13

CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH: CUTTACK

Date of order: 23-10-2008

O.A. No. 606, 634 and 855 of 2005

Prasanta Kumar Naik and another... Applicants

versus

Union of India & Ors. ... Respondents

(FOR INSTRUCTIONS)

1. Whether it be referred to the reporters or not?

2. Whether it be circulated to all the Benches of the CAT or not?

(JUSTICE K. THANKAPPAN)
MEMBER (JUDICIAL)

(C.R.MOHAPATRA)
MEMBER (ADMN.)

14

CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH: CUTTACK

Date of order: 23rd October, 2008

PRESENT:
THE HON'BLE MR.JUSTICE K.THANKAPPAN,MEMBER(J)
A N D
THE HON'BLE MR.C.R.MOHAPATRA,MEMBER (A)

In the Matter of:

O.A. No.606 of 2005

P.K.Naik & Anrs. Vs UOI & Ors.

O.A.No.634 of 2005

Mukut Ekka & Ors vs. UOI & Ors.

O.A.No.855 of 2005

Biranchi Narayan Naik & Ors. Vs. UOI & Ors.

(For Full details, see the enclosed cause title)

For Applicant: : M/s.S.Patnaik,L.Mohanty,
M.Das,D.K.Mohanty, Counsel

For Respondents: Mr.U.B.Mohapatra, SSC.

O R D E R

MR. C.R.MOHAPATRA, MEMBER (A):-

Since these three cases involve common questions of fact and law, though the matter was heard one after the other, for the sake of convenience this common order is passed which would govern all these three cases.

2. While in Original Application No. 606 of 2005 there are 32 Applicants, in OA No. 634/2005 there are 10 Applicants and in OA No. 855 of 2005 there are 10 Applicants. The Applicants in OA No. 606 of 2005 worked during the period 1993 to 1998, in OA No. 634 of

15

2005 during 1994 to 1998 and in OA No. 855 of 2005 during 1996 to 2001. The Applicants earlier approached this Tribunal in OA Nos.61 to 76 of 2000. The said Original Application was disposed of by this Tribunal under Annexure-A/5 dated 7th March, 2002 of OA No. 606 of 2005 holding as under:

> "2. In all these cases, the Applicants have claimed to have been engaged on Casual basis in Central Excise Organization. Their claim is that despite their long continuance as Casual labourers, they have not yet been given the temporary status. Once temporary status is given, they can have a better claim to be regularized in Gr. 'D' posts. Having heard Advocate for the Applicants and Learned Senior Standing Counsel Mr.Bose for the Respondents, all the Original Applications are disposed of with a direction to the Respondents, to examine the case of each of the Applicants as to whether they are eligible to get the temporary status and, if so, to treat them as temporary status casual workers from the dates when they completed 240 days in a calendar year and maintain their seniority. Direction is hereby further given to the Respondents to test them suitably as and when required and absorb them in regular establishment in Gr. 'D' posts suitably. The exercise, at the first instance, to take them as temporary status casual worker/confer them temporary status should be completed within three months hence."

3. Annexure-A/6 dated 30.05.2002 is the order passed by the Respondents in compliance of the directions of this Tribunal referred to above. Relevant portion of the aforesaid order under Annexure-A/6 reads as under:

> "DISCUSSIONI AND FINDINGS
>
> I have carefully gone through the facts of the each individual case and also the reports furnished by the Committees headed by Sri B.Acharya & Sri M.C.Sahu7 both Deputy Commissioners of Central Excise & Customs, Bhubaneswar-I & II Commissionerates respectively.

Department of Personnel and Training, Government of India, New Delhi vide their Office Memorandum No. 51016/2/90-Estt. Dated 10.09.1993 had formulated and circulated a scheme called Casual labourers (grant of temporary status and regularization) scheme of Govt. of India which came into force with effect from 01.09.1993. Under the said scheme, the casual labourers who were in employment on 10.09.1993 and who have rendered a continuous service of at least one year as on that date were entitled to the benefit under the said scheme.

In each individual case of the applicants, all relevant records have been carefully examined by me. I find that the said applicants had not been engaged by the department as casual labourers. Moreover, they were also not in employment as casual labourers under the department on the date of issue of the said Department of Personnel & Training O.M. dated 1009.1993. As the applicants were not working in the department as on 10.09.1993 as casual labourers, the question of counting of their continuous service as well as extending benefit of the said scheme to the applicants does not arise.

