
(1995) 03 KL CK 0024
In the High Court Of Kerala
Case No : W.A. No. 542 of 1994

State of Kerala and Others

APPELLANT

Vs

C. Mohanan

RESPONDENT

Date of Decision : 02-03-1995

Acts Referred:

Industrial Disputes Act, 1947 — Section 10, 12(4), 12(5), 2, 25
Kerala Public Services Act, 1968 — Section 4

Citation : (1995) 70 FLR 1127 : (1995) 2 LLJ 1096

Hon'ble Judges : K.T. Thomas, J;K.K. Usha, J

Bench : Division Bench

Advocate : M. Hemalatha, for the Appellant;

Final Decision : Allowed

Judgement

K.K. Usha, J.—The question involved in this appeal, at the instance of the State of Kerala, is whether an appointee to the post of driver in the Tourism department under the Kerala General Subordinate Service on daily wages can claim the benefit of Section 25-F of the Industrial Disputes Act. The petitioner was engaged on daily wages to work in the office of the fifth respondent, the Deputy Director, Department of Tourism Guest House, Ernakulam on different dates from December 19, 1987. He puts forward a contention that his service is liable to be regularised in the light of the provisions contained u/s 25-F of the Industrial Disputes Act as he had worked for more than 240 days continuously in an year. It is contended that termination of his service with effect from June 20, 1990 is in violation of Section 25-F of the Industrial Disputes Act, 1947. Since the fifth respondent was not inclined to accede to his demand for reinstatement, the petitioner wanted to raise an industrial dispute. The fifth respondent refused to participate in the conciliation proceedings initiated by the third respondent taking the stand that no industrial dispute can be raised against the fifth respondent. The third respondent sent failure report to the second respondent u/s 12(4) of the Industrial Disputes Act. Since no orders were passed by the

second respondent on the above report u/s 12(5) of the Industrial Disputes Act, the writ petitioner approached this court by filing O.P. No. 9577 of 1991, seeking a writ of mandamus directing the second respondent herein to refer the dispute to the appropriate Labour Court or Industrial Tribunal. This court directed the second respondent to pass orders on the petitioner's application. The second respondent thereupon referred the matter to the first respondent and under exhibit P-7 order of the first respondent took the view that since the Tourism department is a Government department it does not come under the purview of the Industrial Disputes Act, 1947, and there is no need to refer the matter for adjudication. The petitioner challenges the view thus taken by the first respondent on his application for reference.

2. According to the petitioner, the main functions of the Department of Tourism of Government of Kerala are to promote tourism in the State by developing tourist centres and providing amenities to the tourists. The activities of the department are nothing but systematic economic adventures. Therefore, it would come within the definition of the word "industry" u/s 2(j) of the Industrial Disputes Act, 1947, and the petitioner is a "workman" as defined in Section 2(s) of the said Act. Termination of the service of the petitioner is, therefore, an industrial dispute u/s 2-A, which is liable to be referred for adjudication to the Labour Court, or the Industrial Tribunal u/s 12(5). It is further contended by the petitioner that amendment to the Kerala Public Services Act by way of insertion of Section 4 under the Act 4 of 1984, would not make any difference in the case of the petitioner regarding application of the provisions of the Industrial Disputes Act. He contended that since his appointment was on daily basis, it cannot be taken that he had been appointed to a public service or to a post in terms of Section 4 of the Kerala Public Services Act and, therefore, his case is governed by the provisions of the Industrial Disputes Act.

3. Counter-affidavits were filed by respondents Nos. 1 and 5 in the original petition. It is contended by the first respondent that the petitioner was employed as a trainee on daily wage basis from February 19, 1987 to June 12, 1990 with breaks in between. The regular post could not be filled up in accordance with the special rules as there was no list of Public Service Commission available during that period. According to the first respondent, the petitioner cannot rely on the decision of this court in *Umayammal Vs. State of Kerala*, in view of the subsequent amendment brought to the Kerala Public Services Act. By introduction of Section 4, cases like that of the petitioner are taken completely out of the purview of the Industrial Disputes Act. It is also contended by the first respondent that the tourism department is a Government department, its functions are sovereign functions and, therefore, it will not come within the definition of "industry" as contended by the petitioner. The fifth respondent has stated in his counter-affidavit that the petitioner's service was no longer required after June 12, 1990, on account of the appointment of a permanent hand who had joined duty as per order No. EI-5702 of 1986, dated May 23, 1990, issued by the Director of Department of Tourism. It is further contended that the service

conditions of those working in the Department of Tourism, Government of Kerala, are governed by the Kerala Civil Services Rules and not by the Industrial Disputes Act.

