
(2000) 02 MP CK 0049

In the Madhya Pradesh High Court

Case No : Writ Petition No. 292 of 2000

Leeladhar Balmukund Jain

APPELLANT

Vs

State of M.P. and Others

RESPONDENT

Date of Decision : 15-02-2000

Acts Referred:

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

Citation : (2001) 3 LLJ 280 : (2000) 2 MPHT 403 : (2000) 1 MPLJ 622

Hon'ble Judges : S.P. Srivastava, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

S.P. Srivastava, J.

Heard the learned counsel for the petitioner as well as the learned Government Advocate representing respondent No. 1.

Perused the record.

The petitioner claims to have been engaged by the Krishi Upaj Mandi Samiti/ respondent No. 3 to perform the duties of Udghoshak (Announcer) on daily wage basis and working as such since April 17, 1989. Vide an order dated January 12, 2000, implementing the decision of the State Government, the Krishi Upaj Mandi Samiti, the employer, dispensed with the services of all those employees who had been engaged on daily wage basis subsequent to December 31, 1988. The petitioner's services were also dispensed with under the aforesaid order.

Feeling aggrieved, the petitioner has approached this Court invoking its jurisdiction under Article 226 of the Constitution of India praying for the quashing of the aforesaid order dated January 12, 2000. He has further prayed for a direction requiring the respondents to classify him as a permanent employee.

Every market committee established under the M.P. Krishi Upaj Mandi Adhiniyam, 1972 is deemed to be a local authority as envisaged u/s 7(3) of the said Act. The

powers and duties of a market committee as envisaged u/s 17 of the Act include the power to employ the necessary number of officers and servants for the efficient implementation of the provisions of the Act and the rules and the bye-laws made thereunder. The provisions contained in M. P. Krishi Upaj Mandi (Mandi Nidhi Lekha Tatha Rajya Vipnan Sewa Ki Gathan Ki Riti Tatha Anya Vishaya) Niyam, 1980 regulate the procedure in regard to expenditure of the Mandi Nidhi by the market committee and also regulates the recruitment and appointment of its employees.

As held by a Division Bench of this Court in its decision in the case of Inder Singh Borana v. Krishi Upaj Mandi Samiti, passed in M. P. No. 1320/92 decided on December 1, 1992, Krishi Upaj Mandi Samiti is an instrumentality of the State.

It may be noticed that the State Government had issued a direction on July 6, 1999 and thereafter on December 31, 1999 requiring all the local authorities (Nagriya Nikay) to dispense with the services of its employees who had been engaged on daily wage basis subsequent to December 31, 1988, latest by January 15, 2000. It may further be noticed that previously the State Government had issued an order providing a scheme for regularisation of the employees engaged on daily wage basis and had fixed the cut off date for the purpose to be December 31, 1988. The procedure prescribed for regularisation included the procedure for obtaining the sanction and creation of the posts to accommodate daily wagers found eligible and suitable for regularisation.

Learned counsel for the petitioner has strenuously urged that the Mandi Samiti falls within the ambit of "industry" and the petitioner was entitled to the status of a permanent employee as contemplated under the Madhya Pradesh Industrial Employment (Standing Orders) Act, 1961. The impugned action, according to the learned counsel for the petitioner, amounted to an unfair labour practice as envisaged under the Industrial Disputes Act, 1947.

It has also been urged that the petitioner had not been paid any amount and the cheque tendered to him representing the salary, the wages for two months, was in favour of some other person having the same name as that of the petitioner but a different parentage. The contention urged is that the petitioner has been retrenched without complying with the mandatory requirements contemplated u/s 25F of the Industrial Disputes Act, 1947.

The learned Government Advocate representing the respondent- State has urged that the State Government was well within its jurisdiction to issue the direction for dispensing with the services of all those employees engaged by the Samiti on daily wage basis after the cut-off date. It has further been urged that the petitioner who had been engaged on daily wage basis had no right to hold any post. It has also been urged that the statutory provisions regulating the recruitment and the appointment of the employees of the Committee were not being adhered to and the State Government was not in a position to bear the unnecessary burden and the financial strain caused by the engagement of

surplus staff beyond the sanctioned strength of the cadre. This activity also adversely affected the proper utilisation of the "Mandi Nidhi" for the purposes for which the Samiti had been created under the Act. In the circumstances, it is urged that no interference while exercising the discretionary jurisdiction of this Court under Article 226 of the Constitution is called for.

