
(2004) 08 AHC CK 0285
In the Allahabad High Court
Case No : C.M.W.P. No. 21959 of 1989

Jai Bahadur Singh

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 06-08-2004

Acts Referred:

Constitution of India, 1950 — Article 311, 311(2)
Industrial Disputes Act, 1947 — Section 2, 25(F)

Citation : (2004) 5 AWC 5115

Hon'ble Judges : R.B. Misra, J

Bench : Single Bench

Advocate : B.P. Srivastava, for the Appellant; S.P. Singh, S.C., for the Respondent

Final Decision : Dismissed

Judgement

R.B. Misra, J.—Heard Sri B.P. Srivastava, learned Counsel for the Petitioner, Sri S.P. Singh, learned Counsel for Respondent No. 3 and learned standing Counsel.

2. In this petition prayer has been made to quash the order dated 28.10.1989, whereby Petitioner's deployment as Gateman has been dispensed with. A further prayer has been made seeking writ of mandamus commanding the Respondent to allow the Petitioner to hold the post of Gateman and to accord him all the benefits and privileges of continuity of service.

3. According to the Petitioner, he was appointed as Gateman by the Divisional Forest Officer, Varanasi, on 24.6.1984. He continued to serve as Gateman from 24.6.1984 to 28.10.1989. As a Gateman, the Petitioner was to open door at the direction given by the Nikashi Munshi and Gateman was not to allow any truck to go out the gate. However, Petitioner was surprised to receive a termination order dated 28.10.1989, which is a stigmatic order which has been passed without affording opportunity of hearing to the Petitioner, as such it is beyond jurisdiction and is contrary to the provisions of Article 311(2) of the Constitution of India and as such the impugned order is arbitrary and is liable to set aside.

4. A counter-affidavit has been filed by Sri Jawahar Lal, on behalf of Respondent No. 2, which indicates that there is no sanctioned post of Gateman in the Forest Department. The Petitioner was deployed to work on daily wages/muster role employee by Range Officer, Ramnagar, who is also Unit Officer. According to the Respondent, contents of Annexure-I giving appointment is manipulated and is not genuine. No post of Gateman has been provided in the establishment of Forest Department. According to the Respondent, the Petitioner was working as daily wager like other daily wagers at relevant time. By virtue of deployment Petitioner was to open the gate of the barrier on the instructions of Nikasi Munshi and not on his own. The Petitioner on 26.10.1989 at 7 a.m. allowed to pass fuel loaded truck through barrier which was without permit. The Unit Officer of Ramnagar submitted his enquiry report that the said truck was allowed to pass through the barrier loaded with fuel wood without permit. According to the Respondent Petitioner was deployed as daily wager. There was no question of issuing appointment order as indicated in Annexure-I. Since the Petitioner was on contractual deployment on day-to-day basis being daily wager was removed from deployment on the basis of report of Unit Officer, Ramnagar, which found the Petitioner guilty in the enquiry. During the course of argument it has been submitted on behalf of Respondent that daily wager has no right to the post and the appointment of daily wager was not made according to procedure. The deployment of the daily wager is on day-to-day basis and their engagement commences in morning and comes to an end in the evening and the deployment is made in the need of work. The daily wage service can be terminated when work is not available or when the person deployed on daily wage is found guilty or was found not suitable to perform the work of daily wager or his service is not satisfactory. According to learned Counsel for the Petitioner, no notice or show cause or opportunity of hearing was necessary to be given to the daily wager before disengagement. The daily wager has no right to post and protection of Article 311(2) of the Constitution.

5. Non-renewal of contractual employment and dispensation of engagement at any stage without any reason in terms of appointment does not amount to retrenchment u/s 2(oo) of Industrial Disputes Act as held by the Supreme Court in Escorts Ltd. v. Presiding Officer and Anr. (1997) 11 SCC 521, while following an earlier decision of Supreme Court in M. Venugopal v. Divisional Manager, L.I.C. (1994) 2 SCC 323. Later on it was considered and followed when similar view was taken by the Supreme Court in State of Rajasthan and Ors. v. Rameshwar Lal Gahlot (1996) 1 SCC 595, where termination of appointment after expiry of specified period held valid and not attracting Section 25F of Industrial Disputes Act, 1947 unless the termination was found to be mala fide or in colourable exercise of powers. Similar view was also taken by the Supreme Court in Executive Engineer v. Madhukar Purshottam Kolharkar, (2000) 2 LLJ 1410SC

