

Refining & S
jud

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
AHMEDABAD BENCH

(8)

O.A. No. 459/87

198

~~Case No.~~

DATE OF DECISION 19-7-91

Shri Rajendrasinh J. Wala Petitioner

Mr. P.H. Pathak Advocate for the Petitioner(s)

Versus

Union Of India & Ors. Respondent

Mr. M.R. Raval proxy counsel for Advocate for the Respondent(s)
Mr. P.M. Raval.

CORAM :

The Hon'ble Mr. M.M. Singh : Administrative Member

The Hon'ble Mr. R.C. Bhatt : Judicial Member

1. Whether Reporters of local papers may be allowed to see the Judgement? *Yes*
2. To be referred to the Reporter or not? *Not Yes*
3. Whether their Lordships wish to see the fair copy of the Judgement? *Yes*
4. Whether it needs to be circulated to other Benches of the Tribunal. *No*

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Shri Rajendrasinh J. Wala,
Opp. Block A/9,
Ravidan Badhavi's House,
JAMNAGAR - 361 002.
Advocate : Shri P.H. Pathak.)

: APPLICANT

VS

1. Union of India, Through
The Collector,
Customs & Central Excise Dept.
RAJKOT.

2. Asstt. Collector of Custom,
Vijay Bhavan,
JAMNAGAR.

: RESPONDENTS

(Advocate : Shri M.R. Raval for
Shri P.M. Raval)

J U D G E M E N T

O.A. No. 459 of 87

Date: 19-7-91

Per : Hon'ble Mr. R.C. Bhatt

: Judicial Member

This application under Section 19 of the Administrative Tribunal Act, 1985, is filed by the applicant who was working as Khalashi- daily wager under respondent No. 2 Asstt. Collector of Custom, Jamnagar, since 1983, challenging the order of termination of his service dated 13th April, 1987, passed by Superintendent Custom, Jamnagar as illegal, invalid, and inoperative. It is alleged by the applicant that he was called for interview by respondent No. 2 for the post of Sea- man Grade II, vide letter dated 26th October, 1981, produced at annexure A, that he was selected and was posted as Sea -man grade - **II**, vide order No. II/3-21/82 in the then pay scale 260- 400 from 15th May, 1982. It is alleged by the applicant that inspite of his appointment, the respondents have found out a device by which the applicant was given orders of appointment for 40 days duration which amounts to change in condition of services, and on every 40th day a break for a day or two was given to him. It is alleged by the applicant

that this action of the respondents giving artificial break was totally arbitrary and the respondents' action to treat the applicant as daily wager at Rs. 8/- per day was also illegal, as his scale of pay was Rs. 260-400/-. It is alleged that there cannot be less salary for the same post and the action of the respondents in giving artificial break to the applicant and also not giving scale of pay was discriminatory and violative of Article 14 & 16 of the Constitution of India. It is alleged that artificial break was given with a view to deprive him of the benefit available to the regular employee. It is alleged by the applicant that he ~~xxx~~ has put continuous service of about 4½ years without actual break in service. According to the applicant, Article 14 & 16 of the Constitution of India has given right to equality and equal protection of law and similarly situated employees cannot be discriminated in such fashion to exploit them, by giving a label of daily rated, for years. It is alleged that Article 39 (C) Cast duty on the state to see that there should not be "hire & fire" or "pick and choose" policy for similarly situated employees. It is alleged that though the applicant was performing the duties as Sea-man, grade- II, he was deprived of the time scale of pay. It is alleged that the respondents have also violated the provisions of the Industrial Disputes Act, that the respondents is an "Industry" within Section 2 (J) of the Industrial Disputes Act, 1947, and the applicant is a ~~xx~~ "Workman" under Section 2 (S) of the Industrial Disputes Act, and the services of the applicant cannot be terminated without complying with the provisions of Section 25 -F of the Industrial Disputes Act, 1947.

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2. The applicant has prayed that the impugned order of termination annexed at annexure A-1 dated 13th April, 1987

be held, illegal, invalid and the same be quashed, as the ~~xx~~ said order was made without following the proper and correct procedure by the respondents. The applicant has also prayed that the action of the respondents in giving artificial break on 40th day be held illegal, invalid and inoperative of law and violative of Article 14 & 16 of the Constitution of India, and the respondents be directed to re-instate the applicant with continuity of services and they be directed to grant all benefits available to the regular employee.

