
(2007) 07 AHC CK 0062
In the Allahabad High Court

Hindustan Lever Limited formerly known as Brook Bond
Lipton India Limited

APPELLANT

Vs

Industrial Tribunal IV and Pawan Kumar Jain

RESPONDENT

Date of Decision : 06-07-2007

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 226

Evidence Act, 1872 — Section 41

Industrial Disputes Act, 1947 — Section 17B, 2, 25F, 26, 27

Citation : (2007) 7 AWC 7014 : (2007) 115 FLR 76 : (2008) 1 LLJ 222

Hon'ble Judges : Rajes Kumar, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Rajes Kumar, J.—By means of the present writ petition under Article 226 of the Constitution of India, the petitioner is challenging the award dated 27th March, 1997 passed by the Presiding Officer, Industrial Tribunal, Agra in a reference made by the State Government in the matter of Industrial dispute between Brook Bond Lipton India Limited, Tundla, District Firozabad and their workman Sri Pawan Kumar Jain son of Shri Phool Chandra Jain, Etah Road, Tundla, Firozabad. It may be mentioned here that in the writ petition, it is mentioned that Brook Bond India Limited is now known as Hindustan Lever Limited a Company incorporated under the Indian Companies Act.

2. Brief facts of the case giving rise to the present case are that Sri Pawan Kumar Jain claimed to be working from June, 1988 as a casual clerk with the employer Brook Bond India Limited. His services claimed to be terminated on 5.2.1992 and was not paid salary after 1.2.1992. He claimed that he has worked for more than 240 days in a preceding year in which his services was terminated but was not able to substantiate its claim. The Tribunal held that the workman, has not worked continuously for more than 240 days in a preceding year in which he was terminated. Tribunal however, having regard to the number of days since, 1988 has accepted the plea of the workman that he was employed for more than four

years and his services was terminated taking advantage of a break created by the employer in the year, 1992 depriving him of rights of continuous service and his claim for regular employment was unjust. Tribunal, accordingly, held that it was unfair labour practice covered under Clause (10) of Schedule V of Section 2(r-a) of the Industrial Disputes Act, 1947. The employer was accordingly, directed to take him back in service within 30 days from the publication of the award and the employers were further directed to consider him for appointment as a regular employee as Clerk-cum-Typist in normal course subject to educational qualifications on the basis of his past experience, Being aggrieved, the present writ petition is being filed.

3. On 12.11.1997, the operation of the directions contained in the impugned award for reinstatement has been stayed subject to the condition that the petitioner shall pay the wages last drawn by the respondent workman with effect from the date of the award in accordance with Section 17B of the Industrial Disputes Act. The aforesaid interim order was vacated on 13.04.2000 with the observation that "learned Counsel for the petitioner states that interim order dated 12.11.1997 may be vacated. It has been stated that the workman is going to be reinstated by the petitioner. It has also been stated that the petitioner shall comply with the award dated 27.03.1997. It is ordered accordingly.

4. It is claimed that thereafter the petitioner has wrote a letter for reinstatement of the workman in the same position with the same status, but the respondent has refused to join as he was claiming the employment as a regular employee.

5. Heard Sri Sudhir Chandra, learned Senior Advocate assisted by Sri Vivek Chaudhary, learned Counsel for the petitioner and Sri Yogesh Kumar Sinha, learned Counsel for the respondent-workman.

6. Learned Counsel for the petitioner submitted that the burden lies upon the workman to prove unfair labour practice on the part of the petitioner and to prove the malice. However, in the present case, the respondent-workman has failed to prove that there was any malice on the part of the petitioner and in this regard, no evidence has been adduced. He further submitted that the workman could not establish that there was any permanent vacancy and he could not be offered. He submitted that the respondent-workman was only a casual clerk and as per award, it was admitted that he was issued daily requisition slip when he was in employment. He submitted that he was not given any appointment order and has also no order terminating his service was passed and being a casual clerk had no right of regularization. He further submitted that subsequently, the factory has been completely closed and all the workmen have been given VRS, therefore, there was no question giving regular employment to the respondent workman. In support of his contention, he relied upon the decisions in the case of Gangadhar Pillai Vs. Siemens Ltd., The Haryana State Agricultural Marketing Board Vs. Subhash Chand and Another, Regional Manager, S.B.I. Vs. Rakesh Kumar Tewari, , Regional Manager SBI v. Raja Ram reported in : (2005)ILLJ12SC , P. Rajeev and Others Vs. The Karnataka State Construction

