

(1989) 10 KAR CK 0012

In the Karnataka High Court

Case No : Writ Petition No's. 11642 etc. of 1989

P. Rajeev and Others

APPELLANT

Vs

The Karnataka State Construction Corporation Ltd.

RESPONDENT

Date of Decision : 06-10-1989

Acts Referred:

Constitution of India, 1950 — Article 14, 16
Industrial Disputes Act, 1947 — Section 2 (oo), 25 F

Citation : (1990) 3 KarLJ 1 : (1992) 1 LLJ 217

Hon'ble Judges : K. Shivashankar Bhat, J

Bench : Single Bench

Judgement

1. In all these petitions, the substance of the relief sought by the petitioners is for a direction to the respondent to absorb them in their respective posts, held by them temporarily. They are aggrieved by the action taken by the respondent - the Karnataka State Construction Corporation Ltd. (hereinafter referred to as "the Corporation") to terminate their respective services.

2. In W.P. No. 11642/89 the petitioner is an Engineering graduate and he was appointed as a Junior Engineer Grade I/Asst. Engineer for a period of six months initially on 26th August, 1987. Thereafter his services were continued from time to time, each time temporarily for a particular period. By an order dated 28th June, 1989, the petitioner was informed that his services stood terminated with effect from 30th June, 1989 on the expiry of the contract period.

In W.P. No. 11664/89 the petitioner is a B.Com., graduate. She has also passed English and Kannada Senior Grade typewriting examination. By an order dated 29th August, 1987 she was initially appointed as a clerk-cum-typist for a period of six months. Her services were continued periodically as above and ultimately by an order dated 26th June, 1989 she was informed that her services stood terminated after 30th June, 1989, on the expiry of the contract period.

Similar is the case of the petitioner in W.P. No, 13329/1989.

The Petitioners in W.P. Nos. 11851 to 11854/89 were appointed as Clerk-cum-Typist, Draftsman. Peon etc., with effect from 26th August, 1987. The contract periods were extended from time to time and ultimately their services were sought to be terminated, by an order dated 26th June, 1989.

The petitioner in W.P. No. 11890/89 is an Engineering graduate, who was also appointed as a Junior Engineer Gr. I/Asst. Engineer on 26th August, 1987, undergoing the same experience as other petitioners regarding the appointment and whose services were terminated by an order dated 30th June, 1989, with effect from the same date.

Similar is the case of the petitioner in W.P. No. 11937/1989, but his order of termination is dated 26th June, 1989 made effective from 30th June, 1989.

The case of the petitioners in W.P. Nos. 12213, 12342 and 12643 of 1989 is also similar.

3. According to the petitioners, they have been working continuously for over one year and ten months and the termination of their services was a colourable exercise of power and the Corporation, in spite of the existence of clear vacancies has resorted to making appointments temporarily and the termination of their services is either in contravention of Section 25F of the Industrial Disputes Act, 1947, or a colourable exercise of the power purported to have been derived by the alleged contracts. According to the petitioners, they are entitled to be absorbed permanently by the Corporation and the mode of their appointments made by the Corporation was only a device unwarranted by the exigencies of the employment-requirements of the Corporation.

4. There is no dispute that the Corporation is an establishment of the Government of Karnataka and is entirely administered and controlled on its behalf. Therefore there has been no dispute that it is a "State" as defined under Art. 12 of the Constitution. In view of its status as a State, the petitioners have invoked Articles 14 and 16 of the Constitution in support of their contentions, while claiming permanency in the service of the Corporation.

