

(2007) 02 DEL CK 0235

In the Delhi High Court

Case No : Writ Petition (C) No. 60 of 2004

Govt. of NCT of Delhi

APPELLANT

Vs

Its Workmen and Another

RESPONDENT

Date of Decision : 21-02-2007

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2007) 02 DEL CK 0235

Hon'ble Judges : Hima Kohli, J

Bench : Single Bench

Advocate : Avnish Ahlawat, for the Appellant; Sanjoy Ghose, Pragnya Routray and Vimal Dubey, for the Respondent

Final Decision : Allowed

Judgement

Hima Kohli, J.—This petition is filed against an award of the Industrial Tribunal dated 11th March, 2002, by which the petitioner management herein was directed to designate the respondent workmen as "Mali" from the date of their regularization and extend to them the facilities of uniform, item of liveries, stitching charges, washing allowance and private conveyance/ cycle allowance as per the rules.

2. Facts relevant for the purpose of disposing of this writ petition, as gleaned from the pleadings are as follows. The workmen under reference were engaged as casual labourers in the Horticulture Department of the Government of NCT of Delhi. Seeking regularization, certain groups of such workmen moved the Supreme Court in 1983. In the said case, entitled "Sh. Naiderand Another v. Delhi Administration and Ors.", the Supreme Court vide its order dated 29th September, 1988 directed the Delhi Administration to prepare a scheme to absorb the casual labourers, who had worked for one year or more in the Soil Conservation Department and other departments of Government of NCT of Delhi and to absorb all such casual labourers as regular employees within six months from the date of the order. It was further directed that until they are so

absorbed, the Delhi administration shall pay to each of the casual labourers working in the Soil Conservation Department and other departments of Government of NCT of Delhi at the rate equivalent to the minimum salary paid to regular employees in comparable posts in the said departments, w.e.f. 1st October, 1998. Thereafter, certain clarificatory orders dated 6th March and 12th March, 1990 were passed by the Supreme Court in the aforementioned matters, as to the expression "salary or wages" to be paid to the petitioner/workmen and it was clarified by Government of NCT of Delhi that minimum salary plus allowances which came to Rs.1,100/-, had to be paid to such employees.

3. In compliance with the above-mentioned orders of the Supreme Court, the petitioner created 999 new posts of "casual laborers" in the scale of Rs.750-950 on 21st March, 1991 and the workmen were accordingly regularized. Thereafter, on 23rd of March, 1994, further 120 posts were created and termed as "diminishing cadre" to accommodate those workmen who were over-aged and could not be regularized as "casual laborers".

4. The basic grievance of the workmen against creation of the said post of "casual laborers" is that they should have been regularized on the posts of "malis" which was the lowest comparable post to that of the casual workmen and as such the pay scale of the new post of "casual laborers" was equivalent to that of the "malis".

5. For redressal of the said grievance, about 350 workmen moved the Central Administrative Tribunal (CAT) in the years 1997, 1998 and 1999 with the prayer that they be designated as "Mali" and be given allowances as perrules. While disposing of two of these petitions, vide orders dated 28th January, 1999 and 12th August, 1999, the Tribunal held that since the workmen had been regularized, their service record was being maintained, and they were eligible to all admissible allowances including medical facilities and promotional avenues, no further directions were required to be passed. In another order dated 17th August, 2001, while disposing of another petition, the Tribunal observed that the respondents therein, petitioner herein has created a class within the class of Mali, which is not legally permissible. It was stated by the Tribunal that while Malis were getting higher benefits, the applicant workmen, in spite of performing the same duties, were not getting the same benefits. However, the Tribunal held that it had no power to re-designate or create posts, and issued a direction to the Government to consider the claim of the applicant workmen for according them benefits as admissible to regular Malis with effect from the date of their regularization.

6. Meanwhile in the year 1997, one Sh. Jai Pal, casual labourer, through the Delhi Pashas and Vikas Vibhag Industrial Employees Union, raised an industrial dispute before the Industrial Tribunal seeking redesignation of the post of "casual laborers" to that of "Malis" with all the allowances attached to the said post, for himself and for other members of the union.

7. By the impugned award, the Industrial Tribunal, held that the onus to prove that the Horticulture Departments is not an industry, lay on the management, and since it had failed to lead its evidence in this regard, and adverse presumption was drawn against the management and the issue was and were in favor of the workmen. It was further held that workmen were entitled to be designated as Mali from the respective dates of their regularization in service and that they could not be denied the facilities of uniform, items of liveries, stitching charges, washing allowance etc. However, it was also held that the workmen were not entitled to be regularized from the date of their initial appointment and that the regularization was proper and could not be disturbed.