Corporation Ltd., and Secretary, State of Karnataka and Others Vs. Umadevi and Others,

7. Learned Counsel for the respondent workman submitted that the writ petition against the award is maintainable, but only on limited ground as held by the Apex Court in the case of Sadhu Ram v. DTC reported in AIR 1994 S C 1467 (Paragraph 2 and 3). He submitted that the Tribunal has recorded the findings of fact with regard to the unfair labour practice, which cannot be interfered with. He submitted that the Standing Order was also applicable in the case of casual workman and not only to the permanent workman. He submitted that the continuous service for more than 240 days should not necessarily being in a preceding year of the year in which his service has been terminated, but can be in earlier year also. He further submitted that the award of the Tribunal has not been complied with though it has been assured by the petitioner.

8. Having heard the learned Counsel for the parties, I have perused the impugned award and other documents annexed with the writ petition, counter and rejoinder affidavits.

9. It is useful to refer Section 2(r-a), Schedule V of the Industrial Disputes Act, 1947.

2 (ra) Unfair labour practice means any of the practices specified in the Fifth Schedule.

THE FIFTH SCHEDULE.

UNFAIR LABOUR PRACTICES.

1. To interfere with, restrain from, or coerce, workman in the exercise of their right to organise, form, join or assist a trade union or to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, that is to say-

(a) threatening workmen with discharge or dismissal, if they join a trade union;

(b) threatening a lock-out or closure, if a trade union is organised;

(c) griming wage increase to workmen at crucial periods of trade union organisation, with a view to undermining the efforts of the trade union at organisation.

2. To dominate, interfere with or contribute support, financial or otherwise, to any trade union, that is to say:

(a) an employer taking an active interest in organising a trade union of his workmen; and

(b) an employer showing partiality or granting favour to one of several trade unions attempting to organise his workmen or to its members, where such a trade union is not a recognised trade union.

3. To establish employer-sponsored trade unions of workmen.
4. To encourage or discourage membership in any trade union by discriminating against any workman, that is to say:
 - (a) discharging or punishing a workman, because he urged other workmen to join or organise a trade union;
 - (b) discharging or dismissal a workman for taking part in any strike (not being a strike which it deemed to be an illegal strike under this Act);
 - (c) changing seniority rating of workmen because of trade union activities;
 - (d) refusing to promote workmen to higher posts on account of their trade union activities;
 - (e) giving unmerited promotions to certain workmen with a view to creating discord amongst other workmen, or to undermine the strength of their trade union;
 - (f) discharging office-bearers or active members of the trade union on account of their trade union activities.
5. To discharge or dismiss workmen.
 - (a) by way of victimisation;
 - (b) not in good faith, but in the colourable exercise of the employer's rights.
 - (c) by falsely implicating a workman in a criminal case on false evidence or on concocted evidence;
 - (d) for patently false reasons;
 - (e) on untrue or trumped up allegations of absence without leave;
 - (f) in utter disregard of the principles of natural justice in the conduct of domestic enquiry or with undue haste;
 - (g) for misconduct of a minor or technical character, without having any regard to the nature of the particular misconduct or the past record or service of the workman, thereby leading to a disproportionate punishment.
6. To abolish the work of a regular nature being done by workmen, and to give such work to contractors as a measure of breaking a strike.
7. To transfer a workman malafide from one place to another, under the guise of following management policy.
8. To insist upon individual workmen, who are on a legal strike to sign a good conduct bond, as a precondition to allowing them to resume work.
9. To show favouritism or partiality to one set of workers regardless of merit.

