

HON'BLE SRI JUSTICE C. PRAVEEN KUMAR

WRIT PETITION No.18348 of 2000

ORDER:

Assailing the common order dated 14.09.2009 passed in I.D.Nos. 185, 186, 187, 188, 189, 190, 192, 193 and 194 of 1996 on the file of the Chairman, Industrial Tribunal and Presiding Officer, Labour Court, Visakhapatnam, the present writ petition came to be filed by the employees.

The factual matrix of the case is as under:

The deponent along with eight others were engaged by the fourth respondent in April, 1990 as road gang mazdoor on a monthly salary of Rs.350/-. They continued to work for a meager salary with a hope that their services would be regularized but as their demands were not met, they demanded for payment of minimum wages which lead to their removal from service on 01.06.1996 without any notice; payment of compensation and without following the procedure prescribed under Section 25 (F) of the Industrial Disputes Act (For short "the Act"). Accordingly, all of them filed different I.Ds. before the Industrial Tribunal, seeking reinstatement with continuity of service and back wages. After considering the oral and documentary evidence adduced by each of the petitioners, the Tribunal by its common order held that the petitioners failed to establish that they are workmen working under the respondents and as such they are not entitled for any benefits like reinstatement with continuity of service and back wages etc. Challenging the same, the present writ petition is filed.

The second respondent ie. Executive Engineer, R & n B Division, filed counter denying the averments made in the writ petition. It was specifically averred that the allegation of the petitioners being engaged by the fourth respondent ie. Assistant Executive Engineer, Cheepurupalli, as Gang Mazdoors on a monthly salary of Rs.350/-; that all the petitioners continued with the fourth respondent with a hope that their services would be regularized and that their services were illegally terminated with effect from 01.06.1996 without any notice and without payment of retrenchment compensation are all false and

incorrect. It has been specifically stated in the counter that these petitioners were never engaged by them and there is no relationship of employee and employer between them. It is also admitted that the respondent Nos.2 to 4 herein did not produce any muster rolls maintained for NMR's payment of wages, registers, daily labour report, measurement books, diaries of supervisors-cum-inspectors and the seniority list since the petitioners were neither employed as labourers nor as NMRs. It is also stated that there is no sanction by the Government to engage them as road gang mazdoors and as such engaging the petitioners by the department does not arise.

The counsel for the petitioners mainly submits that there is enough material available on record to show that the petitioners were employed either by the department or by the contractor engaged by R & B department. In support of its case, he placed reliance on the oral evidence of WWs.1, 2 and 3 and also the evidence of MW.1 to show the employment of the petitioners with the respondents. It is his case that the petitioners were engaged directly by the R & B Department for the purpose of laying the roads which is perennial in nature. The counsel for the petitioners mainly submitted that if the labourers were engaged through a contractor, as per Section 7 of Contract Labour (Regulation and Abolition) Act, 1970, the principal employer needs registration. He further submits that if the work is sought to be executed through a contractor, the contractor should register himself under Rule 74 of the Andhra Pradesh Contract Labour (R & A) Rules, 1971. He also refers to Rule 75 and 78 to show that the contractor, who engaged the labourers has to maintain records and registers and in the absence of the same an inference has to be drawn that these petitioners were employed by the Department. It is his case that though the petitioners asked for production of documents containing the names of the petitioners, no document is placed on record by the Department or by the Contractor, which itself is sufficient to prove the case of the petitioners.

On the otherhand, the learned counsel for the respondents would submit that in the absence of any evidence being adduced by the petitioners to prove their employment either with the department or with the contractor, the order under challenge which has been passed based on the material available on record, warrants no interference.

Therefore, the questions that arise for consideration would be 1) Whether the services of the petitioners were utilized by the first respondent; (2) Whether they were employed directly by the first respondent or through a contractor; (3) If the petitioners were engaged through a contractor, whether he was a registered contractor and if the contractor was not a registered contractor, the effect of petitioners when engaged by such contractor and the consequence of non-production of registers and records by the respondents.

In order to appreciate the issues raised above, it would be necessary to refer to the evidence available on record.

As stated earlier, the workman examined themselves as WW.1 and also examined two witnesses in support of his plea, where as one witness was examined on behalf of the Management as MW.1. WW.1 is a workman, who in his evidence deposed about joining the service of the management in question on 01.04.1990 as a Gangman on a monthly salary of Rs.350/-. He deposed about working continuously till 01.06.1996, on which date his services were terminated without any notice or payment of retrenchment compensation. He deposed that the management removed them from service when they demanded for enhancement of salary and regularization of their services through union. He further deposed that after their retrenchment, the management engaged fresh workmen. In spite of taking objection with regard to fresh appointment, there was no reply from the management. Hence, the I.D. came to be filed. In the cross examination, he denied the suggestion that he was never employed by the management and also about receiving salary from the management. He also denied a suggestion that the petitioner made a false claim in order to get employment unjustly.