3. The respondents have filed reply contending that the application is not maintainable, that the applicant is estopped from challenging the alleged breaks in his services, that the application is barred by law of limitation. The respondents have contended that the proposal from the Inspector Custom (MS) Jamnagar, vide his letter dated 14th May, 1982, was received and due to shortage of sea-man in C.A.C. Al-Wahid, the applicant alongwith two others were appointed as casual workers for 40 days from 15th May, 1982 to 23rd June, 1982 Rs. 8/- per day on Departmental Launch, Al-wahid, and it was purely on temporary basis, that as per Board's letter dated 24th September, 1980, the applicant's name alongwith other was sent for appointment as marine sea-man grade of Rs. 200-250/- and the applicant and others were appointed purely on temporary basis, that the applicant had joined duty on 20th December, '82, that the said appointment had not been confirmed by the higher authority and they had directed to cancel the appointment and to regularise the appointment for less than 45 days, vide the letter dated 12th May, 1983, that immediately thereafter under provisions of sub-rule (1) of Rule 5 of the CCS (Temporary Service) Rules, 1965, the applicant was served with a notice dated 25th May, 1983, and his services were terminated. It is contended that thereafter the applicant has been appointed as casual

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worker for 40 days from 1st July, 1983 to 9th August, 1983 vide the letter dated 11th July, 1983 with the condition that his services are purely on temporary basis and were liable to be terminated at any time without assigning any reason and since the applicant's appointment was not according to the Employment Exchange Regulations, he has been continued as casual worker on temporary appointment for 40 days each time. The respondents denied that Artificial Break had been given to the applicant as alleged. It is contended that every time the services of the applicant were terminated and fresh appointment was given on each spell for a period of 40 days.

4. The respondents have further contended that the office of the Assistant Collector had made suggestion to the higher authorities for regularisation of all the casual workers in Group "D" post including the applicant, that the applicant was called for interview on 17th June, 1986, but he was not selected in the interview by the committee, and therefore he was liable to be terminated. But in spite of that situation, the applicant has been continued on 40 days basis as casual workers upto 12th April, 1987. It is contended that due to economic measure the applicant's services were not required on the Board of Custome Launch, Jamnagar, and his services were terminated. It is contended that by the order dated 9th April, 1987, the services of the applicant have been terminated with immediate effect and has been relieved on 12th April, 1987. The respondents have denied that the impugned action is violative of Article 14 & 16 of the Constitution of India, as alleged, and denied that the respondents is an "Industry" within the meaning of Industrial Disputes Act, and denied that the applicant was a "Workman". It is contended that the applicant is governed by the CCS (Temporary Service) Rules, that the Industrial Disputes Act has no application and the application be dismissed.

5. The applicant has filed rejoinder controverting the

contentions taken by the respondents in the reply. The applicant has produced at Annexure A-3 the order of Assistant Collector, Customs, Jamnagar, dated 7th December, 1982, which shows that the applicant and four others were appointed provisionally to officiate to the post, scale of pay and place of posting shown against their names, on temporary capacity, and their services were liable to be terminated with one months' notice on either side under C.C.S., Temporary Rules, 1965. The applicant has denied that he was not selected in the interview held at Rajkot.

6. The applicant has waived oral arguments and he preferred to give written submissions. Respondents have neither made oral submissions nor availed of opportunity by giving written submissions. The first contention taken by the respondents in the reply is that the application is not maintainable because the applicant has not exhausted all other remedies available under the Administrative Tribunals Act, 1985, and therefore, the application is not maintainable in view of the provisions of Section 20 of the Administrative Tribunals Act. The learned advocate for the respondents has not pointed out which remedy was available to the applicant under the relevant service Rule for redressal of his grievance. The respondents have not satisfied us on the point that the application is not maintainable. The applicant has in his application challenged the impugned order of termination, annexure A-1, being violative of Article 14 and 16 of the Constitution of India and Article 39 and 41 also of the Constitution of India, and also on the ground that it is violative of the provisions of Industrial Disputes Act, 1947. The respondents in their reply have contended that the respondents is not an "Industry" and the applicant is not a "Workman" under the Industrial Disputes Act, and that the provisions of the

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Industrial Disputes Act do not apply in this case. The larger Bench of the Central Administrative Tribunal has recently held in A. Padmavally & Another Vs. C.P.W.D. III(1990) C.S.J.

