
(1994) 09 KL CK 0038
In the High Court Of Kerala
Case No : O. P. No. 11247 of 1990

K.A. Joseph and others

APPELLANT

Vs

Flag Officer Commanding-in-Chief and Others

RESPONDENT

Date of Decision : 24-09-1994

Acts Referred:

Constitution of India, 1950 — Article 14, 141, 16, 39(d)

Citation : (1994) 2 KLJ 823

Hon'ble Judges : D.J. Jagannadha Raju, J

Bench : Single Bench

Advocate : Mathai M. Paikeday, for the Appellant; K.P.G. Menon (Addl. C. G. S. C.), for the Respondent

Final Decision : Allowed

Judgement

D.J. Jagannadha Raju, J.—This original petition is filed by four Sports Malis who are working in the play grounds under the control of Southern Naval Command. They were appointed on the following dates: first petitioner on 2-12-1965, second Petitioner on 1-7-1979, third petitioner on 14-9-1982 and the fourth petitioner on 1-12-1982. Since then, they have been working continuously without any interruption. Their grievance in this original petition is that in spite of long continuous service they are being paid miserable wages as indicated in Ext. P1 and they were never regularised or made permanent. Relying upon various decisions of the Supreme Court, they claim that they are entitled to be regularly absorbed and made permanent employees and they should be paid wages that are payable to class IV or group D employees with all consequential benefits. They also contend that earlier on 24-1-1984, the second respondent put up a proposal to the first respondent to absorb them regularly and make them permanent employees. But the first respondent did not care to do it, Earlier, O. A. No. 170 of 1986 was filed before the Central Administrative Tribunal; on the ground that the petitioner do not have the status of civil servants. The tribunal held that the petition is not maintainable. The SLP filed in the Supreme Court

against that order ended in dismissal and hence they have come forward with the present original petition. They claimed that uninterrupted service for a long time confers the mantle of permanency on the employee and they cannot be asked to continue to work on ad-hoc basis. Original petition is resisted by the respondents and in the elaborate counter affidavit filed on behalf of the respondents, it is contended that there is a stadium and a few sports grounds in Southern Naval Command and it is the responsibility of the second respondent to manage them with the money from the non public fund. There are no posts sanctioned by the Government for the maintenance of sports grounds. These petitioners were engaged purely on an ad-hoc basis on mutually agreed terms. They are not appointed against any sanctioned posts nor the Government paid their salaries from Government fund. Petitioners are private employees engaged by the second respondent and they are not working against any Government posts Hence they are not entitled to be absorbed as Government servants.

2. Like the petitioners, there are large number of privately engaged persons who are all being paid from non public fund and who are working in different posts in Southern Naval Command. These are not entitled to claim regular appointment or permanent appointment. They cannot claim parity of treatment with Group "D" employees under the Government Original petition is not maintainable. Earlier the Central Administrative Tribunal dismissed O. A. No. 170 of 1986. The dismissal of the O. A. was confirmed by the Supreme Court in SLP (Civil) No. 11719/87. The judgments of the tribunal and the Supreme Court operate as res judicata. There are no permanent posts sanctioned for the maintenance of the sports grounds. They are not appointed against any sanctioned Government posts. They do not come under the purview of public employment. In spite of O. A. No. 170/86 being dismissed, the petitioners were permitted to continue in their engagement on humanitarian grounds. It is true that they have been engaged since long time. They are only private employees and they are not entitled for regular absorption nor are they entitled to be paid wages on par with "D" class employees. Original petition may be dismissed.

3. The two crucial questions that arise for consideration in this original petition are; (i) whether the dismissal of O.A. No. 170 of 1986 by the Central Administrative Tribunal would operate as res judicata and be a bar for the maintainability "of the present original petition and (ii) whether the petitioners are entitled to be regularly absorbed and made permanent and if so, from what date and what are the attendant benefits to which they are entitled.

4. The learned counsel for the petitioners Shri. Mathai M. Paikeday contends that the petitioners who have been working since long time, are being paid paltry wages as indicated in Ext. Pl. They cannot be made to work on ad-hoc basis for ever. They are-not private employees of the second respondent. They are doing work for the establishment, viz., sports grounds of the Southern Naval Command. It is wrong to describe them as private employees. Though they might have been employed originally on ad-hoc basis, as they are continuously

working for more than 10 years, they are entitled to be regularly absorbed. They cannot be denied permanent jobs on the ground that they were net working against the sanctioned posts. It is the duty of the first and second respondents to take steps to see that the posts are sanctioned for the work which is being done by these employees. The mere fact that they are being paid from private sources or non-public fund is not a bar for granting relief a prayed for in the original petition.

