

Zakir Hussaln Vs. Engineer-in-chief, Irrigation Dept. and ors.

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Court : Allahabad

Decided On : Nov-13-1992

Reported in : (1994)ILLJ5All; (1993)1UPLBEC15

Judge : R.A. Sharma and ;S.N. Saxena, JJ.

Acts : [Industrial Disputes Act, 1947](#) - Sections 25F

Appeal No. : C.M.W.P. No. 42156/1992

Appellant : Zakir Hussain

Respondent : Engineer-in-chief, Irrigation Dept. and ors.

Advocate for Def. : Standing Counsel

Advocate for Pet/Ap. : Devendra Dhama, Adv.

Judgement :

R.A. Sharma, J.

1. Petitioner claims to have been appointed as Electrician by the respondent No. 3 on May 23, 1990 on daily wages basis at the rate of Rs. 54 per day. Petitioner further claims that he was continued to work as Electrician on the above basis till July 31, 1992, on which date his services were terminated. He has accordingly filed this writ petition for quashing the order of termination of his services for a writ

of mandamus directing the respondents to regularise his services and absorb him in the department on regular basis and pay him the salary equivalent to the salary of regular employees.

2. In support of the writ petition, the learned counsel for the petitioner has made three submissions, viz., (i) the petitioner falls within the definition of workman and has completed service of 240 days and as such he is entitled to be regularised by the respondents; (ii) in any case, the petitioner has worked on daily wage basis for about two years and in pursuance of the Government Order and the law laid down by the Courts his service is liable to be regularised by the respondents, and (iii) after completion of 240 days of service his service cannot be terminated without complying with S. 25F of the Industrial Disputes Act.

3. A person who is appointed on daily wages on ad hoc basis does not have any right to the post and his services can be terminated at any time. He cannot claim regularisation of his services merely because he has completed 240 days in service. In this connection reference may be made to the decision of the Supreme Court in the case of Delhi Development Horticulture Employees Union v. Delhi Administration, 1992-II-LLJ-452, wherein, while rejecting similar argument it was laid down as follows (p.459):

'Apart from the fact that the petitioners cannot be directed to be regularised for the reasons give above, we may take note of the pernicious consequences to which the direction for regularisation of workmen on the only ground that they have put in work for 240 or more days, has been leading. Although there is Employment Exchange Act which requires recruitment on the basis of registration in the Employment Exchange, it has become a common practice to ignore the Employment Exchange and the persons registered in the Employment Exchange, and to employ and get employed directly those who are either not registered with the Employment Exchange or who though registered are lower in the long waiting list in the Employment Register. The Courts can take judicial notice of the fact that such employment is sought and given directly for various illegal considerations including money. The employment is given first for temporary periods with technical breaks to circumvent the relevant rules and is continued for 240 or more

days with a view to give the benefit of regularisation knowing the judicial trend that those who have completed 240 or more days are directed to be automatically regularised. A good deal of illegal employment market has developed resulting in a new source of corruption and frustration of those who are waiting at the Employment Exchange for years. Not all those who gain such back-door entry in the employment are in need of the particular jobs. Though already employed elsewhere, they join the jobs for better and secured prospects. That is why most of the cases which come to the courts are of employment in Government Departments, Public Undertakings or Agencies. Ultimately it is the people who bear the heavy burden of the surplus labour. The other equally injurious effect of indiscriminate regularisation has been that many of the agencies have stopped undertaking casual or temporary works though they are urgent and essential for fear that if those who are employed on such works are required to be continued for 240 or more days they have to be absorbed as regular employees although the works are time-bound and there is no need of the workmen beyond the completion of the works undertaken. The public interests are thus jeopardised on both counts'.

4. The second submission of the learned counsel also lacks merit. There is no Government Order placed before us whereunder the petitioner can claim, as a matter of right, the regularisation of his services after having worked for two years in the Department. Government Order dated July 25, 1992, copy of which has been filed as Annexure 6 to the writ petition, on which reliance has been placed by learned counsel for petitioner does not provide for regularisation after an employee has put in two years of service. In that order after deprecating the practice of the authorities in making appointment on daily wage basis, the Government has laid down that as the number of work charged employees and those who have completed 240 days in service is excessive, only such of those employees be retained in service who are required according to the requirement of the work and rest of them be removed from service. This order, as mentioned above, nowhere lays down that after a person has put in two years of service he is to be regularised by the State. In fact, it appears that the petitioner's services were terminated in accordance with the above Government Order.