5. The respondent Corporation has filed its statement of objections. It mainly contended that all these appointments were made on ad hoc basis under Rule 3-10 of the Karnataka State Corporation Service Rules (hereinafter referred to as "the Rules"). According to the respondent, since the regular appointment requires following of an elaborate procedure and reservation of posts for Scheduled Castes and Scheduled Tribes and Backward Classes, ad hoc appointments were made at the relevant time, having regard to the urgency of the situation. It is also contended that by the inclusion of clause (bb) to Section 2(oo) of the Industrial Disputes Act, termination of the service of the workmen as a result of non-renewal of the contract of employment is not a retrenchment and therefore Section 25F etc., of the I.D. Act is not attracted. The petitioners had also pleaded estoppel relying upon certain assurance allegedly held out by the Corporation to absorb them. This is denied by the Corporation. The reason

for the termination of the services of these petitioners is stated as follows :

"It is submitted that as the management had suffered much loss, it intended to bring about some economy in expenditure. There was surplus staff and some rationalisation was called for, and it had to curtail some labour to some extent and for some time. Keeping these factors also in mind the respondent had taken a decisions not to continue the contract labour. Such a decision of the Board cannot be challenged as motivated or unfair labour practice."

It is also further stated that the fact that the petitioners were in service earlier would give them a better chance of selection in the permanent appointment as and when permanent appointments are to be made for which purpose the Corporation has resolved to give preference to these petitioners.

6. The respondent Corporation has framed the Rules governing the recruitment and the other governing the recruitment and the other conditions of services. It also contemplates the prescription as to the cadre strength and classification and categorisation of the posts.

7. In the year 1975 the Service Rules were framed by the Corporations. Rule 3.7 provides the procedure for direct recruitment and reservation for certain categories of persons. Rule 3.10 which is relevant, governing the procedure for appointment on ad hoc basis, reads as follows :

3.10 : Procedure for appointment on ad hoc basis or on contract :

Where the appointment by following the regular procedure involves undue delay or where suitable persons are not found even after advertising the vacancies, the appointing authority may fill up any such vacancy on an ad hoc basis or by contract for a period not exceeding one year, which term may be extended by the appointing authority by another one year in deserving cases".

8. Another Rules called "The Karnataka State Construction Corporation Ltd. (Cadre and Recruitment) Rules 1986" were also placed before me on the same subject. It provides for method of recruitment, as (a) by promotion; (b) by obtaining loan of service of a person already in the service of Government or other organisations; (c) by direct recruitment and (d) on contract basis with the approval of the Board of Directors.

9. However, no argument was addressed with reference to these Rules and even the statement of objection filed by the respondent refers to only Rule 3.10 extracted above already, as governing the cases of the petitioners.

10. On a perusal of the respective pleading and the documents, it is clear that the Corporations has been continuing the services of the petitioners since about 21 months. The only explanation given by the Corporation was that at the time the petitioners were appointed, it was impracticable to make a regular appointment as it had to follow an elaborate procedure to make permanent appointments. However, there is no explanation any where as to why the regular

appointments could not have been made and as to why the elaborate procedure prescribed by the Rules could not be followed. There is no explanation again as to why these appointments were continued from time to time. It is not the case of the Corporation that these appointees were appointed to satisfy a temporary requirement. The stand taken by the Corporation explaining the purposes behind these temporary appointments looks to me quite vague and understandable. If regular appointments could not have been made immediately in August 1987, atleast thereafter it should have taken steps to fill up the posts regularly. In one of the writ petitions the petitioner has asserted that the Corporation resolved to make permanent appointments subsequently but the said decision was given up again after some time. The learned counsel for the petitioners also contended that the periodical appointments made for short periods, if permitted to be repeated again and again would give scope for favoritism in the matter of appointments and some of the petitioners actually apprehend that their services are now sought to be terminated, so that the present Board of the Corporation may resort to the making of fresh temporary appointments of those in whom they are interested.

11. Technically, there is no doubt that a temporary employee has no right to the post. His services could be terminated at the end of the contract period. In fact the service gets terminated automatically at the end of the contract period. But the real question that has to be considered is whether the State (which term would include its instrumentalities) could resort to the making of temporary appointments year after year without caring to examine the need to fill up the posts permanently by recourse to the regular procedure in accordance with law. Some decisions of the Supreme Court throwing light on the question are to be referred, before I proceed to resolve the question raised before me.

