SUPREME COURT OF INDIA

Executive Engineer ZP Engineering Division

Vs.

Digambara Rao.

C.A.Nos.1164-66 of 2002

(N. Santosh Hegde and S.B.Sinha JJ.)

27.09.2004

JUDGMENT

S.B. Sinha, J.

1. These appeals arise out of the judgments and orders dated 9.11.2000 and 20.11.2000 passed by the High Court of Karnataka at Bangalore in Writ Appeal Nos.2756-57 of 2000 and 2759 of 2000 respectively whereby and where under the appeals preferred by the Appellants herein against the orders dated 14.2.2000 and 15.2.2000 passed by the learned Single Judge of the said court in several writ petitions were dismissed.

FACTS:

2. The Respondents were originally employed on daily wages in relation to a Scheme known as 'Kriya Scheme' aimed at providing drinking water and construction of roads for the benefit of the rural poor in the District of Gulbarga in the State of Karnataka. The employment allegedly commenced in the year 1993. The services of the Respondents were terminated in 1996. They filed writ petitions before the Karnataka High Court contending, inter alia, that as they having worked for a number of years, became entitled for regularization. It was furthermore contended that they had still been in service. The prayers made in the said writ petitions which are relevant for our purpose are as under:

> "a) Issue a writ of mandamus order or direction directing Respondents No.2 & 3 to regularization (sic for regularize) the service of the petitioner no.1 to the post of Assistant Engineer in the pay scale of Rs.2050/- with allowance, the petitioners no.2 and 3 as Junior Engineers in the pay scale of Rs.1520/- and allowance.
>
> b) Issue a writ in the nature of mandamus order or direction not to discontinue the service of the petitioners and to direct payment of arrears of salary from September 1996 onwards and also to pay difference or arrears of salary to the petitioners from the date of completion of 240 days to grant all service benefits as are applicable to regular employees, like seniority, promotion, increments, allowance etc."

3. The said writ petitions came up for consideration before a learned Single Judge of the Karnataka High Court.

4. We may further notice that along with the said writ petitions, the Respondents herein annexed two documents wherefrom it appeared that they had allegedly continued to work beyond 19.10.1996, the date of termination of their services. Upon an inquiry made in this behalf at the behest of the High Court, it was contended by the Appellants by filing an additional affidavit that no payment for daily wages had been made to the Respondents after the order of their discharge and such certificates had been procured from a Junior Engineer against whom a departmental inquiry had been initiated. It was further pointed out that author of one of the documents had himself disowned the said letter in terms of a communication annexed to the said additional affidavit.

In the said writ petitions, two questions fell for consideration:

> "1) Whether the petitioners continued in employment of the Respondents beyond the 19th of October, 1996; and 2) whether they are on the basis of the service rendered as daily wager entitled to an order of regularization?"

5. By reason of a judgment and order dated 1.12.1997, the learned Single Judge held that having regard to the fact that their services had been discontinued, the question of a direction being issued for continuance of their services does not arise having regard to the fact that the life of the Scheme had come to an end. As regard the claim for regularization even on the basis of the services rendered by the Respondents upto October 1996, it was held that they were not entitled thereto in law.

6. The writ petitions were, thus, dismissed. An appeal preferred thereagainst was also dismissed by the Division Bench of the said High Court by an order dated 19.3.1998. Despite the same, the Respondents herein filed applications before the Labour Court at Gulbarga which were marked as Reference Nos. 495 of 1998 and 498 of 1998. In the said Reference Applications the Respondents did not disclose that the High Court had dismissed their earlier writ petitions and furthermore the appeal preferred thereagainst had also been dismissed. Written statements in the said proceedings were filed by the Appellants, wherein, inter alia, it was contended that the employment of the Respondents was for daily wages and for a specific scheme. A further contention was raised therein that having regard to the decision of the High Court in the earlier writ petitions, Respondents were not entitled to any relief.

7. By an order dated 1.10.1999, the Labour Court, however, passed two awards setting the orders of termination, inter alia, on the ground that the Respondents having worked for more than 240 days, the provisions of Section 25F of the Industrial Disputes Act were required to be complied with. They were in terms of the said awards directed to be reinstated with 50% of the back-wages. The legality and/or validity of the said awards came to be questioned by the Appellants herein by filing two writ petitions before the Karnataka High Court which were marked as Writ Petitions Nos.3808 of 2000 and 3697-98 of 2000 which were dismissed

by an order dated 14.2.2000 and 15.2.2000. The appeals there against filed by the Appellants herein were also dismissed by orders dated 9.11.2000 and 20.11.2000. Hence these appeals.