5. Appointment on ad hoc and/or daily wage basis used to be exception in the past, but has now become almost a rule, whereby competitive examinations for appointment are easily avoided and people are taken into service by back-door entry. In this connection reference may be made to the observations made by the Supreme Court in the case of Delhi Development Horticulture Employees' Union (supra), which has been reproduced hereinbefore, whereby development of illegal employment market and its effect on the society has been highlighted.

6. Question of regularisation of employees, appointed on ad hoc or daily wage basis, has been attracting the attention of the courts from time to time and large number of cases laying down law in connection therewith have been decided by the Supreme Court and this Court. It is not necessary to cite all those cases. Position as now stands is that for regularisation of service of an ad hoc employee or a daily wager there must be regular or permanent post and funds must also be available for payment of the salary. That apart, he should be qualified and there must be the necessity, according to the requirement of the work for retaining him and his work and conduct in the past must also be satisfactory. Supreme Court in the case of Delhi Development Horticulture Employees Union (supra) has laid down that,(p.457):

'For regularisation, there must be regular and permanent post or it must be established that although the work is of regular and permanent nature, the device of appointing and keeping the workers on ad hoc or temporary basis has been resorted to, to deny them the legitimate benefits of permanent employment'.

In State of Haryana v. Piara Singh,(1992 AIR SCW 2315) (1993-II-LLJ-937), extract of which is reproduced below, the Supreme Court has considered the question of regularisation again and has highlighted the problems which are created by orders directing for regularisation of ad hoc employees.(pp.947-948 of LLJ)

'We may venture to point out the several problems that will arise if such directions become the norm:

(a) Take a case where certain vacancies are existing or expected and steps are taken for regular recruitment either through Public Service Commission or other such body, as the case may be. A large number of persons apply. Inevitably there is bound to be some delay in finalising the selections and making the appointments. Very often the process of selection is stayed or has to be redone for one or the other reasons. Meanwhile the exigencies of administration may require appointment of temporary hands. It may happen that these temporary hands are continued for more than one year because the regular selection has not yet been finalised. Now according to the impugned direction the temporary hands completing one year's service will have to be regularised in those posts which mean frustrating the regular selection. There would be no post left for regularly selected persons even if they are selected. Such cases have indeed come to this court from these very two States.

(b) In some situations, the permanent incumbent of a post may be absent for more than a year. Examples of this are not wanting. He may go on deputation, he may go on Faculty Improvement Programme (FIP), or he may be suspended pending enquiry into charges against him and so on. There may be any number of such situations. If a person is appointed temporarily in his place and after one year he is made permanent where will the permanent incumbent be placed on his return? Two persons cannot hold the same post on a regular or permanent basis.

(c) It may also happen that for a particular post a qualified person is not available at a given point of time. Pending another attempt at selection later on an unqualified person is appointed temporarily. He may continue for more than one year. If he is to be regularised it would not only mean foreclosing of appointment of a regular qualified person, it would also mean appointment of an unqualified person.

(d) Such directions have also the effect of disregarding and violating the rule relating to reservation in favour of Backward Class of citizens made under Article 16(4). What cannot be done directly cannot be allowed to be done in such indirect manner.

(e) Many appointments may have been made irregularly - as in this case - in the sense that the candidates were neither sponsored by the Employment Exchange nor were they appointed after issuing a proper advertisement calling for applications. In short, it may be a back door entry. A direction to regularise such appointments would only result in encouragement to such unhealthy practices.

These are but a few problems that may arise, if such directions become the norm. There may be many such and other problems that may arise. All this only emphasises the need for a fuller consideration and due circumspection while giving such directions'.