12. *Central Inland Water Transport Corporation Ltd. and another v. Brojo Nath Ganguly and another* 1986 I LLJ 171, was relied, while contending that contract of employment for temporary periods renewed or made afresh from time to time was an unconscionable agreement, the employee being in an inferior bargaining strata, was not bound by the clause governing the period of employment and such a clause should be ignored as void.

13. In *Central Inland* case referred above, the employment was a permanent employment. However, a sub-rule provided for termination of service by giving three months' notice. This sub-rule was struck down, having regard to the inequality in the bargaining power of the parties and it was held that such a sub-rule was void u/s 23 of the Contract Act, being opposed to public policy. The power to strike down such a clause, was found to be in consonance with the mandate of Art. 14 of the Constitution of India. In judging the circumstances leading to the appointment in question, Supreme Court, observed at page 211 :

"Undoubtedly, the contesting respondents accepted appointments with the corporation upon these terms. They had, however, no real choice before them. Had they not accepted the appointments, they would have at the highest

received some compensation which would certainly have exposed themselves to the hazard of finding another job."

Since the power vested in the employer-Corporation vested an arbitrary power, enabling it to discriminate between employee and employee, the enabling power was held to offend Art. 14 of the Constitution. Further, it was held that, since the clause tends to create a sense of insecurity in the minds of those to whom it applies, it was against the public good.

14. The basic fact to be noted here is that the employee was appointed to a permanent post, temporarily; however, at the time of appointment, the appointee had no choice but to accept the term as to termination of his service, at any given point of time by a three months" notice. If the candidates for appointment to the post were in short supply, and the candidates had a superior bargaining power, such a clause would not have been accepted by the appointee.

15. But, in a situation where temporary appointments are to be made, due to certain circumstances warranting such appointments, question of equality in bargaining power cannot arise. Even if the appointees are to insist for a permanent appointment the respondent Corporation could not have appointed them permanently, because, the permanent appointments should conform to certain legal requirements; further, at the time of appointments permanent posts should be available. This apart, if the announcement is to make only temporary appointments, some of the meritorious and competent persons suitable to the jobs, may not come forward at all, in spite of the prevalent vast unemployment situation. Temporary appointments (ad hoc appointments) are made without following statutory requirements. Scope for favoritism and arbitrariness is quite large at the time of such appointments. If these appointees are to be treated as permanent, it will be perpetuating these illegalities, inspite of any compassionate ground. Equity does not always depend upon compassion and every compassionate field does not yield the crop of equity.

16. The decision rendered in Mangalore University Non-Teaching Employees Association Vs. Mangalore University, is quite instructive on this question. The Association sought a writ of mandamus to appoint the persons who were members of the Association, who were temporary appointees. The prayer was refused. At page 2228, it was observed :

"..... regular recruitment into the services of the University to the various categories of non-teaching and ministerial posts could be made only in accordance with Section 50 of the Act, and the Statutes framed for the purpose and the temporary appointment made u/s 51-B of the Act is limited only for a period of six months and if any person so appointed is continued in service beyond the period of six months, such continuance itself is a breach of Section 51-B and it does not create any right in the person so continued."

Again at page 2229 :

"In this case, Section 50 of the Act, the statutes governing temporary appointments, and also the orders of appointments admittedly contained the condition that appointment was for a period for a period of six months or until regular appointment whichever was earlier. No one had or could promise them to make them permanent. The fact that temporary appointments were given to them again and again only disclose utter disregard to the Law by the authorities, but did not confer any right on the temporary appointees."

17. The University was held to be bound to make recruitment on permanent basis only in accordance with the relevant law regulating the method of recruitment; further, it was held that the temporary appointees were bound to apply when the posts are advertised and compete along with others, for selection and appointment.

18. Rattanlal and others etc. etc. v. State of Haryana and others 1986 I LLJ 223 was referred, in support of the principle deduced in Mangalore University case (supra). The ratio of the decision in the Daily Rated Casual Labour Employed under P and T Department Vs. Union of India (UOI) and Others, was held inapplicable as the said decision pertained to the payment of wages.