It has further been urged that even on the own showing of the petitioner, he claimed to be a workman in an industry and the nature of the dispute raised by him clearly falls within the ambit of an industrial dispute. In the circumstances, it is urged that he ought to have raised such a dispute before the forum made available under the provisions of the Industrial Disputes Act, 1947, for the redressal of his grievance.

It has also been urged that the assertion of the petitioner, that he has to be taken to have acquired the status of a permanent employee, on the strength of the provisions contained in the M. P. Industrial Employment (Standing Orders) Act, 1961, is totally misconceived and it will not be appropriate to hold an inquiry into this matter in the present proceeding. In this connection, it is further urged that the Act of 1961 sought to be relied upon does not confer on the petitioner or vests in him any statutory status so as to entitle him to maintain the present writ petition.

I have given my anxious consideration to the above submissions.

It must not be lost sight of that a daily wager has no right to hold the post. The foundation of his engagement as the aforesaid expression "daily wager" itself indicates is subject to the availability of work. He may be given the work the next day of his engagement only if the work is available. He is not obliged to report for duty on the next day of his engagement as the engagement is for a particular day only. The eligibility and continuous work for howsoever a long period should not be permitted to overreach the law. The requirement of the rules relating to selection and direct recruitment cannot be substituted by humane considerations and the law must take its own course.

Further, as pointed out by the Apex Court, back door entry and irregular appointments have to be checked. Moreover, the petitioner had accepted the appointment on daily wage basis offered to him not under a mistake but with his eyes wide open. He cannot have any grievance. In the circumstances, specific terms of the appointment have to be enforced.

In the present case the petitioner seeking a writ in the nature of a mandamus must show that the duty sought to be enforced is a duty of public nature that is a duty created under the Constitution, Statute or some rule of common law and that the duty is mandatory and not discretionary in nature.

It may also be noticed that back door ad hoc or daily wage basis appointment at the behest of the power source or otherwise and the recruitment according to rules are mutually antagonistic and strange bed partners. They cannot co-exist in

the same sheath. The former is the negation of fair play. The latter are the products of an order and regularity.

The appointments are to be made in accordance with statutory rules, giving equal opportunity to all the aspirants to apply for the posts and following the prevalent policy of reservation in favour of Scheduled Castes/ Scheduled Tribes and other backward classes. Whenever the employees are appointed on ad hoc/ time bound/daily wage basis to meet an emergent situation, every effort should be made to replace them by the employees appointed on regular basis in accordance with the relevant rules as expeditiously as possible. However, where no rules are operative, it is open to the employees to show that they have been dealt with arbitrarily and their weak position has been exploited by keeping them ad hoc or on daily wage basis for long spell of time. In its decision in the case of Khagesh Kumar and others Vs. Inspector General of Registration and others, , the Hon''ble Apex Court had not issued direction for regularisation of those employees who had been appointed on ad hoc basis or on daily wages after the cut off date taking into account the provisions of U.P. Regularisation of Ad hoc Appointment (on posts outside the purview of the Public Service Commission) Rules, 1979 and such employees who were not eligible under the said Rules were not given the benefit of regularisation.

In its decision in the case of Umesh Kumar Nagpal Vs. State of Haryana and Others, the Hon''ble Apex Court had observed that as a rule, appointment, in the public services should be made strictly on the basis of open invitation of applications and merit. No other mode of appointment nor any other consideration is permissible. Neither the Government nor the Public authorities are at liberty to follow any other procedure. There may be some exceptions carved out in the interest of justice and to meet certain contingencies. The exceptions however cannot nullify the main provision.

In the case of State of Himachal Pradesh Vs. Suresh Kumar Verma and another, the Apex Court had held that the judicial process cannot be utilised to support a mode of recruitment de-hors the Rules. Unless a person establishes his right to a post, he cannot claim any legal right. Unless the appointment confers legal right on the candidate, he cannot enforce the same by invoking writ jurisdiction.

In case the appointments, as in the present case, are allowed to continue in that event it would have the effect of obliterating the principles enunciated in Articles 14 and 16 of the Constitution which requires that there should be an equality and equal treatment in the eye of law as well as equal opportunity of employment. In case individuals are given appointments through back door, all other eligible candidates who had a right to be considered would be excluded in violation of Articles 14 and 16. Therefore, in such circumstances, the High Court cannot come in aid of the petitioner to invoke its extra- ordinary writ jurisdiction envisaged under Article 226 of the Constitution in absence of any legal right vesting in the petitioner.