6. Undisputedly, the Petitioner was a daily wager. The daily wagers have no right to the post in view of Himanshu Kumar Vidyarthi and Others Vs. State of Bihar

and Others, and Bipin Bihari Srivastava v. District Judge Basti 1993 (1) AWC 168 because appointment of daily wagers are made by not complying or observing the procedural formalities in consonance to any rules, regulations or by observing the procedures prescribed for the recruitment. The engagement of daily wagers commences in the morning and comes to an end in the evening of every day. There is a contractual deployment for every day. It is upto the employer to allow to continue the employment or disengage the daily wagers at any time in absence of work. The daily wagers have no right or protection under Article 311 of the State of Assam and Others Vs. Shri Kanak Chandra Dutta, ; Jagdev v. State of U.P. 1998 LIC 1088 (AP) para 16 and Channey Lal v. Director Malaria Research Centre, New Delhi 1998 (4) AWC 222 : 1999 (82) FLR 76 and 10.

7. In Himanshu Kumar Vidyarthi and Others Vs. State of Bihar and Others, , the Supreme Court has held that every department of Government cannot be treated as industry and dispensation of service of persons engaged on daily wages under the Government department, therefore, is not a retrenchment. In Himanshu Kumar Vidyarthi (supra) the services of the writ Petitioners, who were appointed as daily wagers as Assistant Drivers and Peon in Cooperative Training Institute under the State Government, were terminated and the contention of the writ Petitioners that they were retrenched from service in violation of provisions of Section 25F of the Industrial Disputes Act, 1947 was rejected by the Supreme Court and it was held as under:

Every department of the Government cannot be treated to be industry. When the appointments are regulated by the statutory rules, the concept of industry to that extent stands excluded. The Petitioners were not appointed to the posts in accordance with the rules but were engaged on the basis of need of the work. They are temporary employees working on daily wages. Their disengagement from service cannot be construed to be a retrenchment under the Industrial Disputes Act. The concept of retrenchment therefore cannot be stretched to such an extent as to cover these employees. Since the Petitioners are only daily-wage employees and have no right to the posts, their disengagement is not arbitrary.

8. The daily wagers/muster roll employees cannot be regularised unless the posts are in existence or the vacancies are available. To entertain the claim for regularisation means to provide appointment to a post after regularising the service of an employee. The position of daily wagers is entirely different inasmuch as the daily wagers hold no post in view of State of Haryana and Anr. v. Tilak Raj and Ors. 2003 (4) AWC 2597 (SC) : 2003 (3) SCC 1096 : 2003 AIR SCW 3382 ; Madhyamik Siksha Parishad, U.P. Vs. Anil Kumar Mishra and others etc., ; State of U.P. v. U.P. Madhyamik Shiksha Parishad Shramik Sangh and Ors. 1996 (9) SCC 34 (paras 3 and 4) as well as State of Orissa v. Dipti Malapatr

9. In State of Haryana and others Vs. Piara Singh and others etc. etc., , the question regarding regularization of ad hoc appointees came up for consideration before the Supreme Court. It was held that normal rule would be regular

appointment through the prescribed agency but exigency of administration may sometime call for an ad hoc and/or temporary appointment to be made. Such ad hoc or temporary appointee, the Supreme Court held, if allowed to continue for a fairly long span, the authorities must consider his case for regularization provided he is eligible and qualified according to the rules and service record and appointment does not run counter to the reservation policy of the State. Direction given by the High Court in that case for regularization of every ad hoc or temporary employees who had been continued for one year was held to be totally "untenable" and "unsustainable". In the case of Piara Singh (supra) the Court noted that the normal rule is recruitment through the prescribed agency but due to administrative exigencies, an ad hoc or temporary appointment may be made. In such a situation, this Court held that efforts should always be made to replace such ad hoc or temporary appointment by regularly selected employees, as early as possible. The temporary employees also would get liberty to compete along with others for regular selection but if he is not selected, he must give way to the regularly selected candidates. Appointment of the regularly selected candidate cannot be withheld or kept in abeyance for the sake of such an ad hoc or temporary employee. Ad hoc or temporary employee should not be replaced by another ad hoc or temporary employee, he must be replaced by only regularly selected employee. The ad hoc appointment should not be a device to circumvent the rule of reservation.

