

(1994) 09 MAD CK 0005
In the Madras High Court

M. Rathinam and Another

APPELLANT

Vs

The Tamil Nadu State Housing Board and Others

RESPONDENT

Date of Decision : 28-09-1994

Acts Referred:

Constitution of India, 1950 — Article 12

Citation : (1995) 1 MLJ 604

Hon'ble Judges : Mishra, J

Bench : Division Bench

Judgement

Mishra, J.—Petitioner, B. Rangarajan, in W.P. No. 5137 of 1991 has sought for the regularisation of his services with the respondent -

Tamil Nadu Housing Board in pursuance of the order of the Government of Tamil Nadu in G.O.Ms. No. 1603, dated 7.12.1988 read with

G.O.Ms. No. 400, dated 2.5.1990 and for consequential benefits.

2. Petitioner, M. Rathinam, in W.P. No. 4603 of 1985 has also made a similar prayer and a further prayer to call for the records on the file of the

3rd respondent, Executive Engineer and Administrative Officer, Special Division of the T.N.H.B., Coimbatore-21, and to quash the memo

A1/4841/ 82, dated 16.2.1985.

3. Petitioner, Rangarajan, has stated that he was employed on Nominal Muster Roll (N.M.R.) basis on 26.2.1979 in the service of the respondent

- board at its Coimbatore Housing Unit under the Executive Engineer of the Special Division. He served to the satisfaction of all concerned and

earned two favourable certificates from the Executive Engineer - one dated 20.3.1981 and the other dated 24.9.1981. He has given a detailed

statement of his employment on daily wage for the years: 1979-80, 1980-81,

1981-82, 1982-83, 1983-84 and 1984-85 saying that until he worked under the respondent- Board he discharged his duties for 240 days in each calendar year. His further statement in this behalf is as follows:

I was diligently discharging my duties up to 10.9.1984 with break of service and thus I have completed 5 years and 4 months of service as Nominal Muster Roll basis. Subsequently after September, 1984 I was informed that as and when aforesaid, for my service arises I would be called for a resume duty and accordingly I have been visiting my office of the Executive Engineer, Coimbatore frequently making anxious enquiries and requesting them to give my postings in anyplace. I have been making several requests and representations in person before my office requesting them to give me some employment and continued service as N.M.R.. Subsequently I was informed by the Executive Engineer and Administrative Officer not to come and make any representations in the office and I was also informed that I have been taken back to office and it was enough if I visit the office after receiving appropriate communications. Even after 2 months, I have not received any communications from the office and thus made me to approach the Executive Engineer and Administrative Officer and request him to employ me in the office which the Executive Engineer and Administrative Officer promised to look into and consider me for employment since I was having a Bachelor's degree in Geography and I have also completed by 5 years and 4 months of service as N.M.R. with the respondent. Subsequently I have also made representations by several letters from 85 to 87 requesting the office of the Executive Engineer to give employment as N.M.R.

In the meantime the respondents by their letter No. E.T. Special 2/29564/85, dated 10.10.1986 requested the Government to regularise the services of 840 members of Nominal Muster Roll workers who have completed the 5 years of service as done in the case of the wings and departments of the Government. On the representations made by the N.M.R. workers like the petitioners and upon accepting the recommendations of the respondents the Government in their orders G.O.Ms. No. 1603, dated 7.12.1988, Housing and Urban Development Department accepted recommendations and requests of the respondent and thus permitted the Board to regularise the services of the N.M.R.

workers who have completed 5 years of service as on 7.12.1978. The respondents in their resolution No. 23, dated 30.1.1987 has resolved that

the services of the N.M.R. appointed during the period from 1.1.1970 to 31.12.1970 with reference to the employment exchange may be

regularised. On the basis of the aforesaid resolution No. 23 dated 30.1.1987, the Government had passed the abovesaid G.O.Ms. No. 1603 and

thereby directed the respondents to regularise the services of N.M.R. who have completed 5 years of service. The Executive Engineer and

Administrative Officer, Special Division by his letter No. A1 4895/87, dated 2.8.1989 had forwarded my service and employment particulars to

the Board in the prescribed pro forma recommending my requests for re-engagement. Subsequently by virtue of the G.O.Ms. No. 400, Housing

and Urban Development Department, dated 2.5.1990 directed the respondents to regularise the services of the N.M.R. workers who have not

completed 5 years service as on 7.12.1988. Based on the abovesaid Government Orders the respondents in their proceedings No. E.Spl. 2/

29564/85-40, dated 15.5.1990 appointed Several of the petitioner's colleagues who have completed 5 years as N.M.R..

