

(1997) 11 CAL CK 0028
In the Calcutta High Court
Case No : F.M.A.T. No. 1160 of 1996

State of West Bengal and Others

APPELLANT

Vs

Nani Gopal Jana and Others

RESPONDENT

Date of Decision : 24-11-1997

Acts Referred:

Industrial Disputes Act, 1947 — Section 2, 25F, 25FFF, 25J

Citation : (1998) 79 FLR 814 : (1998) 1 LLJ 1116

Hon'ble Judges : Prabha Shankar Mishra, C.J.;Nure Alam Chowdhury, J

Bench : Division Bench

Advocate : Indrajit Kumar Sen and Arun Mitra, for the Appellant; L.C. Bihani and Suchandra Mukherjee, for the Respondent

Final Decision : Dismissed

Judgement

Prabha Shankar Mishra, C.J.—Muster roll workers under Divisional Forest Officer, East Midnapore Division, who have worked continuously for periods ranging from 3 years to 10 years have moved this Court alleging inter alia, that although for all purposes, they are permanent employees, they have not been given regular appointments and the benefits which regular and permanent employees must receive.

2. Holding on the basis of the principle that the casual workers who have been appointed against perennial job and who have discharged functions for more than 240 days in a year, are entitled to be regularised in the normal vacancies, learned single Judge has directed the respondents-appellants to absorb the writ petitioners-respondents in the regular vacancy of Group D posts within six months from the date of communication of the order. The learned single Judge, for the said purpose, has further ordered as follows:

"The Finance Department, Government of West Bengal shall sanction the creation of posts for regularisation of the petitioners as they have been working since 1978 or 1980 as the case may be. In the event no regularisation is made on the

expiry of six months from the date of communication of this order, the petitioners will be entitled to the scale of pay as admissible to the similar Group-D employees of the Government until their absorption. The petitioners will be absorbed within the time specified above and no vacancy shall be filled up in Group D post without giving employment to the petitioners first in terms of this order."

3. The instant appeal has been preferred mainly on the grounds:

1. Appointment on daily wage basis is not appointment to posts according to rules;

2. Petitioners-respondents were appointed under a scheme or beautification and thus for a purely temporary job and since the scheme has come to an end, they have no right to claim continuance in service any further and their claim that they are to be regularised is not proper:

3. In any event, direction to create new posts for them and absorb them and until such absorption is made, they be paid emoluments as regular employees and further injunction that no one be appointed on permanent basis until the petitioners- respondents are absorbed, are directions which are not at all warranted on the facts and in the circumstances of the case.

4. Sheet anchor of the argument of the learned counsel for the appellants is the law that appears to have been stated on the peculiar facts of the case which fell for determination before the Supreme Court, is that the project in which the petitioners- respondents were engaged having come to an end, they have necessarily to be terminated for want of work and the Court cannot give direction to re-engage them in any other work or appoint them against existing vacancies for which they have not been regularly recruited. In *State of Himachal Pradesh Vs. Suresh Kumar Verma and another*, , the Supreme Court dealt with a case in which the workmen engaged with the project were not recruited to any of the services under the State or to class of posts under the State in accordance with the rules of recruitment. The Court, on the basis of above, observed that the State is bound to follow the rules of recruitment and to have the selection of the candidates made as per recruitment rules and appointments shall be made accordingly. A person who is recruited in accordance with the rules, from the date of discharging the duties attached to his post becomes a member of the service. Appointment on daily wage basis, in such situation, is not an appointment to the post according to the rules. The Supreme Court also noticed that the project in which the respondents had engaged workers had come to an end and that therefore they had necessarily to be terminated for want of work and upon that observed:

"The Court cannot give any directions to re-engage them in any other work or appoint them against existing vacancies. Otherwise, the judicial process would become other mode of recruitment de hors the rules."

5. In the other case of State of Himachal Pradesh, through the Secretary (Rural Development) to the Talluri Venkaiah Naidu and another Vs. Public Prosecutor, High Court of Andhra Pradesh, also the Supreme Court observed:

"It is seen that when the project is completed and closed due to non-availability of funds, consequently, the employees have to go along with the closed project. The High Court was not right in giving the direction to regularise them or to continue them in other places. No vested right is created in temporary employment. Directions cannot be given to regularise their services in the absence of any existing vacancies nor directions be given to create posts by the State to a non-existent establishment. The Court would adopt pragmatic approach in giving directions. The directions would amount to creating of posts and continuing them inspite of non-availability of the work. We are of considered view that the directions issued by the High Court are absolutely illegal warranting our interference."