19. When permanent appointments are to be made by the State, full opportunity to all eligible persons to compete for the appointment should be given, in accordance with Article 14 and 16 of the Constitution. This constitutional requirement cannot be circumvented by anyone, by conferring permanency on the temporary appointees, as observed in Mangalore University's case (supra). I am also in full agreement with the views expressed at para 10, on the applicability of Section 25F of the I.D. Act. The cessation of a temporary tenure and the automatic termination of the services by efflux of time, as contracted, will not be retrenchment. In such a situation, it has to be conclusively established, that the purported appointment on a temporary basis was a camouflage to circumvent the provisions of the I.D. Act.

20. Sri Gopala Gowda, the learned counsel for one of the petitioners, contended that the termination of the petitioner's services contravened Section 25F of the I.D. Act. The learned counsel contended that, the procedure adopted by the employer in the instant cases to attract Section 2(oo)(b) of the I.D. Act, was an unfair labour practice, as defined in Section 2(ra) of the said Act, read with Item 10 of its Fifth Schedule.

21. Item 10 of the Fifth Schedule to the I.D. Act makes it an unfair labour practice :

"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".

22. 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.D. 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.

23. Sri Gopala Gowda cited the decision in *The Karnataka State Tourism Development Corporation v. T. Narayana Bhat and others* 1987 (55) F. L. R. 223 , wherein Chandrakantharaj Urs, J., relied on the decision of Supreme Court in *S. Govindaraju Vs. Karnataka S.R.T.C. and Another*, to hold that, the fact situation therein warranted an inference of unfair labour practice.

24. In Govindaraju's case (supra), the services of a badli conductor whose name was in the select list, was terminated. Under the Statutory Regulation, a person regularly selected as included in the select list; but, till the actual permanent appointment is made, he is treated as a badli. The services were terminated relying on a stipulation that services could be terminated at any time. This stipulation was attacked by the learned counsel for the workmen in Govindaraju's case before the Supreme Court as an unfair labour practice and urged that the termination of the services of the said workman was violative of Section 25F of the I.D. Act. If workmen could employed and their services could be terminated at any time, Section 2(oo)(bb) is likely to be misused, was the contention. The Supreme Court did not go into this contention. The relevant passage in the decision of the Supreme Court simply stated the contention advanced and this statement seems to have to be taken as an expression of Court's opinion by Chandrakantharaj Urs, J. Supreme Court kept open the question raised before it, as is clear from the following passage, at page 353 :

"The learned counsel for the appellant urged that if the view of the High Court is accepted it would enable unscrupulous employers to provide a stipulation in the contract of service for terminating the employment of the employees to escape the rigour of Section 25F of the Act. This would further confer arbitrary powers on the employers which would be destructive of the protection granted by the Act to the employees. We do not consider it necessary to express any opinion on this question as in our opinion the appellant is entitled to succeed on another short question i.e., the termination order being violative of principles of natural justice."

25. Thereafter, the Supreme Court considered the applicability of the principles of natural justice. It was held that a regularly selected person and whose name is included in the select list, has a right to be appointed to permanent post; his functioning as a badli till a permanent post falls vacant does not take away the right vested in him of for the permanent post. Since such a vested right is sought to be taken away by the order of termination, based on a power to terminate the services at any time, Supreme Court read into the said power, the requirement to follow the principles of natural justice. The ratio of the decisions in Govindaraju's

case is found in the following observation, at p. 353 :

"Before the services of an employee are terminated, resulting into forfeiture of his right to be considered for employment, opportunity of explanation must be afforded to the employee concerned."

26. H.D. Singh Vs. Reserve Bank of India and Others, is another decision cited by the learned counsel for the petitioner. The decision was with reference to the facts prior to the amendment of I.D. Act, by inclusion of Section 2(oo)(bb). On facts, Supreme Court found the employee, not to be a badli and the mode adopted by the Reserve Bank was held to be an unfair labour practice, in the background of a confidential circular referred by the Supreme Court (at page 136 of its judgment). However, observation at para 15 requires reiteration, which highlights the problem of unemployment facing the country :

"We will not be far from truth if we say that the bank has deliberately indulged in unhealthy labour practice by rotating employees like the appellant to deny them benefits under the Industrial Law. It has disturbed us to find that the appellant was denied job because he had become better qualified. Perhaps the Reserve Bank of India and its Officers are not aware of the grave unemployment problem facing the youth of this country and also not aware of the fact that graduates, both boys and girls, sweep our roads and post-graduates in hundreds, if not in thousands, apply for the posts of peons."