I was anxiously awaiting orders from Board every day due to fact I am eligible for appointment since I am having graduate qualification, satisfied

the condition and have 5 years and 4 months as N.M.R. work Assistant under the respondent.

On the basis of the aforesaid G.O., the petitioner's colleagues have been appointed and their services were regularised and I crave leave of this

Hon"ble Court to file a copy of the order regularising N. Sarojini's appointment by the respondent. Since I was expecting favourable appointment

order, I have not taken any other employment. Besides I have completed my youthful services with the respondents and with the age of 40 I am

not eligible for any other Government services or employment and thus on humanitarian grounds I am entitled to be considered by the respondents

for regularising my services. I have been making several representations to the respondents and I may be permitted to file some of the

representations. I have been writing letters and submitting representations from 1985 onwards. And I am filing the representations made on

1.8.1989, 2.8.1989, 31.8.1989, 4.10.1989, 11.10.1989, 29.11.1989, 15.5.1990, 18.7.1990, 22.8.1990, 18.9.1990, 18.12.1990 and

19.1.1991 and all the abovesaid representations made by registered post acknowledgment due to evoke any response or reply from the respondent and thus compelling me to approach this Hon"ble Court invoking Article 226 of the Constitution, since no other efficacious effective alternative legal remedy is available and thus I am filing this writ petition praying for a writ of mandamus directing the respondents to regularise the services as per the respondent's resolution No. 23, dated 31.8.1987 and in pursuance of G.O.Ms. No. 1603, dated 7.12.1988 read with G.O.Ms. No. 400, dated 2.5.1990; consequently direct the respondents to employ me and regularise my services with the respondents and grant such other reliefer and thus render justice.

4. Petitioner Rathinam has stated that she was appointed by the 2nd respondent on the Nominal Muster Roll for 3 months originally on 1.9.1979

by letter dated 23.8.1979, pursuant to which she joined as a clerk in the office of the 3rd respondent. Ever since her appointment has been

continued by the 3rd respondent, however, by issuing letters of re-appointment at the end of every three months period to create a break of one

day between the three mouths period, for accounting purpose alone. She has asserted, ""I have actually worked continuously with no break at all in

reality"". She served as alleged, satisfactorily and gained experience in practically all the branches of the IUEP Division, acquired requisite

qualifications and fulfilled her tasks satisfactorily with no blemish in her records. On 16.2.1985, however, the third respondent issued a Memo No.

41/484/82 saying that she was discharged from work with effect from 13.2.1985, as per the instruction of the Superintending Engineer, Salem

Circle and directed to report for duty before the Executive Engineer and Administrative Officer, Coimbatore Housing Unit. When she did so, she

was informed that there was no vacancy and thus she was not permitted to join the unit. She issued a letter through a counsel on 3.4.1985 to the

2nd and 3rd respondents, stating how she was continued in service and as directed by the Superintending Engineer, Salem Circle, when she went

to Coimbatore unit for joining duty, she was refused to join on the ground that there was no vacancy. The said notice, however, was not answered

by the respondent-Board.

5. In the counter-affidavit filed on behalf of the respondent board in W.P. No.

5137 of 1991, it is conceded that he was engaged as N.M.R. on daily wages from 7.3.1979 and continued till 17.9.1984. It is, however, alleged that he was very irregular in attending duty; he had attended duty only for 1782 days as against 2016 working days and he did not turn up for duty from 18.9.1984. It is also stated in the counter that the case of the petitioner is not covered by the G.O.Ms. No. 1603, dated 7.12.1988, as he had ceased work from 18.9.1984 and had not put in 5 years of service as envisaged under the said Government Order.