WW.2 deposed that he was working as an employee in R & B Department and also as Secretary of Vizianagaram District A.P. Highways R & B Employees Union. According to him, the workmen were members of the union, of which he was the Vice President, and he used to work in Cheepurupalli Section of R & B Department as Gangman from 1990 to 1996. He deposed about sending representation to R & B authorities demanding payment of minimum wages and also maintenance of muster rolls in respect of workmen among several other demands. He further deposed that the management

maintained the records for some time and discontinued the same three months prior to his representation. He placed on record Exs.X1 and X2 which are the minutes relating to the resolutions passed by the Union agitating the rights of the petitioners. Ex.X3 is the representation sent by their Division President to Superintending Engineer, Vizakhapatnam. Ex.X4 is a remainder to Ex.X3. Ex.X5 is the reply to the correspondence from Executive Engineer. Ex.X6 is the representation made to the authorities thereafter. In the cross examination WW.2 admits that the workmen did not work in R & B while he was in service. However, he denied the suggestion that the management never employed the petitioners and that his evidence is false.

WW.3, was also working as a Gangman in Cheepurupalli Section. According to him, the petitioners used to work along with him for a week or ten days in a month and that all through he was entrusted with duty of maintenance of Cheepurupalli-Laveru road. According to him, the workmen were residing at a distance of 12 kms. from the work spot. To a suggestion that the workmen were never engaged by the department he stated that he is not aware about the same.

The management examined their Assistant Executive Engineer as MW.1. He deposed that he was working as Assistant Executive Engineer in R & B Cheepurupalli since 03.02.1999 and as per his records the petitioners never worked as NMR's Road Gang Mazdoor in their section. He stated that they never employed and the Government did not sanction any such engagements. During cross examination, he admits that he verified the charge register for the period 01.04.1990 to 01.06.1996 which contains the particulars of wages of permanent employees. He submits that during his service in the department no muster roll and seniority list was maintained as they were not employed NMR workers. He also stated that after joining service there were no appointment of Gangman. He showed ignorance about the G.O. issued by the Government directing the authorities to absorb the NMRs, who have put in five years of service as work charged employees. However, he admits that the contractors were engaged for patch works and inturn they engaged contract labourers. He admits that he cannot tell the names of contractors engaged during that period. He further admits that the department does not have any record to confirm or deny the suggestion that their section has engaged NMR workers during the

period 01.04.1990 to 01.06.1996. He also denies about NMR workers being regularized in other sections by way of absorption.

From the evidence available on record, the petitioners claim to have worked with the department in Cheepurupalli Section of R & B as Gangmen from 1990 to 1996.

It is urged by the counsel for the petitioner that since the plea of respondent Nos.2 to 4 before the Industrial Tribunal being the petitioners might have been engaged by a Contractor, under Contract Labour (Regulation & Abolition) Act has to be followed before terminating their services. But a perusal of the evidence of WWs.1 to 3 and the documents Exs.X1 to X7 filed by the workmen does not anywhere suggest employment of these petitioners through a contractor. If really, the petitioners were engaged through a contractor, the petitioners would have definitely made the said contractor as a party to the proceedings. In the absence of the same, the argument that the petitioners were engaged through a contractor for getting the work done, cannot be accepted. Infact, the averments in the affidavit that the petitioners might have been engaged by a contractor cannot also be accepted for the reason that neither the evidence of WWs.1 to 3 nor the evidence of MW.1 refer to engagement of a contractor for getting the work done. Therefore, the argument of the learned counsel for the petitioners that the provisions of the Contract Labour (Regulation and Abolition) Act was not followed, cannot be accepted. Hence, the judgments of the Apex Court relied upon by the counsel for the petitioners namely Secretary, Haryana State Electricity Board v. Suresh and others etc. (AIR 1999 SC 1160) and Ramsingh and others v. Union of India (AIR 2004 SC 969) may not be of any help to him.