8. It is the aforementioned award of the Industrial Tribunal that the petitioner has assailed by way of the present petition. During the course of arguments, learned Counsel for the petitioner submitted that there did not exist any Recruitment Rules for the post of "casual laborers" and as "laborers" was not a designated post, there was no comparable post existing with the petitioner, hence the said post was created only to regularize the workmen, the directions of the Supreme Court. On the other hand, recruitment to the post of Mali is based on the Recruitment Rules for the said post, and since the respondent workmen and other comparable workmen were not appointed in accordance with the said rules, they could not be regularized at the post of Mali. In support of this contention, reliance was placed on the case of Secretary, State of Karnataka and Others Vs. Umadevi and Others, , wherein the Apex Court dealt with a number of issues concerning service and labour and held that once a person accepts an engagement either temporary or casual in nature, he cannot be allowed to be regularized or continue in such post by bypassing the constitutional scheme of appointment as per the Recruitment Rules. Counsel for the petitioner has also relied on a judgment rendered by a Division Bench of this Court dated 22nd February, 2005, in LPA No.2067/2005 entitled "Govt. of NCT of Delhi v. Workmen, by Delhi Prashasan, Vikas Vibhag Industrial Employees Union", wherein after considering the earlier judgment of the Supreme Court in Naider's case (supra), it was held that the directive of the Supreme Court will prevail over the award of the Tribunal. Reliance has also been placed on a judgment of another Division Bench dated 21st September, 2005 in connected matters, lead matter being LPA No.925/2003 entitled "M/s Hauz Rani Seed Farm v. Smt. Kashmiri and Ors." wherein, after referring to the Naider's case (supra), it was held that the decision rendered by the Supreme Court in that case and other factors such as the fact that the respondent workmen had accepted the other benefits without protest, are the guiding principles in deciding whether order for payment of back wages could be issued by the Tribunal.

9. Learned counsel for the petitioner management further submitted that there are only 50 posts of Malis sanctioned in various departments of the Government of NCT of Delhi and the casual labourers who were regularized as per the directions of the Supreme Court were all working under the supervision of Malis and performed the duties of digging pits, trenches, preparing nursery beds,

planting and maintaining trees, collecting seeds and loading and uploading etc. It was also stated that the respondent workmen and other similarly placed workmen continued to perform the same work even after their regularization to the post of "casual laborers" in 2001.

10. Learned counsel for the petitioner management further stated that the post of "Mali" is not equivalent to the post of "casual laborers". It was submitted that while "Mali" is a supervisory post, the casual labourers work under the supervision of Malis. Further, learned Counsel for the petitioner management also stated that there was nothing placed by the respondent workmen on the record to show that the casual labourers were working as "Malis" and that the onus to prove that the respondent workmen performed work of the same nature as performed by the Malis was on the respondent workmen, which they failed to discharge. Support was sought to be drawn from the case of Manager, R.B.I., Bangalore Vs. S. Mani and Others, . It was submitted that no documentary evidence was produced by the respondent workmen, before the Industrial Tribunal to show as to what was the nature of work being performed by the Malis or to show that the respondent workmen were performing the same work as the Malis, or even to prove that workmen performing similar work like that of the respondents, were designated as Malis in CPWD, DDA, MCD or the NDMC. It was submitted that in absence of any such evidence being led by the respondent workmen, the Tribunal's presumption that individuals performing similar work like that of the respondents, were designated as Malis in CPWD, DDA, MCD or the NDMC, is perverse and liable to be rejected.

11. Learned counsel for the petitioner also sought to assail the said award of the Tribunal on the ground that it wrongly arrived at a conclusion that the Horticulture Department is an industry. Reliance was placed on the judgments of the Supreme court in this regard, in the cases of Chief Conservator of Forests and another, Vs. Jagannath Maruti Kondhare, etc. etc., and Physical Research Laboratory Vs. K.G. Sharma, . It was also stated that the creation as well as designation of a post is not within the domain of the Industrial Tribunal. Learned counsel for the petitioner also contended that equal pay for equal work is not a fundamental right vested in any employee and that fixation of pay and parity in duties and responsibilities is only for the executive to decide, and not for the tribunals and the court to decide. Reliance in this regard, was placed on the following judgments of the Supreme court:

(i) State of Haryana and Another Vs. Haryana Civil Secretariat Personal Staff Association, .

(ii) U.P. State Electricity Board and Anr. v. Hydro-Electric Employees Union and Anr., (2003) 3 LLJ 560SC .