6. Initially no counter-affidavit was filed on behalf of the respondent-Board in W.P. No. 4603 of 1985. After the case was taken up for hearing, however, the respondent-Board has delivered a counter affidavit on 27.9.1994 in which it is stated that the N.M.Rs. are not appointed, but are engaged for works as and when necessity arises for a period of 3 months or until such period the necessity ceases, whichever is earlier, "the petitioner was engaged as N.M.R. without consulting the Employment Exchange on her representation." Her claim that she worked without interruption has been denied, but it is conceded that she received Festival Advance and Bonus, but that she was never given salary and other benefits, such as casual leave and other leave benefits which are available to a regular employee. She was also not engaged on Sundays and holidays and hence her contention that one day's break is given for accounting purpose only is not true. The respondent - Board has stated that N.M.R. Employees are not covered under any services regulations and the petitioner accordingly has no claim, which she can enforce against the respondents.

7. The respondent- Board is a statutory authority and is a State under Article 12 of the Constitution of India. Employment extended by it to any person has to conform to the requirements of Article 16(1) of the Constitution and Articles 14 and 21 thereof. It also satisfied the definition of an "Industry" u/s 2(j) of the Industrial Disputes Act, 1947, which means any business, trade, undertaking, manufacture or calling of employers and includes any calling, service, employment, handicraft, or industrial occupation or avocation of workmen. Petitioners, it is not in dispute, were employed for the work of the respondent- Board and given a status called Nominal Muster Roll employee. The Industrial Disputes Act has defined

"workmen" u/s 2(s) to mean any person including an apprentice employed in any industry to do any manual unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, including any such person who has been dismissed, discharged, or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal discharge or retrenchment has led to that dispute, but does not include any person who is subject to the Air Force Act, or the Army Act, or the Navy Act: or who is employed in the police service or as an officer or other employee of a prison; or who is employed mainly in a managerial or administrative capacity or in a supervisory capacity on wages exceeding one thousand six hundred rupees per mensem, or by the duties, attached to the office or by the reason of the powers vested in him, his functions are mainly of a managerial nature. The Industrial Disputes Act has extended several protections to workmen employed in any industry and there are provisions in Chapter V-A which are made to regulate lay-off and retrenchment. Chapter V-B which contains special provisions relating to lay-off, retrenchment and closure in certain establishments, is applied only to an industrial establishment, as prescribed u/s 25-K of the Act, in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months and to the establishments, which are not of a seasonal character, or in which work is performed only intermittently. There is no dispute to the fact that Chapter V-A is applicable to the establishment of the respondent- Board. Section 25-B of this Chapter carries a definition of continuous service in these words:

25-B Definition of continuous service: For the purposes of this Chapter:

(1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman:

(2) Where a workman is not in continuous service within the meaning of Clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer:

(a) for a period of one year, if the workman, during a period of twelve calendar months proceeding the date with reference to which calculation is

to be made, has actually worked under the employer for not less than-

(i) one hundred and ninety days, in the case of a workman employed below ground in a mine, and

(ii) two hundred and forty days, in any other case:

(b) for a period of six months, if the workman, during a period of six calendar months preceding the date with reference to which calculation is to

be made, has actually worked under the employer for not less than-

(i) ninety-five days, in the case of a workman employed below ground in a mine; and

(ii) one hundred and twenty days, in any other case.

Explanation: For the purposes of Clause (2), the number of days on which a workman has actually worked under an employer shall include the

days on which-

(i) he has been laid off under an agreement or as permitted by standing orders made under the Industrial Employment (Standing Orders) Act, 1946

(20 of 1946) or under this Act or under any other law applicable to the industrial establishment.

(ii) he has been on leave with full wages earned in the previous years:

(iii) he has been absent due to temporary disablement caused by accident arising out of and in the course of his employment; and (iv) in the case of

a female, she has been on maternity leave; so, however, that the total period of such maternity leave does not exceed twelve weeks.