(C.A.T.) 384 (FB) that where the competent authority ignores statutory provisions or Acts in violation of Article 14 of the Constitution, where either due to admissions made or from facts apparent on the face of the record, it is clear that there is statutory violation, it is open to the Tribunal exercising power under Article 226 to set aside the illegal order of termination and to direct reinstatement of the employee leaving it open to the employer to act in accordance with the statutory provisions, and to this extent as per this decision, alternative remedy cannot be pleaded as bar to the exercise of jurisdiction under Article 226. These guidelines in para 38 of the decision show that though the applicant seeking under provision of the Industrial Disputes Act, must originally exhaust the remedy available under that Act, an application can be maintainable before us if his case is covered as per the guidelines given in para 38 of the decision. Therefore we shall consider whether the respondents have acted in violation of Article 14 of the Constitution, whether from admission made or from the fact apparent on the face of the record, it is clear that there is statutory violation.

7. The respondents have contended in para 4 of the reply that the applicant alongwith two others was appointed as casual worker for 40 days from 15th May, 1982 to 23rd June, 1982 Rs. 8/-per day on Departmental Launch Al-wahid. This, averment made in the application by the applicant that he was appointed on 15th May, 1982 by the respondents, is admitted by the respondents. Moreover, the order dated 7th December, 1982 produced with rejoinder by the applicant that the Asstt. Collector, Custom Jamnagar, had appointed him and four others to officiate to the post, scale of pay and

place of posting shown against their names on temporary capacity is also not disputed. This order shows that the applicant along with four others were appointed as Sea-man, Grade II, in the scale of Rs. 200-250/- It further shows that the services of these persons were liable to be terminated with one months notice on either side under CCS (Temporary Service) Rules, 1965. The respondents terminated the services of the applicant under the provision of sub rule 1 of Rule 5 of the CCS (Temporary Service) Rules, 1965 by notice dated 25th May, 1983 and the reason given in para 4 of the reply filed by respondents is that the appointment had not been confirmed by the ~~in~~ higher authority and the higher authority had directed to cancel the appointment and to regularise the appointments for less than 45 days, vide letter dated 12th May, 1983. The respondents have not produced this letter dated 12th May, '83 before us.

However according to the respondents, the applicant had been appointed then as casual worker for 40 days period each time. The applicant has produced at Annexure A-2 36 such orders of respondents appointing him for 40 days after giving break each time, which, according to respondents was actual break. Many orders were issued at the time in the middle of the month after the applicant had actually stated working as found from the statement A-2. The contentions of the respondents is that each time, the services of the applicant were terminated and fresh appointment was given, and, therefore, it could not be said that the service of the applicant was continuous service. These 36 orders for 49 days duration each time from 15th May, 1982 lasted upto 12th April, 1987 and on 13th April, 1987, Custom Superintendents, Jamnagar, informed the applicant by order annexed at annexure A-1, that as per ACS order dated 9th April, 1987, his services as casual worker were no more required on board Custom Launch, MS Jamnagar. The nature of duty performed by the applicant was on the same post where he was paid Time Scale earlier and for the same nature of work. He was paid Rs. 8/- per day, initially and then it was increased upto Rs. 16.60 per day gradually.

which, according to the applicant is totally discriminatory and arbitrary. The applicant has given written submissions and has waived oral hearing. It is mentioned in these submissions that the breaks given by the respondents were artificial breaks and were not legal and valid and were violative of Article 14 of the Constitution of India. In support of this submission, decision in Ghanshyam M.Pandya vs. State of Gujarat & Others reported in 1985 GJH (U.J.) page 51, is relied by the applicant. The material observation is as under:

"It is not shown as to what authority or right the respondents have to give appointment orders in the manner they have done the fact that 42 appointment orders were passed during the period of little more than four years indicates that there was vacancy of the post of peon and the petitioner was appointed on such vacancy. It would further appear that respondents were giving the petitioner appointment for only 29 days thinking that he would not acquire any right over the post to which he was appointed. The action of the respondents in giving appointment order in the manner they have done appears to be arbitrary".