12. On the other hand, learned Counsel for the respondent workmen drew my attention to the parameters laid down by the Supreme Court for intervention in industrial adjudication. In this respect he relied on the following judgments:

(i) Sadhu Ram v. Delhi Transport Corporation AIR 1984 SC 1967

(ii) Harbans Lal Vs. Jagmohan Saran, .

(iii) Calcutta Port Shramik Union Vs. Calcutta River Transport Association and Others, .

(iv) Sudhoo Vs. M/s. Haji Lal Mohd. Biri Works and others, .

13. It was stated that it is only the perversity in an award that can be examined under Article 226 of the Constitution of India.

14. Learned counsel for the respondent workmen further stated that Horticulture Department is an industry and has relied on the following judgments in support of his contention:

(i) Chief Conservator of Forests and another, Vs. Jagannath Maruti Kondhare, etc. etc., .

(ii) State of U.P. Vs. Jai Bir Singh, .

(iii) Management of Horticulture Department of Delhi Adm. Vs. Trilok Chand and Another, .

15. It was stated that whether the petitioner was an "industry" or not is a mixed question of fact and law and that no evidence whatsoever had been led by the petitioner on the said issue.

16. Learned counsel for the respondent workmen further submitted that the Industrial Adjudicator is not fettered by any limitations to alter, create or revise the contract of employment or conditions of service. Reliance was placed on a number of judgments of the Supreme Court including the following :

(i) Western India Automobile Association v. Industrial Tribunal, Bombay and Ors. (1949) FCR 321.

(ii) The Bharat Bank Ltd., Delhi Vs. Employees of the Bharat Bank Ltd., Delhi and The Bharat Bank Employees" Union, Delhi, .

(iii) Bidi Leaves and Tobacco Merchants Association v. The State of Bombay (1961) 1 SCR 381.

17. Reliance was also placed on judgments of the Supreme Court to indicate the various conditions of service, which have been interfered with by the Courts. Such conditions of service include bonus, leave encashment, holidays and hours of work. Learned counsel for the respondent workmen also claimed that a writ court or a tribunal can direct payment or increase in payment of allowances like car allowance, uniform allowance etc. and can apply the "Industry-cum-Region Principle" in deciding whether an allowance or a perquisite given to similarly situated employees is to be given to the workmen.

18. Finally, counsel for the respondent workmen argued that the petitioner did

not create any comparable cadre, and instead, created new posts, which was contrary to the directions of the Supreme Court and that the petitioner did not place any evidence before the Industrial Tribunal as to what was the nature of work, over and above the work being done by the respondent workmen, which qualified them to be designated as Mails. It was submitted that in any case, the award does not deserve to be interfered with as it is beneficial in nature and has no monetary fall out, except for the perks to which the respondent workmen have been held entitled.

19. I have heard the learned Counsel for the parties, perused the records as also the judgments cited by the parties and have given my thoughtful consideration to the submissions made by the respective parties.

20. A perusal of the award given by the Industrial Tribunal shows that the reference has been answered in favor of the respondent workmen mainly on the premise that the petitioner management did not dispute that persons like the respondent workmen employed in CPWD, MCD, DDA and NDMC are designated as Mails and Therefore, it was held that the contention of the petitioner to the effect that as the respondent workmen were appointed as casual labourers, pursuant to the directions of the Supreme Court, and thus they could not be designated as Mails, is baseless and without justification. Relying on the aforesaid logic, the respondent workmen were held entitled to be designated as Mails from their respective dates of regularisation in the service, and it was further held that they could not be denied the facilities of uniform, item of liveries, stitching charges, washing allowance which is provided to their counterparts in CPWD, MCD, DDA and NDMC as also conveyance allowances and cycle allowances as per the rules.

21. The aforesaid conclusion appears to be fallacious, for there as on that the Industrial Adjudicator lost sight of the fact that it was pursuant to the directions of the Supreme Court in Naider's case (supra) that the petitioner formulated a scheme and created new posts of "casual laborers" ,to which the respondent workmen were appointed and regularised. Once the respondent workmen accepted the terms and conditions of appointment and did not raise any dispute with regard to their appointment in the newly created post of "casual labourers" at the relevant time, they cannot claim entitlement to being designated as 'Malis' and as a consequence thereto, claim the benefit of various facilities and perks to which Malis are entitled in terms of the relevant rules. The respondent workmen are bound by the terms and conditions of their appointment which was accepted by them with open eyes, without any reservation and without any demur. The claim raised by the respondent workmen before the Industrial Tribunal, after being regularised to the posts of casual labourers is Therefore not justified. However, fact remains that the claim was made by the respondent workmen, the same was entertained and a reference was made by the appropriate Government to the Industrial Tribunal, which was answered in favor of the respondent workmen.