8. Learned Counsel for the petitioners has contended that the petitioners, qualified as workmen, are in continuous service of the Board, as they

have worked for 240 days in one calendar year and thus in case their services are terminated, they are entitled to the protection u/s 25-F of the

Industrial Disputes Act, which states;

25-F. Conditions precedent to retrenchment of workmen: No workman employed in any industry who has been in continuous service for not less

than one year under an employer shall be retrenched by that employer until;

(a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the

workman has been paid in lieu of such notice, wages for the period of the notice;

(b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months: and

(c) notice in the prescribed manner is served on the appropriate Government or such authority of the Government by notification in the Official Gazette.

According to him, the petitioners' case is governed by the definition of "retrenchment" u/s 2(oo) of the Act, as they have not been removed from service by way of disciplinary action; they have not sought voluntary retirement, or retirement on reaching the age of superannuation; their services also not terminated as a result of non-renewal of the contract of employment on its expiry or under a stipulation in that behalf in the contract or on the ground of continued ill-health. He has accordingly submitted that the petitioners' continuous services are not determined by the respondent-board in accordance with law.

9. Learned Counsel for the respondent-board, on the other hand, has contended that Nominal Muster Roll employment on daily wages was given to the petitioners and others only on occasions when workload demanded casual employment on daily wages and although contracts were renewed as alleged by the petitioners, each renewal created a fresh contract and services stood terminated with the expiry of the period of contract.

10. I have given my anxious consideration to the above contentions and looked into the facts critically. I have found, however, that petitioners were employed not when workload demanded additional number of employees, but almost for the regular work for a number of years. They were given letters of appointment for a specified period of three months or until cessation of work, but they were continued to work without any report as to cessation of work and without in any manner inhibited by the period specified in the letters of appointment. The period specified in the letters of appointment. The period specified in the letters was more a design to keep the petitioners and other persons engaged for work by the respondent -

Board away from claiming benefits of substantive appointment than for the

reason of exigencies of work. It is fair in such a situation to accept that the respondent- Board has given to the petitioners appointment in a regular establishment and since the petitioners worked for more than 240 days in one calendar year, they became entitled to the benefits u/s 25-F of the Industrial Disputes Act.

11. Apart from the above, there is yet another violation, which deserves mention. Section 256 of the Industrial Disputes Act states the procedure for retrenchment thus: where any workman in an industrial establishment who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman. What is stated in Section 25-G is a rule, which is also read in the guarantee under Article 14 of the Constitution and in case of employment under Article 16 thereof, and called by courts the rule of last come, first go, that has to be applied without exception to an employee under a State under Article 12 of the Constitution.

12. In *The Manager, Government Branch Press and Another Vs. D.B. Belliappa*, the Supreme Court has pointed out that the expression "appointment" in Article 16(1) includes termination of or removal from service; and when it was contended that Articles 14 and 16(1) have no application whatever to the case of a temporary employee whose service is terminated in accordance with the terms and conditions of his service, because the tenure or the duration of the employment of such an employee is extremely precarious being dependent upon the pleasure and discretion of the employer- State the Supreme Court has said:

In our opinion no such generalisation can be made. The protection of Articles 14 and 16(1) will be available even to such a temporary Government servant if he has been arbitrarily discriminated against and singled out for harsh treatment in preference to his juniors, similarly circumstanced. It is true that the competent authority had the discretion under the conditions of service governing the employee concerned to terminate the latter's employment without notice. But such discretion has to be exercised in accordance with reason and fair play and not capriciously. Bereft of

rationality and fairness, discretion degenerates into arbitrariness which is the very antithesis of the rule of law on which our democratic polity is

founded. Arbitrary invocation or enforcement of a service condition terminating the service of a temporary employee may itself constitute denial of

equal protection and offend the equality clause in Articles 14 and 16(1). Article 16(1) guarantees equality of opportunity for all citizens in matters

relating to employment or appointment to any office under the State, Moreover, according to the principle underlying Section 16 of the General

Clauses Act, the expression, "appointment" used in Article 16(1) will include termination of or removal from service also.