Moreover, the orders produced in the said matter before the Gujarat High Court reveals that the orders of reappointing the petitioner in that case were issued on any day during the course of the month. The same is the case with the 36 appointment orders each for 40 days which were given by the respondents in nearly about five years and most of the appointment orders were given during the course of the period when the applicant was actually on work. This will clearly show that the respondents created artificial breaks even though they needed the applicant for continuous work. By ~~that~~ this action, the respondents illegally deprived the applicant service benefits of continuous service and payment on pay scale. Such exploitation of labour has been disapproved by the Supreme Court and appropriate relief ordered. The illegality of such an arrangement is no more res ^{per} _{integra} ^{per} _{Hamid} ⁿ _L arrangement. The learned counsel brought to our notice the law on this subject laid down in several

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cases. Gujarat High Court in the decision of Ghanshyam M.Pandya (Supra) held that the action of termination of the petitioner's service by oral order was arbitrary and had no basis in law, that the petitioner being in continuous services from 1980 to 1984 had acquired the status of temporary government servant and the action of the respondents was clearly violative of Article 14 and 16 of the Constitution of India and the reinstatement was ordered, with continuity of the service. This decision helps the applicant because similar orders are made in this case also. There was no actual break. The initial appointment order produced dated 7th December, 1982 with rejoinder shows that the appointment was on temporary basis, which was liable to be terminated with one month's notice on either side under CCS (Temporary Service) Rules, 1965. In the reply in para 9, the respondents, have asserted that the applicant is governed by the said Rules. The respondents did not continue the scale of the applicant which was given to him at the initial appointment, but gave daily wages at lower rate and gave artificial breaks. The applicant in written submission has also relied on decision in (1) Dhirendra Chamoli & Another vs. State of U.P. 1986, Supreme Court Case (L & S) 187. Hon'ble Supreme Court allowed the writ petition and directed the respondents to pay the same salary as that of class IV employees and on the same conditions of service received by the class IV employees. The other decisions relied on by the applicant are on the same line as per ratio laid down in Dhirendra Chamoli's case (supra). They are (2) Ratnlal & Others vs. State of Haryana and others 1985 Supreme Court Cases (L & S) 938, (3) Bhagwan Dass and Others vs. State of Haryana and others AIR 1987 S.C. p. 2049, (4) H.D.Singh vs. Reserve Bank of India & Ors. 1985 Supreme Court Cases (L & S) 975, (5) Premchand & Ors. vs. State of [~]Himachal Pradesh & Ors. 1988 Lab. I.C. 1094, (6) Surinder Singh vs. Engineer -in Chief C.P.W.D., 1986 Suprme Court

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Case (L & S) 189, (7) Dr. (Mrs.) Premlata Choudhari vs. Employees State Insurance Corporation, 1987, 3 Administrative Tribunal Cases pg. 879, (8) Dr. Sangeeta Narang & Ors. vs. Delhi Administrative and Ors. A.T.R., 1988 C.A.T. pg. 556.

8. We, therefore, hold that in the instant case, having regard to the facts of the case and documents on record and the averments made by the respondents in the reply, the break given to the applicant at the interval of 40 days was artificial break which was illegal, invalid and violative of article 14 and 16 of the Constitution of India. Besides the instant case is of graver violation of the law. The applicant was not even given the notice as required to be given to a Temporary Government Servant under Section 5 of the Central Civil Service (Temporary Service) Rules, 1965, though, according to the initial appointment order, one month's notice was to be given on either side in case of termination of services and though the respondents have asserted in para 9 of the reply that the applicant is governed by the C.C.S. (Temporary Service) Rules, the impugned order annexed at annexure A-I, shows that the respondents had terminated the services of the applicant on 30th April, 1987 on the very same day.

9. So far the question of regularisation of the services of the applicant is concerned, it depends on several factors and, therefore, in absence of adequate material before us on that point, we hesitate to direct the respondents to consider the applicant as regular employee. As we have held that the action of the respondents was violative of Article 14 and 16 of the Constitution, this application is maintainable before this Tribunal, in view of the decision in A. Padmavally's case (Supra). In the result the

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following order is passed:-

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ORDER

1. It is declared that the impugned action of the respondents giving artificial break on 40th day to the applicant is illegal, invalid and inoperative in law and violative of Article 14 & 16 of the Constitution of India. The applicant shall be taken by the respondents as having been continuously in service on the basis that the orders of artificial break do not exist.
2. The impugned order annexed at Annexure A-I of termination of service of the applicant dated 13th April, 1987 is held illegal, invalid and inoperative and the same is quashed and set aside.
3. The respondents are directed to reinstate the applicant in their services in the pay scale of Rs.200-250 within thirty days of the issue of this order with continuity of services and backwages. The backwages be paid within four months from the date of reinstatement and the respondents to pay Rs.250/- as cost to the applicant within four months. Application is allowed to the above extent.

Resd

(R.C.Bhatt)
Judicial Member

H. H. Singh

(9/7/91)
(M.M. Singh)
Administrative Member