In the present case, the petitioner has not been able to show a right to the post. It is not a fit case where this Court should exercise its discretion envisaged under Article 226 of the Constitution simply on the ground that the petitioner has not been able to establish his legal right to hold the post or to continue in the post. Unless a person claims a right to the post he cannot invoke the writ jurisdiction and any appointment de hors the rules cannot be taken to confer any right to continue in service. Right to work is right to livelihood but that does not mean that in every case the said principle would apply even when appointment is made orally or on daily wage basis to serve a temporary need. Unless a right to post is established one cannot claim infringement of right to livelihood.

The Madhya Pradesh Industrial Employment (Standing Orders) Act, 1961, which came into force with effect from July 8, 1961, applies to every undertaking wherein the number of employees on any day during the twelve months preceding or on the day the Act came into force or on any day thereafter was or is more than twenty and such other class or classes of undertaking as the State Government may, from time to time, by Notification, specify in this behalf. Section 2(2) of the aforesaid Act provides that nothing in the said Act shall apply to the employees in an undertaking to whom the Fundamental and Supplementary Rules, Civil Services (Classification, Control and Appeal) Rules, Civil Services (Temporary Service) Rules, Revised Leave Rules, Civil Services Regulations or any other Rules or Regulations that may be notified in this behalf by the State Government in the Official Gazette apply.

Section 4 of the said Act provides that nothing in the Industrial Employment (Standing Orders) Act, 1946 shall apply to any undertaking to which the Act applies.

Section 6 of the said Act prescribes that the State Government may by notification, apply standard Standing Orders to such class of undertakings and from such date as may be specified therein. Where immediately before the commencement of the said Act Standing Orders are in force in respect of any undertaking, such standing orders were to, until standard Standing Orders are applied to such undertaking under Sub-section (1) continue in force as if they were made under the said Act. The standard Standing Orders made or amendments certified under the said Act were to provide for every matter set out in the Schedule.

The Madhya Pradesh Industrial Employment (Standing Orders) Rules, 1963 provide standard Standing Orders for all the undertakings in the State. These Standing Orders regulate the classification of the employees in an undertaking and other service conditions in regard to the workmen.

As has already been indicated hereinabove the Madhya Pradesh Krishi Upaj Mandi (Mandi Nidhi Lekha Tatha Rajya Vipnan Sewa Ki Gathan Ki Riti Tatha Anya Vishaya) Niyam, 1980, also provides for the service conditions regulating the recruitment, appointment, promotion, probation, confirmation etc. of an

employee of the Krishi Upaj Mandi Samiti.

The learned counsel for the petitioner has urged that the status of the petitioner being that of a workman as contemplated under the Industrial Disputes Act, he is entitled to all the benefits and the protections as envisaged under the Standard Standing Orders as the Mandi Samiti though an instrumentality of the State, has been held to be an industry and since the impugned action is violative of the mandatory requirement envisaged under the Standing Orders as well as Section 25 of the Industrial Disputes Act amounts to illegal and unauthorised retrenchment of a workman and the impugned order dispensing with the services of the petitioner is liable to be quashed in the present proceedings under Article 226 of the Constitution of India.

In its decision in the case of Rajasthan State Road Transport Corporation and Another Vs. Krishna Kant and Others, rendered by a Three Judges Bench of the Hon'ble Supreme Court it was clarified that while it was true that the Industrial Employment (Standing Orders) Act makes it obligatory upon the employer of an industrial establishment to which the Act applies or is made applicable to submit draft Standing Orders providing for the several matters prescribed in the Schedule to the Act and it also provides the procedure inter alia, the certifying officer for examining their fairness and reasonableness for certification thereof, yet it must be noted that these are conditions of service framed by the employer -the employer may be a private corporation, a firm or an individual and not necessarily a statutory corporation - which are approved/ certified by the prescribed statutory authority, after hearing the workman concerned. It was further indicated that the Act does not say that on such certification, the Standing Orders acquire statutory effect or become part of the statute and it can certainly not be suggested that by virtue of certification, they get metamorphosed into delegated/subordinate legislation. Though these Standing Orders are undoubtedly binding upon both the employer and the employees and constitute the conditions of the service of the employees, it was difficult to say, on principle, that they have statutory force. Considering the earlier decisions of the Apex Court, it was indicated by the larger Bench, as follows in Rajasthan State Road Transport Corporation and Another Vs. Krishna Kant and Others, :

"17. Indeed, if it is held that certified Standing Orders constitute statutory provisions or have statutory force, a writ petition would also lie for their enforcement just as in the case of violation of the Rules made under the proviso to Article 309 of the Constitution..... We do not think the certified Standing Orders can be elevated to that status. It is one thing to say that they are statutorily imposed conditions of service and an altogether different thing to say that they constitute statutory provisions themselves."