To another argument with reference to the terms of the contract embodied in the letter of appointment that the employee's service was purely

temporary and was liable to termination at the will and pleasure of the appointing authority, without reason and without notice; and having willingly

accepted the employment on terms offered to him, the employee could not complain against the removal from service which was in accordance

with those mutually agreed terms, the Supreme Court observed:

The argument is wholly misconceived. It is borrowed from the archaic common law concept that employment was a matter between the master

and the servant only. In the first place, this rule in its original absolute form is not applicable to Government servants. Secondly, even with regard to

private employment, much of it has passed into the fossils of time. This rule held the field at the time when the master and servant were taken more

literally than they are now and when, as in early Roman Law, the rights of the servant, like the rights of any other member of the household were

not his own but those of his Pater Familias." The overtones of this ancient doctrine are discernible in the Anglo - American jurisprudence of the

18th century, and the first half of the 20th century, which rationalized the employer's absolute right to discharge the employee. "Such a philosophy

as pointed out by K.K. Mathew, J. (vide his treatise: "Democracy, Equality and Freedom" page 326) "of the employer's dominion over his

employee may have been in tune with the rustic simplicity of bygone days. But that philosophy is incompatible with these days of large, impersonal,

corporate employers". To bring it in tune with vastly changed and changing socio-economic conditions and mores of the day, much of this old,

antiquated and unjust doctrine has been eroded by judicial decisions and legislation, particularly in its application to persons in public employment,

to whom the constitutional protection of Articles 14, 15, 16 and 311 is available. The argument is therefore overruled.

13. What flows thus from the protection under Articles 14 and 16 of the Constitution cannot be overlooked only because the respondent- Board

has chosen to hand over to the petitioners letters of appointment with stipulations which were not warranted by any exigency of work, but

contrived only to keep a large number of citizens employed by it for its work from claiming benefits of substantive employment.

14. From the above thus the irresistible conclusion is that the petitioners satisfied the definition of "workman" whose services have been terminated

without following the procedure prescribed for the removal of an incumbent from service and without extending to them the benefits of continuous

service. The respondent - Board has acted arbitrarily and thus violated Articles 14 and 16(1) of the Constitution of India. This conclusion,

however, in my view, would benefit petitioner - Rathinam only and not petitioner - Rangarajan. Rangarajan ceased to be in service of the Board,

when he was not allowed to join duty, as alleged by him, and according to respondents he did not turn up for duty from 18.9.1984. While

petitioner - Rathinam moved this Court no sooner she learnt that Coimbatore unit of the respondent board reported no work for her, Rangarajan

waited until she learnt about the Government Scheme to regularise the service of the Nominal Muster Roll employees, who had put in five years of

service. It is necessary in the case of Rangarajan to know whether the respondents denied any work to him, or, as alleged by them, he did not turn

up for duty from 18.9.1984. It is not possible in the instant proceeding to decide as to who is speaking the truth: whether the petitioner has made a

correct statement that he was not allowed to join his duty, or whether the respondents have alleged correctly that the petitioner- Rangarajan did

not turn up for duty from 18.9.1984. Moreover, petitioner- Rangarajan has come to this Court after a long period of time and the delay is such that

it is neither caused by any act of the respondents nor by the court in the disposal of his case. Rathinam has not only moved the court promptly, but

has also demonstrated that it were the respondents, who failed to honour their own commitment to give her a job in the Coimbatore. unit. Since

Rathinam's juniors have been retained in service and have been made permanent by the so-called procedure of regularisation, in my view,

Rathinam is entitled to the relief of reinstatement forthwith with all consequential benefits, as her next junior in the muster roll has received, and to

be placed above her next junior accordingly. Rangarajan's case to fail mainly for the reason of delay as well as for the reason that the main

question, whether the respondents denied continuity of service to him, has fallen in dispute.

15. In the result, W.P. No. 4603 of 1985 is allowed and the respondents therein are directed to treat the petitioner-Rathinam as continuous service

and accordingly reinstate her with all consequential benefits, as indicated above. W.P. No. 5137 of 1991 is dismissed. There will be no order as to

costs.