SUBMISSIONS:

8. Mr. Mallikarajun Reddy; learned counsel appearing on behalf of the Appellants, would, inter alia, submit that the Reference Applications were barred under the principle of res judicata. The learned counsel would contend that the principle of res judicata would apply to a proceeding under the Industrial Disputes Act and in that view of the matter, the High Court committed a manifest error in not interfering with the awards passed by the Labour Court. Reliance in this behalf has been placed on Pondicherry Khadi & Village Industries Board vs. P. Kulothangan and Another.

9. Mr. K. Maruthi Rao, learned counsel appearing on behalf of the Respondents, on the other hand, would submit that the principle of res judicata has no application in the instant case inasmuch as in the writ petitions the prayer made by the Respondents herein was for regularization of their services, whereas before the Labour Court the legality or otherwise of the orders of termination came to be questioned. In any event, Mr. Maruthi Rao would contend that having regard to the fact that the Respondents herein are qualified Junior Engineers and have already crossed the age of forty, this Court may not, in its discretion, interfere with the impugned judgments.

ANALYSIS:

10. The said writ petitions were filed by the Respondents on the following premise: (1) The Respondents had been appointed in the year 1993; (2) When the writ petitions were filed they were still in service; (3) They were appointed as Daily Wages Graduate Engineers; (4) They were not being paid the regular scale of pay, although they had been doing the same work as was being done by the regular employees; (5) Having regard to the fact that they had rendered about four years of continuous service and being under threat of termination of service, they were entitled to be regularized in their service as also other benefits attached thereto, having completed 240 days of continuous service in a year.

11. We have noticed hereinbefore that the factual premise that the Respondents had still been in service at the time of filing of the writ petitions had been found to be incorrect, as in fact their services had been terminated on or about 19.10.1996. It was further held that as they were appointed against a Scheme, the question of their continuance in service beyond the life thereof does not arise. The High Court was furthermore of the opinion that their services cannot be directed to be regularized.

12. We have noticed hereinbefore that although the principal plea of the Respondents in the said writ petition was for regularization of their services but they had also prayed for issuance of a writ of mandamus or for a direction not to discontinue their services as also payment of arrears of salary from September 1996 onwards, difference or arrears of salary

from the date of completion of 240 days and to grant all service benefits as applicable to regular employees like seniority, promotion, increments, allowance etc.

13. The said prayer in the said writ applications had a direct nexus with the orders of termination of their services. A finding of fact having been arrived at that their services had been terminated and they were not entitled to continue in service, in our opinion, the legality or otherwise of the said purported orders of termination could not have been the subject-matter of proceedings under the Industrial Disputes Act; for the reason that if the Respondents herein were not entitled to continue in their services by reason of the judgment of the High Court, the question of their reinstatement with back-wages would not arise.

14. The Respondents herein approached the High Court with full knowledge that their services had been terminated. Their attempt to show that they were still in service had been disbelieved and it was found as of fact that their services had been terminated on 19.10.1996. The Respondents, therefore, while filing the writ application were bound to lay their whole claim having regard to the provisions contained in Order II Rule 2 of the Code of Civil Procedure or the principles analogous thereto. The very basis upon which the writ petitions were based was found to be incorrect. It was, thus, obligatory on the part of the Respondents herein to question their orders of termination upon placing correct facts before the High Court. They did not choose to do so. They did not pray for and obtain any leave of the court to raise the contention about the legality or otherwise of the orders of termination before an appropriate forum. Furthermore, their plea to the effect that they were entitled to continue in service was specifically rejected. In that view of the matter, the proceedings initiated before the Labour Court questioning the orders of termination passed against them by the Appellants praying for their reinstatement with full back-wages, in our opinion, was wholly misconceived. Such a plea was barred under the principle of Res Judicata. It is now well-settled that the general principle of Rs. Judicata applies to an industrial adjudication.