6. With respect we record our agreement with the view that when certain persons are recruited to complete a project and the project is completed and the work thus closed, such persons have to be terminated from their services in accordance with law. In case of persons who are engaged for work and have been continuing for longer duration but while engaging them for work recruitment is not made in accordance with rules of service or the group of posts, such persons cannot be said to have entered into service or group of posts in accordance with law and thus cannot seek absorption as regular employees in the service or in the group of posts. Any recruitment which is not made in accordance with the rules or is made without affording equal opportunity to all such persons who are qualified for such recruitment would be violative of Article 16(1) of the Constitution of India read with Article 14 thereof. Such employees are often described as back-door entrants and their retrenchment, sometimes, is taken as the right course of law. In the case of workmen, however, to whom Industrial Disputes Act applies and in whose cases it cannot be said that their recruitment has been made in violation of any rules or in their recruitment equality of opportunity of employment has been denied to any other person, the position is different.

7. Industrial Disputes Act has not envisaged any special feature of a permanent employee or temporary and ad-hoc employee. These nomenclatures given to those employees are referable, however, sometimes to the mode of recruitment and sometimes to the type of work for which they are engaged. Industrial Disputes Act has envisaged certain rights accrued to the employees who have worked continuously in an industry which is not an industrial establishment in which less than 50 workmen on an average per working day, have been employed in the preceding calendar month or which are of a seasonal character or in which work is performed only intermittently. Continuous service is defined in Section 25B which is in Chapter V-A of the Industrial Disputes Act and for the category of work in which the workers are engaged. If any employee is in

uninterrupted service including services which may be interrupted on the ground of sickness or authorised leave or an accident or a strike which is not illegal, or a lockout or a cessation of work which is not due to any fault of the workman, for a period of one year and work for 240 days in that calendar year, such employee should be treated as an employee on continuous service. Although there is a vague denial of the claim of the petitioner-respondents in the counter-affidavit filed on behalf of the appellants in the writ petition in the nature of ipse dixit, a specific allegation in this behalf is made in the writ petition that the petitioner-respondents have given their respective period of continuous service which in the case of any of the petitioners is not less than 3 years and thus they have worked for more than 240 days in a calendar year. There is some statement in the counter-affidavit in respect of the nature of the work and the appellants have stated that the petitioner-respondents were engaged to work when a beautification scheme was introduced and since they were engaged for the work under the said scheme, after the scheme has come to an end, they have to be terminated. The statement, in this behalf, however, in the counter-affidavit is so vague that it is not possible to rely upon the same to discredit the claim of the petitioner-respondents that they have worked for more than 240 days in a calendar year and that the work is of perennial nature and it has not come to an end.

8. We wanted to know from the appellants as to when the scheme started and when the scheme has been closed. In spite of our specific queries in this behalf, the appellants have not been able to give any specific reply. Thus, going by the period of service rendered by the petitioner-respondents, it is possible to conclude without hesitation that the work is of perennial nature.

9. There is yet another reason to come to the conclusion that the work is of perennial nature but to that we shall advert after we take notice of the rights which have accrued to the petitioner-respondents under the Industrial Disputes Act.

In Chapter V-A of the Industrial Disputes Act Sec. 25-J says:

"The provisions of this Chapter shall have effect notwithstanding anything inconsistent therewith contained in any other law including Standing Orders made under the Industrial Employment (Standing Orders) Act, 1946:

Provided that where under the provisions of any other Act or Rules, orders or notifications issued thereunder or under any standing orders or under any award, contract of service or otherwise, a workman is entitled to benefits in respect of any matter which are more favourable to him than those to which he would be entitled under this Act, the workman shall continue to be entitled to the more favourable benefits in respect of that matter, notwithstanding that he receives benefits in respect of other matters under this Act.

Section 25FFF of the Act states:

Where an undertaking is closed down for any reason whatsoever, every workman who has been in continuous service for not less than one year in that undertaking immediately before such closure shall, subject to the provisions of Sub-section (2), be entitled to notice and compensation in accordance with the provision of Section 25F, as if the workman had been retrenched:

Provided that where the undertaking is closed down on account of unavoidable circumstances beyond the control of the employer, the compensation to be paid to the workman under Clause (b) of Section 25F shall not exceed his average pay for three months."

10. The said Section , however, states that an undertaking which is closed down by reason merely of financial difficulties including financial losses or accumulation of undisposed stock or the expiry of the period of the lease or licence granted to it or in a case where the undertaking is engaged in mining operation, exhaustion of the minerals in the area in which such operations are carried on, shall not be taken to be closed down on account of unavoidable circumstances beyond the control of the employer within the meaning of the proviso to this subsection.

Sub-section (2) says:

Where any undertaking set up for the construction of buildings, bridges, roads, canals, dams or other construction work is closed down on account of the completion of the work within two years from the date on which the undertaking had been set up, no workman employed therein shall be entitled to any compensation under Clause (b) of Section 25F, but if the construction work is not so completed within two years he shall be entitled to notice and compensation under that Section for every completed year of continuous service or any part thereof in excess of six months.

11. Is it possible on the facts of this case to say that the scheme has been completed and the work and the undertaking has been closed down? The answer on the facts of this case is an emphatic No. The petitioner-respondents have not been given the notice as contemplated u/s 25F of the Act and they have not been paid any compensation as if they have been retrenched . Section 25F contemplates:

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 workmen 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 as may be specified by the appropriate Government by notification in the Official Gazette.