22. Be that as it may, after availing of the scheme formulated under the orders of the Supreme Court and being regularised to the posts of casual labourers between the years 1991-94, the respondent workmen invoked the provisions of the Industrial Disputes Act, after three years, somewhere in the year 1997, seeking redesignation of the post of "casual labourers" to that of "Malis" with all the allowances attached to the said posts. Assuming that the respondent/workmen were at all entitled to raise such a claim, they ought to have approached the Supreme Court for necessary clarifications of its earlier order dated 29th September, 1988. In fact, as noted above, pursuant to the order dated 29th September, 1988 certain workmen had approached the Supreme Court for obtaining clarificatory orders with regard to the expression "salary or wages" to be paid to the workmen and necessary clarifications were given by the Supreme Court vide orders dated 6th and 12th March, 1990. In case the present respondent workmen were aggrieved by the manner in which the petitioner interpreted the order of the Supreme Court and formulated a scheme to absorb them by while creating new posts of "casual labourers" instead of creating a comparable cadre, nothing prevented them from once again knocking at the doors of the Supreme Court. This factor has been completely overlooked in the impugned award wherein it has been held that the defense taken by the petitioner to the effect that the respondent workmen cannot be designated as Mails because their posts were created on the orders of the Supreme Court, is only an excuse and is without any justification. I am fortified in taking this view in the light of the judgments rendered by two Division Benches of this Court in LPANos. 2067/2005 and 925/2003, referred to above, wherein it was held that the judgment of the Supreme Court in Naider's case ought to have been the guiding principle in deciding the case of the respondent/workmen therein who had accepted the benefit of the scheme offered by the Delhi Government pursuant to directions of the Supreme Court.

23. There is force in the contention of the petitioner that the onus to establish that the respondent workmen were performing the job of Mali slay with the respondent workmen, claimants before the Industrial Tribunal and not the petitioner. The record reflects that no document was placed on the records to show the nature of duties being performed in CPWD, MCD, DDA and NDMC by Malis so as to compare the nature of work being done by the respondent workmen in Delhi Administration and, Therefore, the conclusion arrived at in the impugned award to the effect that the petitioner has not disputed that such persons who were doing similar work in CPWD, MCD, DDA and NDMC were designated as Mails, is not substantiated from an appreciation of the records. There are no documents placed on the record by the respondent workmen with regard to the nature of work being performed by Malis in the aforesaid Departments vis-a-vis the work being performed by the respondent workmen, for the respondent workmen to be held entitled to be designated as Malis. In fact, there is no discussion in the award on this aspect before arriving at the said conclusion.

24. It is a settled position that though the provisions of Indian Evidence Act, 1872 per se are not applicable to an industrial adjudication, but its procedure is guided by the general principles of the law of evidence that he who asserts must prove.

25. The law relating to onus of proof in the field of labour law has been dealt with by the Supreme Court in various cases. In *The Range Forest Officer Vs. S.T. Hadimani*, , it was held as follows:

2 . In the instant case, dispute was referred to the Labour Court that the respondent had worked for 240 days and his service had been terminated without paying him any retrenchment compensation. The appellant herein did not accept this and contended that the respondent had not worked for 240 days. The Tribunal vide its award dated 10-8-1998 came to the conclusion that the service had been terminated without giving retrenchment compensation. In arriving at the conclusion that the respondent had worked for 240 days, the Tribunal stated that the burden was on the management to show that there was justification in termination of the service and that the affidavit of the workman was sufficient to prove that he had worked for 240 days in a year.

3 . For the view we are taking, it is not necessary to go into the question as to whether the appellant is an "industry" or not, though reliance is placed on the decision of this Court in *State of Gujarat v. Pratamsingh Narsinh Parmar* (2001) 9 SCC 113. In our opinion the Tribunal was not right in placing the onus on the management without first determining on the basis of cogent evidence that the respondent had worked for more than 240 days in the year preceding his termination. It was the case of the claimant that he had so worked but this claim was denied by the appellant. It was then for the claimant to lead evidence to show that he had in fact worked for 240 days in the year preceding his termination. Filing of an affidavit is only his own statement in his favor and that cannot be regarded as sufficient evidence for any court or tribunal to come to the conclusion that a workman had, in fact, worked for 240 days in a year. Nopro of receipt of salary or wages for 240 days or order or record of appointment or engagement for this period was produced by the workman. On this ground alone, the award is liable to be set aside....