10. To employ workmen as "badlis", casuals or temporaries and to continue them as such for years, with the object of depriving them of the status and privileges of permanent workmen.

11. To discharge or discriminate against any workman for filing charges or testifying against an employer in any enquiry or proceeding relating to any industrial dispute.

12. To recruit workmen during a strike which is not an illegal strike.

13. Failure to implement award, settlement or agreement.

14. To indulge in acts of force or violence.

15. To refuse to bargain collectively, in good faith with the recognised trade unions.

16. Proposing or continuing a lock-out deemed to be illegal under this Act.

10. It is not in dispute that the respondent workman was working as a casual clerk. It has been admitted that whenever the work has been taken daily requisition slip was issued. Tribunal has held that the workman has not continuously, worked for more than 240 days in a preceding year in which the service has been terminated. Without entering into the dispute whether he has worked in any other year for more than 240 days or not, but admittedly the regularization has not been claimed in any of the earlier year. Finding of the Tribunal in this regard is finding of fact. This issue has been decided against the workman. The workman has not challenged this view of the Tribunal. Therefore, it is not open to the respondent workman to raise the issue with regard to the continuous working for more than 240 days.

11. In the case of Gangadhar Pillai v. Siemens Ltd. (supra), the Apex Court held that merely because the workman worked for more than 240 days cannot get right of regularization of his service or a permanent status. Under the Industrial Disputes Act, 1947, the concept of 240 days was introduced so as to fasten statutory liabilities upon the employer to pay compensation to be computed in the manner specified in Section 25F of the Industrial Disputes Act, 1947 before he is retrenched from services and not for any other purpose.

12. In the aforesaid case, the Apex Court was considering the meaning of Item 6 of Schedule VI to the Maharashtra Recognition of Trade Union and Prevention of Unfair Labour Practice Act, 1971, which was synonymous to Clause (10) of Schedule V of Section 2(ra) of the Industrial Dispute Act, 1947.

13. It has been held that the burden to prove unfair labour practice lies on the workman. The Apex Court further held as follows:

The Act was enacted not only for recognition of trade unions but also prevention of unfair labour practices. What is an "unfair labour practice" has been defined in Section 26 of the Act, to mean all the practices listed in Schedules II, III and IV,

Section 27 of the Act prohibits engagement of an employee by any employer or union in any unfair labour practice. Section 28 provides for procedure for dealing with complaints relating thereto. Schedule IV to the Act enumerates general unfair labour practices on the part of the employers. Item 6 of Schedule IV to the Act reads as under:

6. To employ employees as "badlis", casuals or temporaries and to continue them as such for years, with the object of depriving them of the status and privileges of permanent employees.

The question as to whether an employee had intermittently been engaged as casual or temporary for a number of years is essentially a question of fact. The issue as to whether unfair labour practices had been resorted to by the employer or not must be judged from the entirety of the circumstances brought on, record by the parties.

Only because an employee has been engaged as a casual or temporary employee or that he had been employed for a number of years, the same by itself may not lead to the conclusion that such appointment had been made with the object of depriving him of the status and privilege of a permanent employee. Unlike other statutes, the employer does not have any statutory liability to give permanent status to an employee on completion of a period specified therein. What is, therefore, necessary to be considered for drawing an inference in terms of the said provisions would be to consider the entire facts and circumstances of the case.

A finding of fact has been arrived at, keeping in view the nature of engagement offered to the appellant by the respondent, by the Tribunal. The burden to prove that the respondent resorted to unfair labour practice indisputably was on the workman. There had been breaks in service but then it has rightly been held that the same were not artificial ones. Requirement to employ employees on a temporary basis is writ large on the face of the nature of the projects undertaken by the respondent. There was nothing on record to show that it had been getting contracts on regular basis. We have perused the charts filed by the parties herein where from it appears that the contracts awarded in favour of the respondent by its various clients had not only been in different parts of the country but also outside the country. It has also not been disputed before us that although the name of the appellant used to be recommended by the head office of the respondents but for employing him, a telegram used to be sent from the site office, in response where to he would report at the place specified in the telegram and would be offered appointment in the prescribed proforma as noticed supra.