For the reasons discussed above and also after taking into consideration of the findings of the committees headed by Sri B.Acharya, Deputy Commissioner of Central Excise & Customs, Bhubaneswar-I Commissionerate and by Sri M.C.Sahu, Deputy Commissioner of Central Excise & Customs, Bhubaneswar-II Comissionerate I have no other option but to conclude that the applicants of OA No. 61 to 76 of 2000 do not possess the eligibility criteria to be considered for grant of temporary status under the scheme formulated by Department of Personnel & Training cited in earlier paras.

O R D E R

Therefore, the Applicants are not covered under the scheme called Casual Labourers (grant of temporary status and regularization) scheme of Government of India communicated vide Department of Personnel and Training OM dated 10.09.1993 cited in earlier paras."

4. Thereafter, Annexure-A/8 dated 2nd May, 2005 was issued by the Government of India, Ministry of Finance, Department of Revenue, Central Board of Excise and Customs stating as under:

> "I am directed to refer to Board's letter F.No.A-12034/53/2002-Ad.III (B) dated 26.11.2002 (Annexure-I) and letter F No. C-18013/75/2003.AD.III.B dated 10.03.2004 (Annexure-II) regarding the ban on engagement of casual workers on daily wages. Attention of all Heads of Department was also invited to the instructions issued by Department of Personnel and Training on the subject from time to time.
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> 2. However, it has come to the notice of the Board that a large number of casual workers have been engaged by the field officers in violation of the above instructions. The Government exercises its unhappiness over such engagement of casual workers in violation of the Government's instructions. Such engagement has also resulted in avoidable litigation since a number of cases have been filed before the Tribunals/Courts for claiming regularization in the Government service.
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> 3. It is once again reiterated that engagement of persons on daily wages stands banned and the Heads of Departments cannot exercise any powers in this regard. As already intimated vide Board's aforementioned letter dated 10.03.2004, essential work for which no regular posts have been created/sanctioned, may be outsourced through service providers/contractors after following the procedure prescribed in the GFRs. The payments for such outsourced work through the service provider may be done from the provisions under "Contingent Office Expenditure and not from "Wages".
>
> 4. The above instructions may be strictly followed and any contravention of the same, being a gross violation of the standing instructions of the Government, shall be viewed seriously. The Government has decided that the office who appoints Casual Workers against the Government's standing instructions, shall besides being subject to disciplinary action be hold to compensate the Government for the expenditure incurred on the wages etc. of such workers."

Being aggrieved by the orders under Annexure-A/6 & A/8, the Applicants have approached this Tribunal in the present OAs seeking the following relief:

> "(i) The order of rejection dated 30.05.2002 under Annexure-6 series be quashed/set-aside;
> (ii) The order of engagement of service provider/contractor dated 02.05.2005 under Annexure-8 be quashed/set-aside, so far it relates to the offices where Applicants are working;
> (iii) Direction or directions be issued to Respondent Nos. 1 & 2 to grant Temporary Status and Regularization of service under the provision of the Scheme formulated by Government of India;
> (iv) Direction or directions be issued in allowing consequential financial service benefits retrospectively;
> (v) The Respondents be directed to frame a Scheme and to regularize the services of the Applicants against Class-IV posts;
> (vi) Any other suitable relief/reliefs, direction/directions as would be deemed fit and proper in favour of the Applicants."

5. Respondents, opposed the prayers of the Applicants by stating that the Applicants are not casual Labourers engaged by the Respondents in any of the attached subordinate offices nor were they in employment as on the cut off date fixed in the OM No. 51016/2/90-Estt. (C) Dated 10.09.1993 of the Department of Personnel and Training, New Delhi, so as to be entitled to the benefits of temporary status and consequent regularization. Applicants have been engaged as contract Labourers as and when required with no work no pay basis. As such it has been claimed by the Respondents that the benefits given to the Applicants in OA No. 2595 and 2924 of 1997 cannot be extended to the present Applicants; former being the