In P. Kulothangan (supra) held:

> "The principle of res judicata operates on the court. It is the courts which are prohibited from trying the issue which was directly and substantially in issue in the earlier proceedings between the same parties, provided the court trying the subsequent proceeding is satisfied that the earlier court was competent to dispose of the earlier proceedings and that the matter had been heard and finally decided by such court. Here the parties to the writ petition filed by the respondent in the Madras High Court and the industrial dispute were the same. The cause of action in both was the refusal of the appellant to allow the respondent to rejoin service. The Madras High Court was competent to decide the issue which it did with a reasoned order on merits and after a contested hearing. This was not a case where the earlier proceedings had been disposed of on any technical ground as was the case in *Workmen vs. Board of Trustees of the Cochin Port Trust*[1] *and Pujari Bai vs. Madam Gopal*[2]. The "lesser relief" of reinstatement which was the subject-matter of the industrial dispute had already been claimed by the respondent in the writ petition. This was refused by the High Court. The correctness of the decision in the writ proceedings has not been

challenged by the respondent. The decision was, therefore, final. Having got an adverse order in the writ petition, it was not open to the respondent to reagitate the issue before the Labour Court and the Labour Court was incompetent to entertain the dispute raised by the respondent and redecide the matter in the face of the earlier decision of the High Court in the writ proceedings."

15. It is not doubt true, as has been contended by Mr. Maruthi Rao, that the burden of proof that the Respondents were employed against a particular Scheme was on the Appellants but such a burden stood discharged and in any event the said question was no longer alive having regard to the decision of the Karnataka High Court in the earlier writ petitions.

16. The plea raised before us by the Respondents to the effect that their termination of employment fell within sub-clause (bb) of clause (oo) of the Industrial Disputes Act, apart from having not been raised before the Labour Court and the High Court, in our opinion, is not available to them having regard to the decision of the High Court in the writ petitions filed by the Respondents.

17. The decision of a Division Bench of this Court in S.M. Nilajkar and Others vs. Telecom District Manager, Karnataka, upon which reliance was placed by Mr. Maruthi Rao, therefore, cannot be said to have any application whatsoever in the instant case.

18. It may not be out of place to mention that completion of 240 days of continuous service in a year may not by itself be a ground for directing an order or regularization. It is also not the case of the Respondents that they were appointed in accordance with the extant rules. No direction for regularization of their services was, therefore, could be issued. [See *A. Umarani vs. Registrar; Cooperative Societies and Ors. and Pankaj Gupta & Ors. etc. vs. State of Jammu & Kashmir & Ors.*[3] Submission of Mr. Maruthi Rao to the effect that keeping in view the fact that the Respondents are diploma-holders and they have crossed the date of 40 by now, this Court should not interfere with the impugned judgment is stated to be rejected.

19. In A. Umarani (supra), this Court rejected the similar contention upon noticing the following judgments:

"In a case of this nature this court should not even exercise its jurisdiction under Article 142 of the Constitution of India on misplaced sympathy.

In *Teri Oat Estates (P) Ltd. vs. U.T. Chandigarh and Others*[4], it is stated:

"We have no doubt in our mind that sympathy or sentiment by itself cannot be a ground for passing an order in relation whereto the appellants miserably fail to establish a legal right. It is further trite that despite an extra-ordinary constitutional jurisdiction contained in Article 142 of the Constitution of India, this Court ordinarily would not pass an order, which would be in contravention of a statutory provision.

As early as in 1911, Farewell L.J in *Latham vs. Richard Johnson & Nephew Ltd.*[5] observed:

"We must be careful not to allow our sympathy with the infant plaintiff to affect our judgment. Sentiment is a dangerous Will O' the Wisp to take as a guide in the search for legal principles."

Yet again recently in Ramakrishna Kamat & Ors. vs. State of Karnataka & Ors., this Court rejected a similar plea for regularization of services stating:

"... We repeatedly asked the learned counsel for the appellants on what basis or foundation in law the appellants made their claim for regularization and under what rules their recruitment was made so as to govern their service conditions. They were not in a position to answer except saying that the appellants have been working for quite some time in various schools started pursuant to resolutions passed by zilla parishads in view of the government orders and that their cases need to be considered sympathetically. It is clear from the order of the learned single judge and looking to the very directions given a very sympathetic view was taken. We do not find it either just or proper to show any further sympathy in the given facts and circumstances of the case. While being sympathetic to the persons who come before the court the courts cannot at the same time be unsympathetic to the large number of eligible persons waiting for a long time in a long queue seeking employment..."

20. For the foregoing reason, we are of the opinion that the Labour Court and the High Court committed a manifest error in passing the impugned judgments and awards and as such they are liable to be set aside.

21. These appeals are allowed and the impugned judgments and award are set aside. No costs.

[1]*(1978) 3 SCC 119*
[2]*(1989) 3 SCC 433*
[3]*2004 (7) SCALE 682*
[4]*(2004) 2 SCC 130*
[5]*[1911-13 AER 117]*