Again in paragraph 33 of the Judgment the Supreme Court has laid down as under.(p.950)

'Now coming to the direction that all those ad hoc/temporary employees who have continued for more than an year should be regularised, we find it difficult to sustain it. The direction has been given without reference to the existence of a vacancy. The direction in effect means that every ad hoc/ temporary employee who has been continued for one year should be regularised even though (a) no vacancy is available for him which means creation of a vacancy (b) he was not sponsored by the Employment Exchange nor was he appointed in pursuance of a notification calling for applications - which means he had entered by a back- door (c) he was not eligible and/or qualified for the post at the time of his appointment (d) his record of service since his appointment is not satisfactory. These are in addition to some of the problems indicated by us in para 25, which would arise from giving of such blanket orders. None of the decisions relied upon by the High Court justify such wholesale, unconditional order. Moreover, from the mere continuation of an ad hoc employee for one year, it cannot be presumed that there is need for regular post. Such a presumption may be justified only when continuance extends to several years. Further, there can be no 'rule of thumb' in such matters, conditions and circumstances of one unit may not be the same as of the other. Just because in one case, a direction was give to regularise employees who have put in one year's service as far as possible and subject to fulfilling the qualifications, it cannot be held that in each and every case such a direction must follow irrespective of

and without taking into account the other relevant circumstances and considerations. The relief must be moulded in each case having regard to all the relevant facts and circumstances of that case. It cannot be a mechanical act but judicious one. Judged from this stand point, the impugned directions must be held to be totally untenable and unsustainable.'

7. Merely because an employee has worked for two or three years he cannot claim regularisation of service as a matter of right. For regularisation, as mentioned before, there must be both posts and funds and the need for retention of the employee according to the requirement of work. That apart he must be qualified and the work and conduct of such employee must also be satisfactory. It is also to be considered whether appointments on ad hoc/daily wage basis have been made against the leave or casual vacancies. In cases of appointment on such vacancies there would hardly be any scope for regularisation. These and various other factors have to be taken into consideration before deciding the question as to whether service of an employee appointed on ad hoc/daily wage basis should be regularised. Regularisation cannot be made as a 'rule of thumb' on the basis of completion of certain years of service of such an employee. It all depends on various facts, some of which have been mentioned above and it is for the employer to decide as to whether in view of the facts and circumstances of the case, the services of those employees who were appointed on ad hoc/daily wages basis should be regularised.

8. A Division Bench of this Court in Bhullar Nath Yadav v. Mayohall Sports Complex, Allahabad 1990 AWC 1005, which has been relied upon, has considered the question of regularisation of the employees working on daily wage basis for about ten years and in that connection this Court issued directions to the respondents to prepare the scheme for regularisation and absorption of the daily wagers. Relevant extract from the said judgment is reproduced below:

'Some of the petitioners have been working on daily wages for more than ten years and no steps have been taken by respondents for regularising their services. Paucity of funds or absence of sanctioned post cannot be a ground for denying the benefit of regularisation to the petitioners. It is undisputed that respondents are

paying wages to the petitioners regularly and if they have funds for paying them for the last several years it is not possible to believe that they are short of funds. When work is of permanent nature there is no justification for not having regular post. In any case non-regularisation of the daily wagers for such a long period appears to us to be arbitrary and unfair. Judgments of Hon'ble Supreme Court are binding on the respondents and they have to devise ways and means to absorb them on permanent basis. In our view at least those who have put in more than three years service on daily wage basis are entitled to be absorbed and their services are liable to be regularised'.

9. The case of Bhullar Nath Yadav (supra) was a case where it was established that although the work was of regular and permanent nature the respondents therein had adopted a device of appointing and keeping the employees on ad hoc basis in order to deny them the benefit of permanent employment. This is clear from the finding recorded by this Court, relevant extract from which has been reproduced hercinabove. The case put up by the respondents therein to the effect that there is neither post nor funds for regularisation, was rejected by this Court on the ground that the work is of permanent nature and wages are being paid to the workers for the last more than ten years. The petitioner cannot derive any help from that case.