casual workers engaged by the Department. According to the Respondents, in compliance of the aforesaid direction of this Tribunal, the matter was examined by constituting a committee headed by Sri B. Acharya, and Shri M.C.Sahu, Deputy Commissioners of Central Excise & Customs, Bhubaneswar I & II Commissionerate respectively. Committee examined the matter thoroughly and submitted its report on 22.05.2002 and 07.05.2002 holding that none of the certificates based on which the applicants intend to prove their engagement as casual Labourer was issued by the concerned officers in Bhubaneswar I and II Commissionerate and the Applicants are only contract Labourers. Based on the report of the Committee, the prayer for grant of temporary status and consequent regularization of the Applicants was rejected and communicated under Annexure-A/6. Their case is that in view of the Government Circular, now Respondent No.2 is duty bound not to further assign any work to contract Labour like the Applicants but to engage service providers/contractors for the nature of work done by Applicants and therefore, Respondent No.2 has no option but to disengage the applicants and get their works done through service providers/contractors. As a preliminary issue, the Respondents, relying on the decision of the Hon'ble High Court of Orissa in W.P(C) No.4601/2003 dated 11.07.2005 have pointed out that the Applicants being the contract Labourers, this Tribunal lacks jurisdiction to entertain this OA. In paragraph 12,of the counter the Respondents have specifically disputed the engagement of some of the applicants and in paragraph 23 they have disputed the applicability of

the letter under Annexure-A/7 dated 26.11.2002 to the present case. According to Respondents, the Applicants who were engaged neither on ad-hoc nor temporary basis, the ratio *decendii* of the Hon'ble Apex Court in the case of *Union of India v Pyara Singh* has no application to the case of the Applicants. However, it has been stated in paragraph 24 of the Counter by the Respondents that they have no objection if the applicants are engaged through service providers/contractors but they cannot be engaged or paid directly by the Respondents. By stating so, the Respondents have strongly opposed the grant of the relief claimed by the Applicants.

6. In the rejoinder filed by the Applicants, apart from reiterating the stand taken in the OA, have stated that the case before the Hon'ble High Court in W.P(C) No.4601/2003 is different from the present case. While in the said case the Applicants who were the retrenched Casual Labourers, had sought engagement and regularization against civil posts under Union Government. Whereas, in the present case, the applicants have sought for the benefits of conferment of temporary status and consequent regularization as per the scheme of 1993 formulated by the Government. As such this case is very much maintainable before this Tribunal. It has been averred that since the Applicants have been continuing to discharge the duties of Safaiwala/Farash and Mali which work essentially being permanent in nature, non-regularization of their services branding them 'contract labourers is a clear case of exploitation of Labour. By placing copy of the order of the Calcatta Bench dated 01.07.2005 as

Annexure-A/16 it has been stated by the Applicants that the Applicants therein who are also like the present Applicants are getting their remuneration regularly and as such according to them they are entitled to the remuneration like the Applicants before the Calcutta Bench; especially when all of the applicants in this case have completed 240 days continuous service in a calendar year. Accordingly, they have claimed for grant of the relief prayed in the OAs.

7. While the matter stood thus, when the Respondents have taken steps to fill up 19 Sepoy (Group D) posts in the Department, through fresh candidates , Applicants moved an application (MA No. 37 of 2008 arising out of OA No. 606 of 2005) seeking interim direction and this Tribunal vide order dated 14.01.2008 disposed of the aforesaid MA with the following direction:

> "5. On the aspect of the requirement of age, it is considered that the casual employees who have been in continuous employment with the organization should not be prevented from being considered with reference to filling up of 19 posts as mentioned in Annexure-A/11. As per the extant Government policy and the Ministry of Finance letter at Annexure-A/10, it would be just and equitous, if these casual employees are allowed to make applications for regularization against the 19 posts irrespective of the age, if they are otherwise eligible. Respondent No.2 is accordingly directed to consider the applications if made by the existing casual employees for regularization against the 19 vacant posts for which action has been initiated vide Annexure-A/11 to the MA 37/08."

8. As it appears, as against the above order, the Respondent-Department approached the Hon'ble High Court of Orissa in WP (C) No. 6204 of 2008 and on 23.06.2008; the Hon'ble High Court disposed

of the aforesaid Writ Petition relevant portion of the order is quoted herein below:

> "The Union of India and its authorities have come up before this Court challenging the order dated 14.1.2008 passed by the Central Administrative Tribunal, Cuttack Bench, Cuttack in OA No. 606 of 2005 directing the present petitioner no.2 to consider the applications made by the OP – Casual employees for regularization against 19 vacant posts for which action has been initiated for regularization, **if they are otherwise eligible**. The case of the Union of India before this Court is that the Ops cannot claim the posts for which regularization is to be made because the regularization is going to be made on the strength of a resolution in which the case of the persons, who are given temporary status, can be considered for regularization. It is further contended by the learned Assistant Solicitor General that the Ops are still contractual employees which denied by learned counsel for the Ops and it is submitted that they are casual employees and have worked for about 15 years All these aspects in our considered opinion can be taken care of by the Tribunal while deciding OA No. 606 of 2005 within a period of two month from the date of communication of this order. We direct that in the meantime the services of the Ops shall not be dispensed with and any regularization made against the 19 posts shall be subject to the result of the final decision in OA No. 606 of 2005."