26. In this regard, law laid down by the Supreme Court in the following cases is also relevant:

(i) *State of Gujarat and Others Vs. Pratamsingh Narsinh Parmar*, .

(ii) *Essen Deinki Vs. Rajiv Kumar*, .

(iii) *Manager, R.B.I., Bangalore Vs. S. Mani and Others*, .

(iv) *R.M. Yellatti Vs. The Assistant Executive Engineer*, .

27. In the present case, since it was the respondent workmen who had claimed that the nature of work being performed by them was the same as that of

"Malis", the initial burden of proof lay on the respondent workmen to produce cogent evidence and relevant documents, which they failed to discharge. Thus any conclusions drawn against the petitioner, merely on the basis of bald averments of the respondent workmen cannot be held to be sufficient for designating the respondent workmen as Mails as done in the impugned award.

28. As per the Recruitment Rules of the petitioner, the post of Mali is a Group-D non-selection post, with a specified scale of pay, period of probation, method of recruitment, entitlement to supply of uniform etc. as per applicable Rules. It has been held by the Supreme Court in the case of State of Haryana (*supra*) that:

Para 10. It is to be kept in mind that the claim of equal pay for equal work is not a fundamental right vested in any employee though it is a constitutional goal to be achieved by the Government. Fixation of pay and determination of parity in duties and responsibilities is a complex matter which is for the executive to discharge. While taking a decision in the matter, several relevant factors, some of which have been noted by this Court in the decided case, are to be considered keeping in view the prevailing financial position and capacity of the State Government to bear the additional liability of a revised scale of pay. It is also to be kept in mind that the priority given to different types of posts under the prevailing policies of the State Government is also a relevant factor for consideration by the State Government. In the context of the complex nature of issues involved, the far-reaching consequences of a decision in the matter and its impact on the administration of the State Government, courts have taken the view that ordinarily courts should not try to delve deep into administrative decisions pertaining to pay fixation and pay parity. That is not to say that the matter is not justiciable or that the courts cannot entertain any proceeding against such administrative decision taken by the Government. The courts should approach such matters with restraint and interfere only when they are satisfied that the decision of the Government is patently irrational, unjust and prejudicial to a section of employees and the Government while taking the decision has ignored factors which are material and relevant for a decision in the matter.

In the present case also, since the order of the Supreme Court dated 29th September, 1988, has been complied with by the petitioner, there is no occasion for any interference by the Industrial Tribunal or this Court in either the designation or the pay scales on which the respondents were absorbed, as such matters being in the exclusive domain of the Executive.

29. The Industrial Tribunal has misdirected itself and misinterpreted the judgment of the Supreme Court by directing the management to designate the respondent workmen as Mails from their respective dates of regularisation and by extending the facilities of uniform, item of liveries, stitching charges, washing allowance and private conveyance/ cycle allowance to them as per the rules applicable to Malis. Any such interpretation is not only contrary to the judgment rendered by the Supreme Court in the case of Uma Devi's (*supra*) but shall also tantamount to rewriting the order of the Supreme Court in Naider's case (*supra*),

which is impermissible. The demands of judicial propriety and prudence lies in veering towards, rather than straying away from the guidelines as laid down by the Supreme Court in Naider's case. If the respondent workmen sought to interpret the orders of the Supreme Court in such a manner, then it was for them to have agitated the issue before the Supreme Court itself and seek necessary clarifications before the said forum rather than doing so before the Industrial Tribunal, particularly after taking benefit of the scheme formulated by the petitioner pursuant to the order dated 29th September, 1988, passed by the Supreme Court and after being regularised in the post of "casual labourers". There was ample opportunity for the respondent workmen to have approached the Supreme Court for further necessary clarifications, if required, which they chose not to do.

30. In the opinion of this Court, no such orders for directing redesignation of the respondent workmen as "Malis" from their respective dates of regularisation along with directions for extending other facilities to them to which Malis are entitled in accordance with the relevant rules, was called for or could have been granted to the respondent workmen. As the impugned award is being set aside on the aforesaid count alone, this Court shall refrain from passing any orders on the plea raised by the petitioner to the effect that ` Department is not an "industry".

31. In view of the aforementioned facts and circumstances of the case and in the light of the judgments rendered by the Supreme Court, the writ petition is allowed and the impugned award dated 11th March, 2002 passed by the Presiding Officer, Industrial Tribunal is set aside. There shall be no orders as to costs.