27. The decision in U.P. Income Tax Department Contingent Paid Staff Welfare Association Vs. Union of India (UOI) and Others, again is not applicable, as it pertains to the payment of wages to workmen who were employed on daily wages.

28. Creation of the permanent posts is a matter for the employer to consider having regard to the employer's requirements. It is to be based on policy decision. This principle is applicable to the employments under the State and its instrumentalities. At the same time, if the State adopts a policy of making only temporary appointments year after year, it may invite the criticism of being a colourable exercise of its powers. Those who are in control of the management, if thinks it convenient to have their own men and women to be appointed, by recourse to the power vested with them to make ad hoc appointments, such a recourse may have to be nullified by the exercise of judicial power, in the context of Articles 14 and 16 of the Constitution of India.

29. State and its instrumentalities are obliged to discharge their duties effectively, for which purpose, they require competent personnel. Keeping vacancies without making the appointments, would ultimately affect the functioning of the organisation, adversely. Requisite number of posts are to be created and regularly filled up so that, the State's instrumentalities could discharge their obligations efficiently and promptly. If a given situation discloses that the State (the term includes its instrumentalities also) does not act to fill up the posts and the work of the organisation would suffer, resulting in damage to

the public interest, it will be an unreasonable and arbitrary non-exercise of the power to make the appointments by the State. In such circumstance, this Court may issue an appropriate writ or direction to the State, to discharge its constitutional and statutory obligations one of which is to make proper appointments to carry out duties.

30. A Corporation set up to take up works would require competent Engineers and other personnel, for the Corporations to function effectively. A hospital set up by the State requires Doctors, nurses and other attendants. Transport Company needs drivers, mechanics and administrators. Educational institutions set up by the State cannot function without teachers/lecturers. If the State fails to fill up these posts in spite of the existence of the need, this Court has a constitutional obligation to direct the State, to take steps to fill up the posts. Economic constraints, budgetary approval and other relevant factors no doubt have an important say while formulating recruitment policy. But, there should be a proper, sincere and open consideration of all the relevant factors by the State, before evolving its policy and initiate steps to make requisite appointments. I find considerable support for my view in the three decisions of the Supreme Court which have already been referred earlier.

31. In Rattanlal's case (supra), the Supreme Court was concerned with the appointment of teachers on an ad hoc basis at the commencement of the academic year and terminated their services before the commencement of the next vacation or earlier, to appoint them again similarly. The Supreme Court observed that a substantial number of appointments are made for several years and it was the duty of the State Government to take steps to appoint teachers in those vacancies in accordance with the rules expeditiously. The Supreme Court further observed that the State Government failed to discharge its duty in those cases. The following observation of the Supreme Court, would equally apply to the instant cases Rattan Lal and Others Vs. State of Haryana and Others,

"These ad hoc teachers are unnecessarily subjected to an arbitrary hiring and firing policy. These teachers who constitute the bulk of the educated unemployed are compelled to accept these jobs on an ad hoc basis with miserable conditions of service. The Government appears to be exploiting this situation. This is not a sound personnel policy. It is bound to have serious repercussions on the educational institutions and the children studying there. The policy of "ad hocism" followed by the State Government for a long time has led to the breach of Art. 14 and Art. 16 of the Constitution. Such a situation cannot be permitted any longer. It is needless to say that the State Government is expected to function as a model employer."

Thereafter the Supreme Court directed the State Government to take immediate steps to fill up the vacancies in accordance with the relevant Rules and until then the ad hoc appointees were to remain in the respective posts. The Supreme Court also directed the State Government to consider sympathetically the question of relaxing the qualification of maximum age in the case of this ad hoc

appointees, if they apply for the permanent appointments.