9. As it further appears from the record, after the orders of the Hon'ble High Court of Orissa, the office of the Chief Commissioner, Central Excise, Customs and Service Tax, Bhubaneswar Zone wrote letter to the Director, Ad.III(B), Central Board of Excise and Customs, Department of Revenue, Ministry of Finance North Block, New Delhi under Annexure-A/18 dated 28/29.01.2008 stating as under:

> "Please refer to your letter F.No. 12034/69/2007-Ad.III (B) dated 17.12.2007 JS (Admn.) letter D.O.F.No.12034/69/2006-Ad.III (B) dated 04.01.2008 and this office letter of even No. dated 02.11.2007 on the above subject.

It has been communicated earlier vide this office letter dated 02.11.2007 that at present there are 17 casual workers with temporary status in the combined commissionerates of Bhubaneswar-I and Bhubaneswar-II (Annexure-A). These 17 casual workers were accorded temporary status w.e.f. 01.09.1993, in accordance with the provisions of the Casual labourers (Grant of Temporary Status and Regularization) Scheme, 1993. However name of these 17 casual workers could be considered for regularization in the light of Hon'ble Supreme Court judgment dated 10.04.2006, in the case of Secretary, State of Karnataka and Others vrs Uma Devi and Others, for the reasons that they were neither engaged against sanctioned vacant posts nor did they satisfy the eligibility criterion of educational qualification prescribed under the Recruitment Rules for Sepoy, Havaldar and Head-Havaldar (Group D).

Apart from the above mentioned 17 casual workers with temporary status there are 66 casual workers/contract workers in the combined Commissionerates of Bhubaneswar-I and Bhubaneswar II, who have put in more than 10 years of service (Annexure-B-I and B-II). Although these 'casual workers' are presently being paid as 'contract workers' from office expenditure Head, there is neither any written contract entered into in this regard, nor is there any service contractor through whom their services have been hired. The earlier attempts to disengage them and hire such services through a service contractor, have not been successful due to the intervention of Hon'ble CAT, Cuttack Bench, which has granted ad interim stay (in OA No. 606/2005, 634/2005, 855/2005, 169/2006 etc.) directing the Department 'not to disengage the applicants/not to discontinue the casual engagements of the applicants/not to substitute these applicants by any fresh personnel engaged through the service providers/contractors without the leave of the Tribunal. The said cases are still pending.

The said 66 casual workers/contract workers do not appear to be strictly covered by the judgment dated 10.04.2006, of the Hon'ble Supreme Court in the case of Uma Devi as they were not engaged against sanctioned vacant posts.

However, considering that the above mentioned 17 casual workers with temporary status and 66 casual workers/contract workers have been

engaged for more than 10 years, their services may be considered for regularization, in the evident of any one time relaxation of the prescribed norms, by the Ministry.

This issues with the approval of the Chief Commissioner, Central Excise, Customs and Service Tax, Bhubaneswar Zone."

10. However, as it reveals, in spite of protracted correspondence, there was no response. Again the Applicants by filing MA No. 393 of 2008 have sought for stay of the selection process of filling up of the said 19 posts of Sepoy (Group D) till disposal of the OAs. Respondents by filing counter to the said MA have objected the prayer made in the aforesaid MA as also by relying on various decisions of the Hon'ble Apex Court, they have stated that as the Applicants are "Contract Labourers" which is not coming within the definition of "Casual Labour" they are not entitled to any of the reliefs claimed in this OAs.

12. In course of hearing, Learned Counsel for both sides put emphasis on the submissions made in their pleadings as referred to above; which needs no repetition and, therefore, having heard the parties, perused the materials placed on record.

