, Lucknow it was informed that no such advertisement as alleged in paragraph under reply was published on 23.2.2008. It is, however, relevant to state that under special drive, advertisement for recruitment of workmen for members of scheduled caste and scheduled tribe was made by the electricity service commission vide its advertisement No. B-12/

VSA/2007 inviting permanent residents of the entire U.P. and the said advertisement was forwarded to be published in News Papers vide letter No. 570 dated 9.10.2007. It is further submitted that the petitioners have not annexed the copy of the any advertisement as alleged in paragraph under which reply have been sought and have annexed some news paper cutting which does not refer any advertisement.

7. The fact remains that by judgment and order dated 23.2.2004 and 14.9.2004, the Court had directed for consideration of petitioners' case for absorption on preferential basis on any vacancies which may be available at that time or may arise in future. It has to be determined whether any vacancies are available for absorption of the petitioners or not. This can only be done in case application for implementation of the award u/s 6-H (1) of U.P. Industrial Disputes Act is filed by the petitioners.

8. In so far as the advertisement, against which petitioner claim consideration of their absorption is concerned, it pertains only for filling up backlog vacancies. None of the petitioners appears to have applied against those vacancies.

9. Section 6-H (1) of U.P. Industrial Disputes Act provides for implementation of the award but the petitioners have not yet moved for implementation of the award. The petitioners have failed to make out a case for exercise of powers by the High Court for implementation of the award for which statutory remedy is already provided u/s 6-H(1) of the U.P. Industrial Disputes Act, 1947.

10. For all the reasons stated above and in view of peculiar facts and circumstances of this case, I am of the view that petitioners have remedy u/s 6-H (1) of U.P. Industrial Disputes Act and not in the writ petition for implementation of the award. In case the petitioners file application for implementation of the award, the same shall be decided expeditiously in accordance with law.

With the above observations, the writ petition stands finally disposed of. No order as to costs.