4. The learned single Judge who heard the original petition took the view that the department of tourism does not discharge sovereign functions to qualify for exemption. The petitioner is a "workman" and the dispute between him and the tourism department could be the subject-matter of reference u/s 10 of the Industrial Disputes Act. The contrary view taken in exhibit P-7 was found unsustainable by the learned single Judge. It was further held that the petitioner had not been appointed to a public service or to a post in terms of Section 4 of the Kerala Public Services Act and, therefore, the benefit of the provisions contained under the Industrial Disputes Act cannot be denied to the petitioner by applying Section 4 of the Kerala Public Services Act. Aggrieved by the above findings of the learned Judge, the State has filed the writ appeal.

5. It was contended before us on behalf of the State that the Department of Tourism is discharging sovereign functions and it is the Kerala Tourism Development Corporation, a separate unit, which is engaged in commercial activities as far as tourism in Kerala is concerned. Therefore, according to the appellant, even applying the principles laid down by the Supreme Court in Bangalore Water Supply and Sewerage Board Vs. A. Rajappa and Others, and by this Court in Umayammal v. State of Kerala (supra), the decisions relied on by the writ petitioner, the tourism department will not come within the definition of "industry". It is further contended that the provisions contained u/s 4 of the Public Services Act are directly applicable to the petitioner's case and on that ground also the petitioner cannot claim the benefit of the provisions of the Industrial Disputes Act. The appellant, therefore, seeks to set aside the judgment of the learned single Judge.

6. First we would consider the argument put forward by the appellant that even if the Tourism Department of Kerala is an "industry" and, therefore, the petitioner a "workman" as defined by the Industrial Disputes Act, he is deprived of all the benefits of the provisions of the Industrial Disputes Act by the introduction of Section 4 in the Kerala Public Services Act. Section 4 of the Kerala Public Services Act, 1968, inserted under the Act 4 of 1984, reads as follows:

"4. Act and rules thereunder to apply to certain persons notwithstanding anything in the Industrial Disputes Act or any other law. Notwithstanding anything contained in Chapter V-A or any other provision of the Industrial Disputes Act, 1947 (Central Act 14 of 1947), or in any other law for the time being in force, or in any judgment, decree or order of any court, the appointment of any person to any public service or post in connection with the affairs of the State of Kerala and the conditions of service (including termination of service) of any person appointed to any such service or post shall be governed by the provisions of this Act and the rules made or deemed to have been made thereunder."

7. A reading of the above Section would show that the provisions contained therein apply to persons appointed to any public service or post in connection with the affairs of the State of Kerala. The question would naturally arise whether the petitioner was appointed to any public service or post in connection with the affairs of the State of Kerala. The argument of the writ petitioner which found favour with the learned single Judge was that his appointment on daily rate wages as driver can not be treated as appointment to a service as defined by Rule 2(1) read with Rule 2(15) of the K.S. and S.S.R. Rule 2(1) provides that a person is said to be appointed to a service when in accordance with those rules or in accordance with the rules applicable at the time, as the case may be, he discharges for the first time duties of a post borne on the cadre of such service or commences the probation, instruction or training prescribed for members thereto. The word "service" is defined under Rule 2(1.5) meaning a group of persons classified by the State Government as a State or subordinate service, as the case may be. The contention was that since the appointment of the petitioner was on daily rate wages it was not an appointment in accordance with general rules or special rules and, therefore, it cannot be held that the petitioner was appointed to a service. According to the respondent, if his appointment was under Rule 9(a)(i) of the General Rules he could not have sought remedy under the Industrial Disputes Act. But since the appointment was on daily wages and, therefore, not under the General Rules he will be outside the purview of Section 4 and he can take recourse to provisions of the Industrial Disputes Act.

8. The learned judge has further held that the writ petitioner was not appointed to a post. The above finding is sought to be justified by the respondent herein for the reason that since his appointment was on casual basis it cannot be taken that he was holding a civil post. In support of the above contention that he was not appointed to a post, reliance was made by learned counsel appearing on behalf of the respondents on an observation made by the Supreme Court in *State of Assam and Others Vs. Shri Kanak Chandra Dutta*, namely, "a casual labourer is not holder of the post."