13. Before proceeding further on the merit of the matter, we would like to state that as it appears, the order dated 14.01.2008 of this Tribunal passed in MA No. 37 of 2008 (arising out of one of the present OAs i.e. OA No. 606 of 2005) was challenged by the Respondents before the Hon'ble High Court of Orissa in W.P ( ) No. 6204 of 2008 and in view of the order dated 23.06.2008 passed in the aforesaid order, the objection raised by the Respondent-Department

so far as maintainability of this OA is concerned no longer requires to be looked into; more so on perusal of the order of the Hon'ble High Court of Orissa, based on which the Respondents raised the question of maintainability of this OA, it reveals that subsequent notification issued, in exercise of the powers conferred on the Hon'ble Chairman, authorizing even the single member Bench of the Tribunal to hear and decide the matter pertaining to conferment of temporary status and regularization was not brought to the notice of the Hon'ble High Court of Orissa.

14. As regards the merit of the matter, we may state that perusal of the records conclusively proves that the engagement of the Applicants was purely contractual for a fixed period. Even assuming that the Applicants are 'Casual Labourers' then also they cannot get the benefits which flow from the scheme of temporary status and regularization issued by the DOP&T in the year 1993 for their failure to prove that they were in employment as on the cut off date fixed under the scheme. It is trite law that onus lies on the workman to prove that he had worked 240 days in a calendar year (vide **BSNL and others v Mahesh Chand**, (2008) 1 SCC (L&S) 792). But the Applicants produced no such documents, not to speak of unimpeachable one to, substantiate that any of the Applicants had in fact completed 240 days service continuously in a calendar year on the cut off date prescribed under the 1993 scheme. However, even if it could have been substantiated or it is a fact that the Applicants complete 240 in a calendar year, then also they are not entitled to the

benefits of the scheme floated by DOP&T because it is settled law that even if one has completed 240 days continuous service, he/she cannot claim any benefit as the very engagement being contractual one (vide-**M.D.Kar, Handloom Dev. Corporation v. Mahadeva L. Raval (SC),** 2007(2) SLR 251). Fact remains that the Applicants were not in employment as on the cut off date fixed in the guidelines issued by the DOP&T. It is trite law that Grant of Temporary Status and Regularization Scheme of the Govt. of India, 1993 is applicable to only those casual labourers who are in employment on the date of commencement of the scheme. The scheme is not in the nature of general guidelines to be applied to casual labourers as and when they complete one year continuous service (vide- **UOI vs. Gagan Kumar**, 2005 SCC (L&S) 803;). So far as the challenge of the decision of the Government to execute the duties discharging by the Applicants through service providers/contractors, we may observe that, these are the policy decisions of the Government and it is trite law as held by the Hon'ble Apex Court in the case of **Basic Education Board, UP vs Upendra Rai and others**, (2008) 1 SCC (L&S) 771, that policy decision of the Government cannot be interfered with by Courts/Tribunal unless it violates constitutional or statutory provisions. Further in the case of **The Tamilnadu Electricity Board, Chennai and Anr. Vs. Bharathiya Electricity Employees Federation Salem,** 2005 (3) ATJ 82 it has been held that the decision maker has the choice in the balancing of the pros and cons relevant to the change in policy. Hence change of policy is for the decision maker

and not the Courts/Tribunal to interfere. In view of the above, we find no force in the above submission of the Applicant and the same is rejected.

15. The Applicants have not been able to point out any statutory rule or executive instructions on the basis of which their claim of continuation in service, grant of temporary status or regularization can be granted. It is well settled that unless there exists some rule no direction can be issued for grant of any of the above reliefs to contract labourers. Such matters are executive functions, and it is not appropriate for this Tribunal to encroach upon the functions of another organ of the State; especially when it is the specific case of the Respondents that there has been no sanctioned post. Ordinarily speaking, the creation and abolition of a post is also the prerogative of the executive. It is the executive again that lays down the conditions of service subject, or course, to a law made by the appropriate legislature. In view of the above, Applicants have no right to get any of the reliefs claimed by them in these OAs which need to be dismissed.

16. However, it is noticed from the correspondence made between the Respondents; especially from the letter under Annexure-A/18 dated 28/29.01.2008 that request has been made to the Head quarters at Delhi for favourable consideration of the grievances of the Applicant in relaxation of normal rule but it is not known where the matter is lying. In the said premises, we make it clear that dismissal

of these OAs shall not stand as a bar on the Respondents for considering the grievance of the Applicants favourably at their level, if they so choose by drawing up an appropriate scheme for such category of contract labourers.

17. In the result, with the aforesaid observations these OAs are dismissed. There shall be no order as to costs.

(JUSTICE K. THANKAPPAN)
MEMBER (JUDICIAL)

(C.R.MOHAPATRA)
MEMBER (ADMN.)

KNM/PS.