5. The learned counsel relies upon numerous decisions starting from AIR 1989 Bombay 213 Laxman Mahadav Tail v. Principal, Shri. Pancham Khemraj Mahavidyalaya and others), Daily Rated Casual Labour Employed under P and T Department Vs. Union of India (UOI) and Others, right upto (1993) 1 SCC.536 State of Madhya Pradesh and another v. Pramod Bhartiya and others) and claims that in view of the numerous decisions of the Supreme Court and the High Courts, petitioners, are entitle to be regularised and are eligible for the status of permanent employees and the usual scale of pay applicable to class "D" employees. Petitioners" Advocate has also produced before this Court two documents in addition to the documents produced in the original petition to show that the pay scale of even contingent employees employed on a full time basis is Rs.775-12-955-14-1025-20-1065. For part-time contingent employees the salary is Rs.460 + 92% D. A. + C. C. A. Even class IV employees of the State Government would get the salary i.e., the scale of Rs. 750-12-870-EB-14-940 and the class IV employees of the State Government would be entitled to various other allowances. He has also produced a computer print out of the salary that is being paid to a Safaiwala (cleaner or scavenger) to show that ha gets a total emoluments of Rs. 2,125/-. The learned counsel contends that in such a background the payment of salary of Rs. 420/- to the first petitioner and Rs. 300/- and odd for the other three petitioners is a pittance and it amounts to an unfair labour practice.

6. The learned standing counsel for the respondents repeats the contentions that are raised in the counter affidavit and claims that these people being private employees paid out of non-public fund, cannot claim regularisation or permanent status. They cannot claim parity of treatment with class "D" employees or Class IV employees of the State Government.

7. In view of some of the statements made in the counter affidavit, a reply affidavit has been filed denying the claim of the respondents that these people are employed of private employees of the second respondent. They are employed by the second respondent not for his private Work, but for the regular maintenance of the stadium and sports grounds under the control of the Southern Naval Command. Even after the stadium and the sports grounds were handed over the M. E. S. authority, they were allowed to continue as Sports Mali"s for the maintenance and upkeep of the stadium and the sports grounds and they cannot be asked to quit after they have put in 29 years and 12 years of service. Refusal to make them permanent employees would amount to unfair

labour practice. In the O. A. filed before the Central Administrative Tribunal, the tribunal did not decide the matter. It only examined the question of maintainability of the application and found that as they are not Government servants, they do not come within the purview of the Act and hence the O. A. was dismissed as not maintainable. It cannot operate as bar of res judicata.

8. Respondents' counsel places strong reliance on two decisions of the Supreme Court reported in *Union of India and others Vs. Tejram Parashramji Bombhate and others*, and *Delhi Development Horticulture Employees' Union Vs. Delhi Administration, Delhi and others*, and claims that the present petitioners are not entitled to be absorbed on a regular basis nor they are entitled to claim wages as permanent employees.

Point No. 1

9. As can be seen from Ext. R1 the order passed in O. A. No. 170 of 1986 on 16-6-1987, the tribunal went in to the question of maintainability of the O. A. and came to the conclusion that as they are not people of civil services employed against any Government sanctioned posts, they have not acquired the status of public servants and hence the petition is apt maintainable. The tribunal also took into consideration the fact that they are being paid from the non-public fund even after the stadium was handed over to MES and hence it is not a case of transfer of the stadium, but only handing over of the stadium to the MES for the purpose of maintenance. Upholding the preliminary objection about the maintainability the O. A. was dismissed. The order of the Central Administrative Tribunal in O. A. No. 170 of 1986 cannot operate as res judicata, because the question whether these people are entitled to be regularly absorbed was not at all considered [and decided by the tribunal. I hold point No. 1 against the respondents.

Point No. 2:

10. There is considerable force in the arguments advanced by the petitioners' advocate in view of the numerous of the Supreme Court, Bombay High Court and other High Courts. One of the earliest decisions is AIR 1989 Bombay 213 (*Laxman Mahadev Teli v. Principal Shri Pancham Khemraj Mahavidyalaya*.) In that decision, a Division Bench of the Bombay High Court was dealing with a case where a person who was first temporarily appointed as Peon in Mahavidyalaya and whose services were twice terminated, but was later re-employed and then allowed to continue to work uninterruptedly from March, 1981 to 19th June, 1986, when his services were terminated the Court observed as follows: "Though purportedly in a temporary capacity, Indisputably the petitioner throughout worked as a Peon without break in service right from Mar. 81 till 17th June 1986. This long spell of over five years of continuous service without break cannot mean that though the petitioner was initially employed in a temporary capacity he continues as a temporary employee indefinitely. The very fact that it was not thought necessary to dispense with the petitioner's service for over 5 long years

by itself indicates that his service during these 5 years cannot be said to be merely temporary. A temporary employee cannot be kept in suspended animation indefinitely. It is unfair to an employee and an unwarranted privilege on an employer to keep an employee indefinitely in a temporary capacity and thereafter at his sweet will and pleasure and irrespective of the length of uninterrupted service put in, unceremoniously terminate the employment under the refuge that the employment was temporary. The length of uninterrupted service, as in this case on the employee confers the mantle of permanency and not the eternal suspense of temporariness..... it is but right and fitting that he must be accorded the dignity due to him of reinstatement". The principle laid down in this decision aptly applies to the facts of our case, where the petitioners have put in continuous service of 29 years and 12 years.