Coming to the issue as to whether the petitioners worked with the respondents and whether there exists a relationship of employer and employee, the entire case rests on the oral and documentary evidence adduced in the form of WWs.1 to 3 and Exs.X1 to X7 on behalf of workmen and the evidence of MW.1, on behalf of the management. The oral evidence of WWs.1 to 3 and MW.1 run contra with each other. While WW.1 in his evidence speaks about his employment as Gang Mazdoor on a monthly salary of Rs.350/- by the

management on 01.04. 1990 and his retrenchment without any notice, the evidence of MW.1 runs contrary to the same. As per the evidence of MW.1, none of the petitioners were engaged to execute the work nor was there any practice of engaging persons as NMRs during his tenure in service. WW.2 whose evidence has been pressed into service to corroborate the evidence of WW.1, admits in the cross examination that while he was in service, the workmen did not work in R & B. His admission in the cross examination completely runs contra to his evidence in chief, wherein he deposed about the petitioners working in Cheepurupalli Section as Gagman from the year 1990 to 1996, and they being members of his union while he was working as a President of the State Body. Even the evidence of WW.3 does not inspire much confidence to show that the petitioners worked in the department, in view of his admissions in the cross-examination, wherein he expresses his ignorance about the employment of the petitioners in the department. As against the oral evidence, there is documentary evidence in the form of Exs.X1 to X7. The Memo dated 31.03.1992 issued by Engineer-in-chief which was marked as Ex.W2 refers to directions to the Superintending Engineers to take prompt action to convert eligible NMR workers without giving any room for association to bring to the notice of the Engineer-in-Chief in such cases. The Superintending Engineers were requested to report as to whether there are any such cases in which orders were not issued by them and if there is any difficulty, cases may be explained for taking further action. Similarly, the Memo No.23.05.1994 refers to process of absorption/regularization of NMR's, daily wage employees etc. in pursuance of a scheme and sending proposals for obtaining clearance from Government Finance and Planning Department for regularization of the said members. The said memo along with G.O.Ms.No.212 was marked as Ex.W3. Ex.W4 is a memo dated 02.01.1996 containing the list of the persons who served the department as NMR workers and

their services were directed to be continued as NMRs till regularized as work charged establishment. A reading of Ex.W4, show that pursuant to an order passed in O.A.No.4929 of 1994, and 7148 of 1993, the service of the persons who were working as Work Inspectors and Driver on NMR basis were directed to be continued as NMRs till their services are regularized. The other documents which were marked through Union namely Exs.X1 to X7 are only minutes relating to the resolutions passed by the Union and copies of the

representations made by the Union. Therefore, none of the documents which are placed on record establish the existence of master and servant relationship between the petitioners and the fourth respondent. The self serving evidence of WW.1, and the affidavit filed in support of the same will not be sufficient to establish the relationship as the burden of proof lies on the workman to prove his case by adducing cogent evidence.

In ***R.M.Yellatti v. Asstt. Executive Engineer*** the Apex Court held as under:

“it is clear that provisions of the Evidence Act in terms do not apply to the proceedings under Section 10 of the Industrial Disputes Act. However, applying general principles, we find that this Court has repeatedly taken the view that the burden of proof is on the claimant to show that he had worked for 240 days in a given year. This burden is discharged only upon the workman stepping in the witness box. This burden is discharged upon the

workman adducing cogent evidence, both oral and documents. In case of termination of services of daily-waged earners, there will be no letter of appointment or termination. There will also be no receipt or proof of payment. Thus in most cases, the workman can only call upon the employer to produce before the Court the nominal muster roll for the given period, the letter of appointment or termination, if any, the wage register, the attendance register, etc. Drawing of adverse inference ultimately would depend thereafter on the facts of each case. It is clear that mere affidavits or self-serving statements made by the claimant workman will not suffice in the matter of discharge of the burden placed by law on the workman to prove that he had worked for 240 days in a given year. Mere non-production of muster rolls per se without any of suppression by the claimant workman will not be the ground for the Tribunal to draw an adverse inference against the management. The Apex Court lay down the basic principle, namely, the High Court under Article 226 of the Constitution will not interfere with the concurrent findings of fact recorded by the Labour Court unless they are perverse. This exercise will depend upon the facts of each case.”

In view of the above, the argument of the counsel for the petitioners that an adverse inference has to be drawn due to failure of the management to produce the NMR register cannot be countenanced as the burden of proof lies on the workman to adduce cogent evidence, which is lacking in the present

case.