14. In the case of *The Haryana State Agricultural Marketing Board Vs. Subhash Chand and Another*, , the Apex Court held as follows:

Reliance placed by Mr. Mahabir Singh upon the Fifth Schedule of the Industrial Disputes Act is again of no assistance. Clauses (b), (d) of Item 5 as also Item 10 of the Fifth Schedule are as under:

5. To discharge or dismiss workmen.

(b) not in good faith, but in the colourable exercise of the employer's rights.

(d) for patently false reasons;

10. to employ workmen as "badlis", casuals or temporises and to continue them as such for years, with the object of depriving them of the status and privileges of permanent workmen.

No case has been made out for attracting Clauses (b) and (d) of Item 5. As regards applicability of Item 10 thereof, we may notice the meaning of "status" and "privilege".

In P. Ramanatha Aiyar's Advanced Law Lexicon, 3rd Edn., Vol. 4 at p.4470, the expression "status" has been defined as under:

Status is a much discussed term which, according to the best modern expositions, includes the sum total of a man's personal rights and duties (Salmond, Jurisprudence 253 257), or, to be verbally accurate, of his capacity for rights and duties. (Holland, Jurisprudence 88).

The status of a person means his personal legal condition only so far as his personal rights and burdens are concerned. Duggamma v. Ganeshayya AIR at p. 101 (Evidence Act (1 of 1872), Section 41).

In the language of Jurisprudence "status" is a condition of membership of a group of which powers and duties are exclusively determined by law and not by agreement between the parties concerned (Roshan Lal Tandon v. Union of India." (See also the judgment of this Court delivered in B.H.E.L v. B.K. Vijay.

The word "privilege" has been defined, at p. 3733, as under:

Privilege is an exemption from some duty burden, or attendance to which certain persons are entitled; from, a supposition of law, that the stations they fill, or the offices they are engaged in, are such as require all their care; that therefore, without this indulgence, it would be impracticable to execute such offices, to that advantage which the public good requires.

A right or immunity granted as a peculiar benefit; advantage or favour; a peculiar or personal advantage or right, especially when enjoyed in derogation of a common right.

Immunity from civil action may be described also as; a privilege because the word "privilege" is sufficiently wide to include an immunity.

The word "privilege" has been defined as a particular and peculiar benefit or advantage enjoyed by a person....

"privileges" are liberties and franchises granted to an office, place, town or manor, by the King's great charter, letters patent, or Act of Parliament.

In view of the aforementioned definitions of the expressions "status" and "privilege" it must be held that such "status" and "privilege" must emanate from a statute. If legal right has been derived by the respondent herein to continue in service in terms of the provisions of the Act under which he is governed, then only, would the question of depriving him of any status or privilege arise. Furthermore, it is not a case where the respondent had worked for years. He has only worked, on his own showing, for 356 days whereas according to the appellant he has worked only for 208 days. Therefore, the Fifth Schedule of the Industrial Disputes Act, 1947 has no application in the instant case. In view of the above, the dispensing with of the engagement of the respondent cannot be said to be unwarranted in law.

15. In the case of Regional Manager, S.B.I. Vs. Rakesh Kumar Tewari, the Apex Court held as follows:

The conclusion of the Tribunal in both appeals that the circulars endorsed and unfair labour practice being followed by the appellant or that the appellant had indulged in unfair labour practice was also incorrect. Unfair labour practice has been defined in Clause (ra) of Section 2 of the Act as meaning any of the practices specified in the Fifth Schedule. The Fifth Schedule to the Act contains several items of unfair labour practices on the part of the employer on the one hand and on the part of workmen on the other. The relevant item is Item 10 which reads as follows:

10. To employ workmen as "badlis", casuals or temporaries and to continue them as such for years, with the object of depriving them of the status and privileges of permanent workmen.

We have already dealt with this issue in Raja Ram case where we had said: (SCC pp. 167-68, para 9).