In paragraph 21 of the aforesaid decision in the case of Rajasthan State Road Transport Corporation (supra) it was observed that where a right or obligation is created by the Industrial Disputes Act, it is agreed by all sides that disputes relating to such right or obligation can only be adjudicated by the fora created by

the Act, adding further, that this is principle No. 3 in *The Premier Automobiles Ltd. Vs. Kamlekar Shantaram Wadke of Bombay and Others*, .

In paragraph 24 of the aforesaid decision while summing up the principles it was indicated as follows:

"(3) If the industrial dispute relates to the enforcement of a right or an obligation created under the Act, then the only remedy available to the suitor is to get an adjudication under the Act."

In paragraph 35 of the aforesaid decision again summarising the principles it was stated as follows:

"(4) It is not correct to say that the remedies provided by the Industrial Disputes Act are not equally effective for the reason that access to the forum depends upon a reference being made by the appropriate Government. The power to make a reference conferred upon the Government is to be exercised to effectuate the object of the enactment and hence not unguided. The rule is to make a reference unless, of course, the dispute raised is a totally frivolous one *ex facie*, wherein the power conferred is the power to refer and not the power to decide, though it may be that the Government is entitled to examine whether the dispute is *ex facie* frivolous not meriting an adjudication."

It was further held as follows:

"(6) The certified Standing Orders framed under and in accordance with the Industrial Employment (Standing Orders) Act, 1946 are statutorily imposed conditions of service and are binding both upon the employers and employees, though they do not amount to "statutory provisions."

It was further indicated that "the policy of law emerging from Industrial Disputes Act and its sister enactments is to provide an alternative dispute-resolution mechanism to the workmen, a mechanism which is speedy, inexpensive, informal and unencumbered by the plethora of procedural laws and appeals upon appeal and revisions applicable to civil Courts. Indeed, the powers of the Courts and Tribunals under the Industrial Disputes Act are far more extensive in the sense that they can grant such relief as they think appropriate in the circumstances for putting an end to an industrial dispute.

In my considered opinion the ratio of the aforesaid decision stands squarely attracted to the facts and circumstances of the present case and the "implications arising under the provisions sought to be relied upon by the petitioner as contained in Industrial Disputes Act or the Industrial Employment (Standing Orders) Act, 1961, the Rules of 1963 framed thereunder and the Model Standard Standing Orders contemplated therein and the provisions contained in the Madhya Pradesh Industrial Relations Act, 1961, have to be considered in the light of the ratio of the decision of the Apex Court in the case of *Rajasthan State Road Transport Corporation v. Krishna Kant* (*supra*). Further I am of the considered opinion that taking that into account the nature of the dispute and

the controversy raised by the petitioner can be effectively decided by approaching the appropriate forum raising an industrial dispute as indicated hereinabove and taking into consideration the observations of the Apex Court in its decision in the case of Rajasthan State Road Transport Corporation v. Krishna Kant (supra) it will not be appropriate to hold any enquiry in the present proceedings under Article 226 of the Constitution of India.

I am further of the opinion that considering the totality of the circumstances referred to hereinabove the present one is not at all a fit case for the intervention of equity.

The learned counsel for the petitioner has heavily relied upon in support of his submissions on the decision of the Apex Court in the case of Krishna Kumar Dubey v. U.P. State Food and Essential Commodities Corporation and Anr., reported in 1994 III LLJ (Suppl) 254 (SC) rendered by a two Judges Bench of the Hon"ble Supreme Court. Besides the fact that this Court is bound to follow the latter decision of the Hon"ble Supreme Court of a larger Bench it may be noticed that in the aforesaid decision it was not disputed that the provisions of Section 25F of the Act had been violated and further since the juniors were retained the principles of "last come first go" had not been adhered to rendering the order impugned in that case vitiated on account of arbitrariness. The ratio of the aforesaid decision cannot come to the rescue of the petitioner in the facts and circumstances as noticed hereinabove.

In view of the conclusions indicated hereinabove this Court declines to exercise its extraordinary jurisdiction envisaged under Article 226 of the Constitution of India leaving it open to the petitioner to avail the statutory alternative remedy for the redressal of his grievances, if any.

The writ petition is accordingly dismissed in limine.