10. Relying on the decision of Supreme Court in Jacob M. Puthuparamli v. Kerala Water Authority, 1991-II-LLJ-65, learned counsel for petitioner has argued that the petitioner is entitled to be regularised as a matter of right, as he has worked for about two years. It is not possible to agree with the learned counsel. The case of Jacob M. Puthuparamli (supra) turned on interpretation of Rule 8(a)(i) of Kerala Subordinate Services Rules and law laid down by Supreme Court in that case, cannot be applied to the instant case, where there is no such rule. Supreme Court itself in Director, Institute of Management Development U.P. v. Smt Pushpa Srivastava, AIR 1992.SC.2070: 1993-I- LLJ-190 has considered the above case of Jacob M. Puthuparamli and has laid down that the law declared and the observation made therein cannot be applied to a case where there is no such rule, as was involved in that case,

11. Learned counsel has also placed reliance on a decision of Supreme Court in *Surendra Kumar Gyani v. State of Rajasthan*, 1992 (5) JT SC 293(1993-II-LLJ-903). In this case termination of service of daily wagers was challenged on the ground of violation of S. 25F of the Industrial Disputes Act as the employees therein have completed more than 240 days of service. That apart, prayer for regularisation of their services was also made. The Supreme Court rejected the case of employees on the ground that they were not given any permanent appointment. In this connection paragraph 14 of the said judgment is reproduced below (pp.909-910 of LLJ)

'After considering the facts and circumstances of the case and the submissions made by learned counsel for the parties, it appears to us that the appellant and other employee concerning the Special Leave Petitions had not been given any permanent appointment and it was not even intended to give them appointment on regular basis, because such appointments on regular basis were not permissible under the relevant recruitment rules and the Rajasthan Public Service Commission was required to select persons for employment in the cadre of Lower Division Clerk. Since there was temporary need to get the service of some Lower Division Clerks in the department it was decided to create temporary posts of 180 clerks as a stop-gap-measure to tackle the volume of work in the General Provident Fund and State Insurance Department. Accordingly 180 posts were sanctioned temporarily on the footing that appointments of daily rated clerks would come to an end on the availability of duly recruited persons. It is the case of the State Government that since the persons recruited as daily wagers were not intended to be appointed as regular employees either permanently or even temporarily it was made expressly clear that their services could be terminated any time without notice and consequently on the basis of such terms of service, the impugned orders have been made. 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 afore- 2 said 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 case, 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'.

12. As the employees were not given permanent appointment on regular basis the termination was upheld by the Supreme Court and it was not found necessary to decide whether or not the department is an Industry. As such this case does not help the petitioner.

13. The question as to whether the service of the employee is liable to be regularised is a question which can more appropriately be decided by the employer, (respondents), because whether an employee should or should not be regularized is the question which has to be decided on the basis of several factors, such as availability of post and funds, nature and length of working of the employee, his qualifications, need according to the requirement of the work for retaining him and his satisfactory work and conduct. These are some of the considerations which are to be taken into account before regularising the service. There may be many more considerations depending on the facts and circumstances of the case. It may, however, be observed that eligibility qualifications are generally considered at the time of entry into the service. But when appointments on ad hoc/daily wages basis are being made almost regularly it is necessary that eligibility qualifications should also be taken into account, while deciding the question of regularisation. In case an employee has worked for several years on the post, it may be appropriate for the employer (State) to consider desirability of relaxing the eligibility qualifications in such a case. As the factors which are required to be taken into consideration while considering the question of regularisation are all questions of facts, appropriate forum, as mentioned above, for deciding these questions, is the employer, before whom the concerned employee should make representation containing all his grievances and giving all the necessary facts and materials in connection therewith. If such representation is made the same is liable to be decided by the employer

expeditiously. In the instant case, the petitioner claims to have filed representations, copies of which have been filed as Annexures-4 and 5 to the writ petition. These representations hardly contain any material. It is, therefore, necessary that the petitioner should make fresh representation before the respondents.