(B)efore an action can be termed as an unfair labour practice it would be necessary for the Labour Court to come to a conclusion that the badlis, casuals and temporary workmen had been continued for years as badlis, casuals or temporary workmen, with the object of depriving them of the status and privileges of permanent workmen. To this has been added the judicial gloss that artificial breaks in the service of such workmen would not allow the employer to avoid a charge of unfair labour practice. However, it is the continuity of service of workmen over a period of years which is frowned upon. Besides, it needs to be emphasised that for the practice to amount to unfair labour practice it must be found that the workman had been retained on a casual or temporary basis with the object of depriving the workman of the status and privileges of a permanent workman. There is no such finding in this case. Therefore, Item 10 in List I of the Fifth Schedule to the Act cannot be said to apply at all to the respondent's case and the Labour Court erred in coming to the conclusion that the respondent was, in the circumstances, likely to acquire the status of a permanent employee.

16. In the case of Regional Manager, State Bank of India v. Raja Ram reported in

(2004) 7 SC C 164, the Apex Court held as follows:

It appears that the High Court as well as the Labour Court had proceeded on a fundamental misconception as to the nature of the right available to the respondent. The respondent was employed for a fixed period of 91 days. Assuming that such an employee could be called a temporary employee for the purposes of the Sastry Award, the requirement as to service of notice of 14 days, would, in cases where an employee has been appointed for a fixed tenure, amount to an embargo on the employer terminating the services prior to the expiry of such period without giving a 14 days' notice. The non-giving of the notice would not mean that the employee would thereby continue to serve beyond the period for which he was originally appointed. The exception to this principle is when an employee is appointed temporarily for successive fixed tenures with artificial breaks in between so as to deny the employee the right to claim permanent appointment. This action would be an unfair labour practice within the meaning of the phrase in Section 2(ra) of the Act. Section 2(ra) says that unfair labour practice means any of the practices specified in the Fifth Schedule to the Act. The Fifth Schedule to the Act contains a list of unfair labour practices; which have been classified under two heads, namely: (I) on the part of the employer and trade unions of employers, and (II) on the part of the workmen and trade unions of workmen. The principle that we have referred to earlier finds place in Item 10 of Part I under which.

to employ workmen as "badlis", casuals or temporaries and to continue them as such for years, with the object of depriving them of the status and privileges of permanent workmen.

is an unfair labour practice. In other words, before an action can be termed as an unfair labour practice it would be necessary for the Labour Court to come to a conclusion that the badlis, casuals and temporary workmen had been continued for years as badlis, casuals or temporary workmen, with the object of depriving them of the status and privileges of permanent workmen. To this has been added the judicial gloss that artificial breaks in the service of such workmen would not allow the employer to avoid a charge of unfair labour practice. However, it is the continuity of service of workmen over a period years which is frowned upon. Besides, it needs to be emphasised that for the practice to amount to unfair labour practice it must be found that the workman had been retained on a casual: or temporary basis with the object of depriving the workman of the status and privileges of a permanent workman. There is no such finding in this case. Therefore, Item 10 in List I of the Fifth Schedule to the Act cannot be said to apply at all; the respondent's case and the Labour Court erred in coming to the conclusion that the respondent was, in the circumstances, likely to acquire the status of a permanent employee. Furthermore, both the High Court and the Labour Court appeared to Have proceeded on the basis that the appointment of Ram Kumar after the employment of the respondent ceased, also on casual basis, was an unfair labour practice. If this view is to be upheld the respondent's

appointment in place of Sooraj would equally be an unfair labour practice and therefore, unsustainable.

As far as the three settlements are concerned, I the respondent is right in contending that the settlements dealt with the absorption of casual employees as permanent employees and did not touch on the question as to whether the respondent should be reinstated as a casual employee. However, the respondent's counsel is incorrect in his submission that the benefit of the Scheme could not have been availed of by the respondent because no offer was made to the respondent by the appellant. The settlements were advertised and it was for the respondent to have taken advantage of the Scheme. Although the settlements are, strictly speaking, not relevant to the question of the correctness of award, nevertheless their terms are necessary to be considered for the purpose of deciding whether, assuming everything in favour of the respondent and against the appellant, the respondent should be reinstated as a casual employee since the Scheme had been propounded by the employer with workmen with a view to granting benefit to persons whose services had been terminated as casual employees. However, the point does not appear to have been raised before the High Court by the appellant. The High Court accordingly, merely affirmed the Labour Court's decision on the ground that the appellant was "indulging in one of the cruellest; forms of unfair labour practices". We have already held that that was an erroneous conclusion.