11. (1988)1 SCO 122 (Daily Rated Casual Labour v. Union of India and others) the case of daily rated workers working in the P & T Department lays down the principle that while the daily rated casual labourers are doing work similar to that of regular workers of the Department, the daily rated workers are entitled to receive remuneration on par with the regular employees on the principle of "equal pay for equal work", at least they are entitled to the minimum pay in the pay scale of the regular workers plus DA, though they may not be entitled to increments. This principle laid down by the Supreme Court, was upheld in various subsequent decisions. On the facts of that particular case, the Supreme Court directed the P&T Department to frame a scheme for absorption of the casual labourers continuously working in the Department for more than one year in a phased manner. (1991) 1 SCC 679 Grih Kalyan Kendra Workers Union v. Union of India) lays down in paragraph 6 at Page 625 the law as follows:-

Equal pay for equal work is not expressly declared by the Constitution as a fundamental right, but in view of the Directive Principles of State Policy as contained in Article 39(d) of the Constitution "Equal pay for equal work" has assumed the status of fundamental right in service jurisprudence having regard to the constitutional mandate of equality in Articles 14 and 16 of the Constitution. Equal pay for equal work and providing security for service by regularising casual employment within a reasonable period has been accepted by this Court as a constitutional goal to our socialistic pattern. It has ceased to be a judge made law as it is the part of the constitutional philosophy which ensures a welfare socialistic pattern of a State providing equal opportunity to all and equal pay for equal work for similarly placed employees of the State. This Court has zealously enforced the fundamental right of equal pay for equal work in effectuating the constitutional goal of equality and social justice in a number of decisions.

Then the Court discussed the entire case law on this aspect. In Jacob M. Puthuparambil and others Vs. Kerala Water Authority and others, popularly known as Kerala Water Authority Employees Case, the Supreme Court exhaustively dealt with the matter of the Constitutional philosophy regarding

absorption of temporary employees who have worked continuously for long period. Discussing the same in the light of Rule 9 (a) (i) of the Kerala State and Subordinate Service Rules, the Court observed in paragraph 15 as follows :-

.....But once the appointments continued for long, the services had to be regularised if the incumbent possessed the requisite qualifications as was done by sub-rule (e). Such an approach alone would be consistent with the constitutional philosophy adverted to earlier. Even otherwise rule must be so interpreted, if the language of the rule permits, as will advance this philosophy of the Constitution. If the rule is so interpreted it seems clear to us that employees who have been working on the establishment since long, and who possess the requisite qualifications for the job as obtaining on the date of their employment, must be allowed to continue on their jobs and their services should be regularized. It is unfair and unreasonable to remove people who have been rendering service since some time as such removal has serious consequences.

12. In *The Dharwad Distt. P.W.D. Literate Daily Wages Employees Association and others, etc. Vs. State of Karnataka and others etc.*, the court had to deal with an instance of nearly 50,000 casual workers who were demanding regularisation and equal pay for equal work with the regular employees. In such a situation, the Supreme Court observed thus: "Equal pay for equal work and providing security for service by regularising casual employment within a reasonable period have been unanimously accepted by the Supreme Court as a constitutional goal to our socialistic policy. What the Supreme Court has said by interpreting law on this subject would be binding on the instrumentalities of State-be it of the Centre or the State-by virtue of Article 141. The philosophy of the Court as evolved in various cases is not that of the Court but is ingrained in the Constitution....." Considering the economic situation and the magnitude of the problem, the court devised a scheme for absorption of these workers in a phased manner and gave guidelines incorporated in paragraph 23. The principle of this decision also applied to the facts of our case. *State of Madhya Pradesh and Another Vs. Pramod Bhartiya and Others*, reiterates the principle of equal pay for equal work. But in claiming advantage of that principle, the burden to establish the right of equal pay for equal work is on the persons claiming the same.

13. Judged in the light of these decisions, it is quite clear that the petitioners are entitled to the benefits of regular absorption by virtue of their long services extending to 29 years and 12 years.