12. None of the three mandatory requirements of Section 25F have been complied with by the appellants. We have given pur anxious consideration to examine whether in the case of the petitioner- respondents it can be said that:

(1) they have suffered termination of service as a result of non- renewal of contract of employment between the employer and the workmen concerned on its expiry or

(2) of such contract being terminated under a stipulation in that behalf contained therein or-

(3) on the ground of continuous ill-health or-

(4) any other ground under which retrenchment compensation shall not be required to be paid.

13. As it shall not be a retrenchment as contemplated u/s 2(oo) under the Industrial Disputes Act, none of the grounds as above are either completed or shown to us.

14. It is, by now, well-settled that a department of the Government or the State or any other authority which is a State under Article 12 of the Constitution of India can be an Industry provided there is:

(i) systematic activity carried on by co-operation between an employer and his employee for the production or distribution of goods or services with a view to satisfy human wants and wishes, not spiritual or religious. 15. A salutary authority in the judgment of the Supreme Court in the case of Bangalore Water Supply and Sewerage Board Vs. A. Rajappa and Others, is available for holding that even in departments of the Government discharging sovereign functions , if there are units which are industries and they are substantially severable, then they can be considered to come within Section 2(j) which defines Industry under the Industrial Disputes Act. Same has to be applied to any other authority.

16. The petitioner-respondents who have worked for more than 240 days in a calendar year and who have not been retrenched as contemplated u/s 25F of the Industrial Disputes Act and who have been working continuously, in the case of some of them, for almost about a decade and in the case of others for more than three years on the date of filing of the writ petition, it is not possible to hold that their Muster roll employment will not give them the guarantee which the law provides, that is, they are continuing in service and they are entitled to continue in service.

17. The State has a prescription of its own for the emoluments to be paid to Group D employees. It is not seriously disputed before us that the petitioner-respondents are engaged in the work which is ordinarily assigned to Group-D

employees. When they have been doing the work of Group-D employees, why have they not been paid the wages which is payable to Group-D employees? In a country where large segment of people are forced to live low and to struggle for their existence they do go for any other employment even though the emoluments paid are so low which cannot be said to be either proper or reasonable.

18. Dealing with the case of temporary employees who were engaged by the contractors for work of People's Union for Democratic Rights and Others Vs. Union of India (UOI) and Others, Supreme Court has pointed out that forced labour as contemplated under Article 23 of the Constitution of India is also a force which social condition creates and which compels any person to take a job at a very low wage. All services under the State are expected to cover all the employees for the benefits of the compulsory insurance, provident fund and gratuity. Equal pay for equal work is another rule which flows from the rights guaranteed under Article 14 of the Constitution. Can there be any justification for State to keep someone engaged in a perennial work almost indefinitely and for a long period of service and deny him or her the benefits which a regular/permanent employee must receive? We are not entering into any academic research of this aspect of the law for we are satisfied that the petitioner-respondents have been denied equal pay for equal work that is, pay which Group-D employees under the State are entitled to receive and until they are retrenched as envisaged u/s 25F of the Industrial Disputes Act, they are entitled to continue in service. Appellants cannot, just because they desire, to retrench a workman, take recourse to Section 25F of the Act. Further guarantees in this behalf are available in Section 25G of the Act which incorporates common law principle of "last come first go" and Section 25H which says where any workmen are retrenched, and the employer proposes to take into his employ any person, he shall, in such manner as may be prescribed, give an opportunity to the retrenched workmen who are citizens of India to offer themselves for re-employment and such retrenched workmen who offer themselves for re-employment shall have preference over other persons.

19. As we have noticed above, the rule of retrenchment applied to the workmen where they are engaged on Muster roll or are given a regular letter of appointment in a service or any group of posts. That itself will guarantee that the petitioner-respondents shall be continued in service.

20. Since we have held that the petitioner-respondents cannot be denied equal pay for equal work unless there is any justification for the same and no such justification is shown to us to give them lower wages than the wages paid to Group-D employees, the petitioner-respondents are entitled to wages equal to Group-D employees. It would be unfair for any employer who has engaged workmen who for the reason of their continuous service and who have qualified for the protection as above, to deny to them the statutory benefits of provident fund, gratuity etc. We have good reasons to find ourselves in agreement with the

view taken by the learned single Judge that the petitioner-respondents be absorbed in regular services and given all consequential benefits as accorded to Group-D employees under the appellants.

21. We, however do not find any justification for a direction for creating supernumerary or any new posts as the work for which the petitioner-respondents are engaged and the duration for which they have worked are perennial and continuous for a long period of time. They have to be treated at par with regular/permanent employees.

22. In the result, we find no merit in the appeal. The appeal is accordingly dismissed, treating the same as on day's list for hearing.

23. The applications for appropriate order filed on behalf of the appellants on November 22, 1996 and by the petitioner-respondents on May 21, 1997 are disposed of as above.

24. On the facts of the case, however, there will be no order as to costs.

Nure Alam Chowdhury, J.

25. I agree.