9. On an anxious consideration of the above contention raised by the respondent and also on examination of the decision of the Supreme Court, we are inclined to take the view that the above mentioned observation of the Supreme Court cannot have any application in the case of the petitioner. The petitioner was not appointed as a casual labourer. He was appointed to the post of adriver in the Tourism department which would come under the Kerala General Subordinate Service. The qualification and method of appointment for the post of drivers in the Tourism department are prescribed under the Rules. Therefore, it has to be taken that the petitioner was appointed to a public post in connection with the affairs of the State of Kerala even if he was not appointed to a service in accordance with the rules. We are, therefore, constrained to disagree with the learned single Judge on this issue.

10. The method of appointment to the post of driver under the Tourist

department (the present Tourism department) is by promotion from certain feeder categories and in the absence of qualified persons from such categories, by direct recruitment. In view of the provisions contained u/s 4 of the Kerala Public Services Act, the petitioner who was appointed to the post of driver on daily wage basis can also claim regular appointment only in accordance with the special rules. He cannot take recourse to the provisions of the Industrial Disputes Act. There is no provision under the special rules for regularising services of those who were appointed on daily rate wage basis. The petitioner's engagement on daily rate wage basis was stopped, when a regular appointee selected through the Public Service Commission had to join duty. In *Surendra Kumar Gyani Vs. State of Rajasthan and Another*, the Supreme Court had occasion to consider a more or less similar situation. Certain lower division clerks were appointed in the department of the State Insurance and Provident Fund of Government of Rajasthan on daily wages as a stop-gap measure. They were not given any permanent appointment or appointment on regular basis as it was not permissible under the relevant recruitment rules. When orders were issued terminating their services on persons recruited by the Public Service Commission becoming available, challenge was made against termination of their services. A Division Bench of the Rajasthan High Court held that in view of the regular selection of lower division clerks by the Rajasthan Public Service Commission, the services of the petitioners who had been taken on daily wage basis against the temporarily created 180 posts of lower division clerks, had to be terminated. Therefore, there was no question of any victimisation of the petitioners and they cannot claim any right to continue in service when lower division clerks regularly selected by the Rajasthan Public Service Commission were made available for appointments. The Supreme Court refused to interfere with the above finding of the Division Bench of the Rajasthan High Court. In para 14 of the judgment (at page 910), it was observed as followed:

"It also appears that as a matter of fact 180 persons properly recruited by the Rajasthan Public Service Commission were made available for appointment and such persons have, in fact, been given appointment. Hence, in any event, the service of the appellant and other employees in special leave petitions was liable to be terminated on the availability of properly recruited persons. In the aforesaid circumstances, we do not think that any direction that the said employees should be held to be in service and are continuing as such should be made. We, therefore, do not think that any interference with the judgment passed by the Division Bench of the Rajasthan High Court need be made. In the facts of the cases, we do not think that it is necessary to decide whether or not the said Insurance and Public Provident Fund Department is an industry. Such question is, therefore, kept open to be decided in an appropriate case on the basis of proper materials."

In the facts and circumstances of the present case, we are also of the view that the petitioner cannot claim regularisation in service and resist termination of service in order to enable a candidate recruited through the Public Service

Commission. Section 4 of the Public Service Act is directly applicable in the case of the petitioner and, therefore, he cannot take recourse to any remedy under the Industrial Disputes Act.

11. In *Umayammal v. State of Kerala* (supra), it has been held that sovereign functions strictly understood alone qualify for exemption from the definition of the term "industry" under the Industrial Disputes Act, and not the welfare activities or economic adventures taken by the Government or statutory bodies. The contention raised by the appellant is that the Tourism department itself is not engaged in any welfare activities or economic adventures. Such activities are carried on by the Kerala Tourism Development Corporation, a separate unit. Therefore, according to the appellant, the department which is exclusively carrying on sovereign functions cannot be treated as an industry. We do not think it is necessary for us to enter a finding on this aspect of this case. Even though there is some merit in the above contention, which was raised at the time of arguments, we find that there are no sufficient pleadings in this case in support of the above contention. Therefore, we leave open the question whether the Kerala Tourism Development would come within the term "industry" as defined under the Industrial Disputes Act. But in the light of our finding that the provisions contained u/s 4 of the Public Services Act are applicable in the case of the petitioner, exhibit P-7 has to be upheld even though not for the reason mentioned therein. We, therefore, reverse the judgment of the learned single Judge and dismiss the original petition.

12. The writ appeal stands allowed as above.