14. It should also be remembered that these employees cannot be treated as private employees of the second respondent. They are not domestic servants or private servants. They are employed by the second respondent who is in charge of the maintenance of the stadium and sports grounds for doing work for the Southern Naval Command. The sports grounds and stadium are owned by the Southern Naval Command which is the instrumentality of the State, it being the limb of the Central Government. The fact that they were being paid from the non-

public fund and not from the fund sanctioned by the Government for any posts is also no bar for the absorption of the petitioners. It should be remembered that the services that are being rendered by them are continuous service. There is necessity for the work that is being done by them. It is the duty of the authorities, viz., first and second respondents to take steps to get the necessary posts sanctioned for the maintenance of the stadium and sports grounds. Simply because they are being paid from the non-public fund, they cannot ask the petitioners to work as slaves or serfs with a pittance of wages. When the stadium was said to be handed over to the M. E. S. which is also an instrument of the State and a separate Department, they should have taken the responsibility of getting the necessary posts sanctioned for the upkeep of the stadium and sports grounds.

15. The fact that they were employed originally on ad-hoc basis and ignoring normal rules of recruitment does not mean that they can be denied the right to regular absorption. They have continuously worked for more than 10 years and 29 years. That means their services are satisfactory, they are competent to do the job and their services are essential. If we compare the salaries paid to them with the salaries of the class IV employees, it can straight-away be said that for all these years by virtue of unfair labour practice, they were being denied their legitimate due. Even class IV employees of the State Government would get the minimum basic wages of Rs. 750/- plus allowances. Even the minimum wages prescribed under the Minimum Wages Act are far more than the salaries paid to the petitioners as shown in Ext. P1. As can be seen from the computer print out produced before the Court even a scavenger or cleaner working in the Southern Naval Command is getting a total emoluments of Rs. 2,125/-. In such circumstances, the present petitioners cannot be asked to work on the salary of Rs. 420/- and Rs. 300/- and odd. As they are Sports Malis employed for doing non-skilled work, they are entitled to be treated on par with class "D" employees of the first and second respondents.

16. The two decisions relied upon by the respondents' advocate are not applicable to the facts of this case. Union of India and others Vs. Tejram Parashramji Bombhate and others, is a case where the Government started a primary school for the benefits of the children of Ordnance Factory. The employees of the Ordnance Factory on their own initiative, started a secondary school and employed teachers and the teachers of the secondary school claimed parity of treatment with the Government employees in Government secondary schools. The Tribunal allowed that petition and gave a direction to the Government to establish a secondary school and to absorb them as secondary school teachers on scales applicable to the Central Government Secondary School teacher employees. In such a background, the Supreme Court set aside the order of the Central Administrative Tribunal. The Court found fault with the Central Administrative Tribunal's order and observed in paragraph 4 as follows:

There is no law requiring the Central Government to sanction the secondary

school. The Central Government has taken a decision that it will not involve itself in sanctioning or running classes beyond the Primary School level. It is a policy matter involving financial burden. No Court or the Tribunal could compel the Government to change its policy involving expenditure. The Tribunal, therefore, could not have, issued the directions as it did to compel the Central Government to assess the needs of the school and create the necessary posts without support of law.

The Court further observed that the respondents are not paid by the Central Government. They are not holding any appointment under the Central Government. They are employed by the local arrangement by the employees of the Ordnance Factory: The court further Said that Section 14 of the Administrative Tribunals Act confers no jurisdiction, power and authority on the tribunal to deal with the service matters of the employees of the respondents. They are not entitled to claim the pay scale admissible to the Government school teachers much less regularisation of their services by the Central Government. Accordingly, the tribunal's order was set aside as one passed without authority.

17. In the present case on hand, the sports grounds and the stadium were established by the instruments of the Central Government. They are not established by any private arrangement. From the non-public fund that is collected from different sources, the salaries are being paid. Though several years have passed, the first and second respondents did not take steps to get necessary posts sanctioned for the upkeep of the sports grounds and stadium. For the negligence of respondents 1 and 2. the petitioners cannot be made to suffer.

18. The decision relied upon by the respondents' counsel is Delhi Development Horticulture Employees' Union Vs. Delhi Administration, Delhi and others, , popularly known as Jawaharlal Nehru Rozgar Yojna. Employees Case. In that decision, the court was dealing with the employment given for a time bound scheme and as a measure of poverty alleviation. In the present case, the maintenance of sports ground and stadium is not a time bound work. It has to continue as long as the Southern Naval Command exists and the Naval unit at Cochin continues to exist. If the Southern Naval Command is shifted to some other place, naturally all these facilities have to be created at the new place. The principle of this decision is not applicable to the facts of our case. For the various reasons I hold point No. 2 in favour of the petitioners. In the result, original petition is allowed. Petitioners shall be absorbed as regular class "D" employees and they shall be paid minimum of the scale of pay payable to class IV or class D employees from the date of filing of the petition viz. 10-12-1990. They will also be entitled to D. A. and other allowances as per rules prevailing. Respondents will have 6 months time to pay the arrears of pay and D. A and allowances but from 1-9-1994 they shall pay petitioners as directed in this judgment.

Each party to bear its own costs.