14. The last submission of the learned counsel for the petitioner is that the petitioner has completed the service of 240 days and as such he could not have been removed from service without complying with the provisions of S. 25F of the Industrial Disputes Act. This question cannot be decided by this Court for more than one reason, firstly the petitioner has not filed copies of his appointment and termination orders. Instead he has filed three certificates as Annexures 1,2 and 3 to the writ petition, in which it has been mentioned that he has worked on daily wage basis from June 1, 1990 to December 31, 1990, April 1, 1991 to September 30, 1991 and February 1, 1992 and May 31, 1992. It may be mentioned that in Annexure 3 the period of service has been mentioned from February 1, 1992 to May 31, 1992. First of these dates is apparently wrong because the certificate which has been filed as Annexure 2 to the writ petition covers the period from April 1, 1991 to September 30, 1991. In the absence of the appointment letters it is not possible to find out whether the petitioner's appointments were for fixed period and what were the terms and conditions of those appointments. If the appointments of the petitioner were for fixed period it may not amount to retrenchment, in view of the amendment of definition of word 'retrenchment' introduced in 1984 by Act No. 49 of 1984. There is lack of proper material on the record of this case on account of which such a plea cannot be entertained by this Court. Proper forum for agitating such a grievance is the Labour Court. Full Bench of this Court in Chandrama Singh v. Managing Director 1991 (2) UPLBEC 898, has held that ordinarily a reference before the Labour Court under Industrial Disputes Act is efficacious alternative remedy against an order of retrenchment and unless the person aggrieved pleads and proves that the remedy of reference before the Labour Court is not adequate or is inefficacious, this Court should not entertain the writ petition against such an order. Learned counsel for the petitioner has, relying upon the decision of Supreme Court in Krishna Kumar Dubey v. U.P. State Food and Essential Commodities Corporation, 1989 (58) FLR 100, submitted that the

aforesaid Full Bench does not lay down the correct law and requires reconsideration. It is not possible to agree with the learned counsel. From the perusal of the judgment of the Supreme Court it is apparent that the appellant therein was appointed as temporary employee and worked for more than three years. The facts, that he has worked for more than 240 days in a year and his services were terminated without complying with the provision of S. 25F, were not disputed. Under these circumstances the Supreme Court quashed the order of termination of service without deciding the question as to whether the High Court was justified in dismissing the writ petition on the ground of availability of alternative remedy before Labour Court. This is clear from the following extract from the judgment of the Supreme Court:

'The High Court took the view that the appellant had an efficacious alternative remedy before the Industrial Tribunal and, accordingly, dismissed the writ petition. It is not necessary for us to consider whether the High Court was justified in dismissing the writ petition on that ground or not, but the fact remains that the appellant had worked continuously for more than 240 days and so, his services could not be terminated without complying with the provision of S. 25F of the Industrial Disputes Act'.

15. Neither the Supreme Court has laid down in the above case that in every case whenever an order of retrenchment is challenged on the ground of violation of S. 25F this Court must interfere nor the Full Bench of this Court in the case of Chandrama Singh (supra) has held that in no case this Court can interfere under Article 226 of the Constitution of India against such an order. As mentioned in para 5 of the aforesaid judgment of Full Bench remedy of reference before the Labour Court under Industrial Disputes Act is 'ordinarily' efficacious remedy. As the word 'ordinarily' itself suggests, such a remedy cannot necessarily be said to be an efficacious remedy in all the cases. What the Full Bench laid down is the ordinary rule of alternative remedy which this Court follows while entertaining the writ petition. It is settled law that if an alternative remedy is available to a person his writ petition cannot be entertained unless he pleads and proves that that remedy is not efficacious or adequate. When the relevant material is on the record, from which it is apparent that services of the employee have been terminated in

violation of S. 25F, relegating him to the Labour Court may not be justified. But when there is lack of material or the plea is being disputed by the opposite parties, the writ petition cannot be entertained unless it is pleaded and proved by the petitioner that the remedy before the Labour Court is not efficacious. In the instant case, as mentioned hereinbefore, there is lack of relevant material on record and the petitioner has failed to plead and prove that the remedy before the Labour Court is not efficacious. Under the circumstances the question as to whether the services of the petitioner were terminated in violation of Section 25F of the Industrial Disputes Act, cannot be decided by this Court. For resolving such a controversy the petitioner should approach the Labour Court by getting a reference made by the Government to it.

16. This writ petition is accordingly disposed of with the following order:

Petitioner should make a fresh representation along with certified copy of this order, before the appropriate authorities, within a month from today. If such a representation is made the same shall be decided by the authorities, along with pending representations, if any, in accordance with observations made hereinbefore, as far as possible within three months from the date of presentation of certified copy of this judgment. The order so passed should be communicated to the petitioner within two weeks thereafter.