Even assuming for the sake of argument that the petitioners were engaged by the fourth respondent, still they are not entitled to be reinstated into service, for the reason that their induction was without following rules of appointment as per the dictum laid down in ***Secretary, State of Karnataka and others v. Umadevi and others*** wherein a Constitution Bench of the Apex Court held as under:

“43. Therefore, consistent with the scheme for public employment, this Court while laying down the law, has necessarily to hold that unless the appointment is in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointee. If it is a contractual appointment, the appointment comes to an end at the end of the contract, if it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued. Similarly, a temporary employee could not claim to be made permanent on the expiry of his term of appointment. It has also to be clarified that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. It is not open to the court to prevent regular recruitment at the instance of temporary employees whose period of employment has come to an end or of ad hoc employees who by the very nature of their appointment, do not acquire any right. High Courts acting under [Article 226](#) of the Constitution of India, should not ordinarily issue directions for absorption, regularization, or permanent continuance unless the recruitment itself was made regularly and in terms of the constitutional scheme. Merely because, an employee had continued under cover of an order of Court, which we have described as 'litigious employment' in the earlier part of the judgment, he would not be entitled to any right to be absorbed or made permanent in the service. In fact, in such cases, the High Court may not be justified in issuing interim directions, since, after all, if ultimately the employee approaching it is found entitled to relief, it may be possible for it to mould the relief in such a manner that ultimately no prejudice will be caused to him, whereas an interim direction to continue his employment would hold up the regular procedure for selection or impose on the State the burden of paying an employee who is really not required. The courts must be careful in ensuring that they do not interfere unduly with the economic arrangement of its affairs by the State or its instrumentalities or lend themselves the instruments to facilitate the bypassing of the

constitutional and statutory mandates.

45. While directing that appointments, temporary or casual, be regularized or made permanent, courts are swayed by the fact that the concerned person has worked for some time and in some cases for a considerable length of time. It is not as if the person who accepts an engagement either temporary or casual in nature, is not aware of the nature of his employment. He accepts the employment with eyes open. It may be true that he is not in a position to bargain -- not at arms length -- since he might have been searching for some employment so as to eke out his livelihood and accepts whatever he gets. But on that ground alone, it would not be appropriate to jettison the constitutional scheme of appointment and to take the view that a person who has temporarily or casually got employed should be directed to be continued permanently. By doing so, it will be creating another mode of public appointment which is not permissible. If the court were to void a contractual employment of this nature on the ground that the parties were not having equal bargaining power, that too would not enable the court to grant any relief to that employee. A total embargo on such casual or temporary employment is not possible, given the exigencies of administration and if imposed, would only mean that some people who at least get employment temporarily, contractually or casually, would not be getting even that employment when securing of such employment brings at least some succor to them. After all, innumerable citizens of our vast country are in search of employment and one is not compelled to accept a casual or temporary employment if one is not inclined to go in for such an employment. It is in that context that one has to proceed on the basis that the employment was accepted fully knowing the nature of it and the consequences flowing from it. In other words, even while accepting the employment, the person concerned knows the nature of his employment. It is not an appointment to a post in the real sense of the term. The claim acquired by him in the post in which he is temporarily employed or the interest in that post cannot be considered to be of such a magnitude as to enable the giving up of the procedure established, for making regular appointments to available posts in the services of the State. The argument that since one has been working for some time in the post, it will not be just to discontinue him, even though he was aware of the nature of the employment when he first took it up, is not one that would enable the jettisoning of the procedure established by law for public employment and would have to fail when tested on the touchstone of constitutionality and equality of opportunity enshrined in [Article 14](#) of the Constitution of India.

47. When a person enters a temporary employment or gets engagement as a contractual or casual worker and the engagement is not based on a proper selection as recognized by the relevant rules or procedure, he is aware of the consequences of the appointment being

temporary, casual or contractual in nature. Such a person cannot invoke the theory of legitimate expectation for being confirmed in the post when an appointment to the post could be made only by following a proper procedure for selection and in concerned cases, in consultation with the

Public Service Commission. Therefore, the theory of legitimate expectation cannot be successfully advanced by temporary, contractual or casual employees. It cannot also be held that the State has held out any promise while engaging these persons either to continue them where they are or to make them permanent. The State cannot constitutionally make such a promise. It is also obvious that the theory cannot be invoked to seek a positive relief of being made permanent in the post.”

In view of the judgment referred to above and as the material on record does not establish the relationship of employer and employee between the petitioner and the fourth respondent, this Court is of the view that there are no merits in the writ petition and the same is liable to be dismissed.

Accordingly, the Writ Petition is dismissed. No order as to costs.

Miscellaneous Petitions, if any, pending in this writ petition, shall stand closed.

JUSTICE C. PRAVEEN KUMAR

29.10.2015

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