17. In the case of P. Rajeev and Others Vs. The Karnataka State Construction Corporation Ltd., the Division Bench of the Karnataka High Court held as follows:

The object behind a particular order of appointment has to be examined to find out whether it is an unfair labour practice. An element of malafide is an essential ingredient of item 10 of the Fifth Schedule to I.D. Act. Unless the essential ingredient of item 10 of Fifth Schedule (to I.P. Act) is alleged and proved, it is not possible to stigmatise a particular mode of appointment as an unfair labour practice. Such an oblique motive on the part of an instrumentality of the State (like the employer-respondent in the instant case) cannot be interfered, merely because, appointments are being made for temporary periods, and the appointees are continued in service temporarily from time to time.

18. In the case of Secretary, State of Karnataka and Others Vs. Umadevi and Others, , the Apex Court held as follows.

Unless the appointment is in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointee. If it is a contractual appointment, the appointment comes to an end at the end of the contract, if it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued. Similarly, a temporary employee could not claim to be made permanent on the expiry of his term of appointment. It has also to be clarified that merely because a temporary employee or a casual wage worker is continued for a time beyond

the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the, strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. It is not open to the Court to prevent regular recruitment at the instance of temporary employees whose period of employment has come to an end or of ad hoc employees who by the very nature of their appointment do not acquire any right.

Employees were engaged on daily wages in the concerned department on a wage that was made known; to them. There is no case that the wage agreed upon was not being paid. Those who are working on daily wages formed a class by themselves; they cannot claim that they are discriminated as against those who have been regularly recruited on the basis of the relevant rules. No right can be founded on an employment on daily wages to claim that such employee should be treated on a par with a regularly recruited candidate, and made permanent in employment even assuming that the principle could be invoked for claiming equal wages for equal work. There is no fundamental right in those who have been employed on daily wages or temporarily or on contractual basis, to claim that they have a right to be absorbed in service. They cannot be said to be holders of a post, since, a regular appointment could be made only by making appointments consistent with the requirements of Articles 14 and 16 of the Constitution. The right to be treated equal with the other employees employed on daily wages, cannot be extended to a claim for equally treatment with those who were regularly employed. That would be treating unequals as equals. It cannot also be relied on to claim a right to be absorbed in service even though they have never been selected in terms of the relevant recruitment rules.

19. The details of number of days the respondent worked given in the impugned order reveals that he has not continuously worked. Admittedly, he has not even worked for 240 days in the preceding year, therefore, it cannot be said that he has been retained as casual workman for years with the object to deprive him of the status and privileges of permanent workman.

20. The pleading of the respondent-workman do not reveal any evidence of. any malice on the part of the petitioner which may warrant unfair labour practice. In,, this view of the matter, the respondent-workman was not able to discharge its burden to prove unfair labour practice. The Tribunal without recording any finding of any malice on the part of the petitioner has illegally held that there was unfair labour practice. It may be mentioned here that the petitioner offered employment on the same post with the same status, but the respondent-workman refused to join, as he was insisting for the regular appointment. Therefore, on the facts and circumstances, it cannot be said that the petitioner has no intention to comply with the assurance given to this Court.

21. For the reasons stated above, the award dated 27th March, 1997 passed by the Presiding Officer, Industrial Tribunal, Agra is liable to be set aside.

22. In the result, writ petition is allowed. The award dated 27th March, 1997 passed by the Presiding Officer, Industrial Tribunal, Agra is set aside. However, the amount paid in view of interim order passed by this Court may not be recovered from the respondent-workman.