10. In *Channey Lal and Ors. v. Director, Malaria Research Centre, New Delhi and Anr.* 1998 (4) AWC 222 : 1999 (82) FLR 76, where the Petitioners deployed on daily wages were orally asked not to come to work even after more than three years of deployment and on their claim for regularisation on the ground that the writ Petitioners have acquired right to be considered for regularisation by virtue of having worked more than 240 days without any break in a calendar year and they were entitled to the protection of Article 311 of the Constitution, this Court following the decision of *Himanshu Kumar Vidyarthi v. State of Bihar* 1997 (76) FLR 237, has held that the daily wagers working as a workman deployed in a project does not hold civil post under the State and have no right to the post, these daily wagers cannot be said to work on temporary or permanent basis and are not entitled to the protection of provisions of Article 311 of the Constitution, and since the daily wagers have no right to the post as such the concept of retrenchment cannot be extended to such daily wage employee and disengagement of such daily wager cannot be said to be arbitrary in view of *Himanshu Kumar Vidyarthi* (supra). The disengagement of deployment of daily wager, who is engaged for a day, is not a termination of service. Since the daily wage labour is engaged only on the basis of a contract lasting for a day and each engagement is a fresh, non-engagement or disengagement is not held to be arbitrary. In view of *Pushpa Agarwal v. Regional Inspectress of Girls Schools, Meerut* 1994 (3) AWC 1728: 1995 (70) FLR 201, the principle of retrenchment as provided under Central Industrial Disputes Act and Rules framed thereunder is also attracted in respect of a workman governed under the U.P. Industrial

Disputes Act and the Rules framed thereunder.

11. In *State of Assam and Others Vs. Shri Kanak Chandra Dutta*, , the Supreme Court (Constitution Bench) has also held that casual labourer is not holder of civil post.

12. This Court (D.B.) in *Zakir Hussain v. Engineer-in-chief, Irrigation Department, U.P., Lucknow* 1992 (2) ACJ 1366, has held that daily wager has no right to the post and there must be regular or permanent post and funds must be available for payment of salary and the daily wagers are to be qualified for appointment to the post and by virtue of only having worked for three years they cannot claim regularisation as a matter of right and the regularisation cannot be made as a thumb of rule, and this Court relegated the matter for adjudication and avail the alternative remedy for claiming the relief in reference to Section 25F of the Industrial Disputes Act.

13. In *State of U.P. Vs. Labour Court, Haldwani and another*, , it was held that the engagement of daily wager in the Irrigation Department comes to an end every evening. Refusal to employ him from a particular day, his disengagement was not under the provision of Section 25F of Industrial Disputes Act. It was observed in para 6 of the above case as below:

Employment to Government service in the Irrigation Department is regulated by statutory rules. Presently, the Respondent No. 2 was not employed in accordance with the rules. For engaging a person casually on day-to-day basis the statutory rules are not required to be followed under which the posts have to be advertised and only the best from the market have to be picked up keeping in view reservation provided from certain classes. Thus, every eligible person has an opportunity to participate in the recruitment process. This is not so in the case of daily wager in whose case even regularisation regarding age, medical fitness, character roll etc. are not observed. Therefore, daily and casual workers who are engaged in disregard of all rules cannot be allowed to enter Government service through the back door and the labour court cannot be allowed to be used as a legal means for such back door entry. The anomalous situation that the impugned award creates can be seen from the fact that till before his alleged retrenchment the Respondent No. 2 was on engagement from day-to-day. The impugned award makes him a permanent employee with the necessary consequence that he would have to be paid salary for all the 365 days as regular employee and the other benefits of regular employment can also not be denied to him. Thus, the award put him, in as much better position that he was before the alleged retrenchment. Such a result is not conceived.

14. I have heard learned Counsel for the parties. I find force in the contentions of learned Counsel for the Respondent. There is no merit in the case. In view of the above observations, no relief as prayed can be granted to the Petitioner, therefore, the writ petition is dismissed.