32. In the Daily Rated Casual labour employed under P. and T. Department through *Bharatiya Dak Tar Mazdoor Manch v. Union of India and others* (supra), the relief sought for before the Supreme court pertained to the minimum pay scale payable to the casual labourers in P. and T. Department. But the Supreme Court in addition to the relief of pay scale, also granted certain other benefit by directing the respondent to prepare a scheme for absorbing as far as possible the casual labourers who have been continuously working for more than one year in the department.

33. The other decision reported is *U.P. Income Tax Department Contingent Paid Staff Welfare Association v. Union of India and others* (supra). In the said case many of the Class-IV employees were found to be working on daily wages for nearly 8 years or more. The Supreme Court issued a direction similar to the one in the earlier decision referred above, to prepare a scheme to absorb these Class IV employees.

34. The decision pertaining to the teachers of State of Haryana seems to me more relevant and proximate to the cases of the petitioners before me. They cannot be treated on par with Class employees where academic qualifications and other eligibility requirements are not of much significance. The posts of typists and certainly of Engineers cannot be filled up just because the candidates have the minimum academic eligibility. The other eligibility requirement prescribed by the Service Rules will have to be satisfied. Therefore, it is not possible for the Court to direct their absorption solely because they have rendered services for over 20 or 21 months. Further, as already observed by me, when a regular appointment is to be made by the State Government, the prescribed procedure for such appointments will have to be followed, as otherwise the appointments would be in contravention of the provisions of Articles 14 and 16 of the Constitution. Having regard to the experience gained by these employees and the services rendered by them all these months, the State would certainly be justified in relaxing certain conditions of eligibility and giving preference to them while making the selection for appointment.

35. From the explanation in the statement objection and other circumstances of the case, it is clear that the Corporation did not appoint these petitioners just to satisfy a temporary need. It was also brought to my notice the proceedings of the Government of Karnataka dated January 12, 1989 directing the entrustment of the construction of certain medium irrigated projects to the Corporation. The said order approved the entrustment of two workers to the Corporation immediately. The petitioners also assert that the Corporation is preferred by the P.W.D. in entrusting the departmental work. There is also no dispute that the Corporation may take up works. Judicial notice can be taken about the vast expanding activities of the State in the sphere of constructions, road making etc. and there is no reason as to why the Corporation should not benefit from these activities. Therefore, it is not possible for me to accept the contention of the

learned counsel for the respondent that the Corporation is not in a position to make permanent appointments as such, without any other material before the court.

36. It is also clear that several officials working at present with the respondent Corporation are on deputation from other departments and these deputationists are paid deputation allowance, apart from their usual salaries. It is matter for the Corporation to consider, whether such deputationists should be continued or they can be sent back without jeopardising the efficiency of the working of the Corporation. This observation is made in the context of the plea put forward by the corporation that it is not in a position to make fresh appointments due to economic constraints. The economy in the total expenditure of an organisation like the Corporation is not dependent solely on the termination of the services of a few members of the staff. Economy could be achieved by resort to so many other rationalisation programme and a sense of dedication in the discharge of their respective duties by all concerned and even a small measure of control over the travelling expenses by the men in-charge of the affairs also may also may help reduction of wasteful expenditure.

37. It is necessary to direct the Corporation not to terminate the services of the petitioners immediately, but to consider the case of filling up of the posts permanently in the light of the observations made above and in such a scheme of making the appointments permanently, preference shall be given to the petitioners.

38. In the result, for the reasons stated above, I make the following :-

ORDER

These petitions are allowed; the terminations of the services of the petitioners are set aside and the respondent-Corporation is directed to continue the services of the petitioners in their respective posts till it examines the question of filling up of the posts regularly on a permanent basis. As and when regular and permanent appointments are to be made, provision shall be made to give preference to the respective petitioners in the selection.

Rule is made absolute.

39. In the circumstances of the case, there will be no order as to costs.