CENTRAL ADMINISTRATIVE TRIBUNAL LUCKNOW BENCH LUCKNOW

Original Application No. 147 of 2006

This, the 20th day of December, 2013.

HON'BLE MR. NAVNEET KUMAR MEMBER (J)

Nishar Ahmad, aged about 31 years, son of Sri Aftaf Ahamd, Resident of 13/4, Purania Labour Colony, Tal Katora, Aishbagh, Lucknow.

Applicant

By Advocate Sri Praveen Kumar.

Versus

1. Union of India through Chief Commissioner Central Excise, 19, Vidhan Sabha Marg, Lucknow.
2. Commissioner, Central Excise, 7-A, Ashok Marg, Lucknow.
3. Commissioner (Appeals) Central Excise, C.G.O. Complex Aliganj, Lucknow.

Respondents

By Advocate: None

(Reserved On 6.12.2013)

ORDER

By Hon'ble Mr. Navneet Kumar, Member (J)

The present Original Application is preferred by the applicant under Section 19 of the AT Act, 1985 with the following reliefs:-

(i) To issue order or direction thereby directing the respondents to consider the case of the applicant for regularization on the post of Farrash.

(ii) To issue order or direction thereby directing the respondents to pay to the applicant the wages in terms of rules and instructions on the subject.

(iii) To issue order or direction thereby direction respondents to not to change of alter the condition of service of the applicant from daily wage to contractual worker.

(iv) To issue order or direction thereby directing the respondents to regularize the service of the applicant from the date of initial appointment and pay to the applicant the difference of the wages.

(v) To pass any other suitable order or direction which is deemed just and proper in the circumstances of the case.

(vi) To allow the O.A. with cost."

2. Since no one is present on behalf of the respondents, as such, after invoking Rule 16-(1) of the CAT (Procedure) Rules, 1987, the learned counsel for the applicant was heard and the judgment is reserved. For ready reference, Rule -16(1) of CAT Procedure Rules, 1987 is reproduced below:-

> "Where on the date fixed for hearing the application or on any other date to which such hearing may be adjourned, the applicant appears and the respondent does not appear when the application is called for hearing the Tribunal may, in its discretion adjourn the hearing or hear and decide the application ex parte."

2. The brief facts of the case are that the applicant is being aggrieved against the illegal and arbitrary action of the respondents whereby the applicant was not considered for regularization despite repeated request/representation, but neither the case of the applicant was considered nor the respondents have ever communicated the decision if any taken by the respondents. The learned counsel for the applicant submitted that he was initially engaged on the post of Farrash from 20th June 1999 and continued to work for substantial period of time. Not only this, it is also pointed out by the learned counsel for the applicant that the applicant is working against the sanction post as such, he deserves to be regularized. The learned counsel for the applicant relied upon the circular dated 7.6.1988 issued by the DOP&T in regard to Casual Labours and according to the circular , the incumbents are entitled to be paid wages not less then 1/30 of the minimum of scale along with dearness allowance on the post on which the applicant is working and as such, the applicant is entitled to the pay in the pay scale of Rs. 3050-4500/-including the Dearness Allowances. The learned counsel also relied upon the office memorandum dated 10.9.1993 lying down the conditions for conferment of temporary status in respect of incumbents who are working in department of Central Government and

the aforesaid office memorandum is known as Central Labour (Grant of Temporary Status) Scheme 1993. The learned counsel for the applicant has also relied upon a similar decision of the Tribunal passed in O.A. No. 407 of 2005 which was disposed of by the Tribunal on 16th September 2005, but this order was passed by the Tribunal in 2005.

2. The learned counsel for the respondents have filed their reply and through reply, it was pointed out by the respondents that the applicant was engaged as contingent paid worker w.e.f. 16.6.99 in terms of minimum wages act 1948 and he is not entitled for temporary status. It is also mentioned by the respondents through their reply that the applicant was engaged on daily wages, not on the post of Farrash as alleged by the applicant. Apart from this, it is also pointed out that the work of the applicant is of casual nature and cannot be compared with regular class IV employee. The applicant was engaged as contingent paid worker which are not disputed by the applicant. The respondents have also clarified about the circular dated 8.4.1999 read with order dated 7.6.1988 and pointed out that since the incumbents engaged in the department prior to 7.06.1988 and since the applicant was not engaged on or before 7.6.1988, therefore, the benefit of the said circular cannot be extended to the applicant. Not only this, it is also submitted by the respondents that the applicant is not even entitled for temporary status in terms of circular dated 10.9.1993. Apart from this , the applicant was not working against any sanction post as such, he is not entitled for salary like regular employees.

3. The learned counsel for the applicant has file the rejoinder and through rejoinder, mostly the averments made in the O.A. are reiterated.

4. Heard the learned counsel for the applicant and perused the record.

5. The applicant is aggrieved by in action of the respondents for not regularizing the services of the applicant as he claims that he was engaged by the respondents to perform work for Farrash since 20.6.1999. the

learned counsel for the applicant has also annexed the order which was passed by the respondents for engaging 30 contingent paid workers for a period from 16.6.1999 to 15.7.1999 and the name of the applicant find place at Serial No. 29. The said engagement was extended from time to time and there is no extension order beyond 15.7.2000. It is also to be clarified that the bare reading of the said order, it is clearly provided that the workers/contract labours engaging in Central Excise HQ office Lucknow are contingent paid workers and there is no letter of appointment annexed along with the O.A. The circular issued by Government of India, Ministry of Finance dated 26th November, 2002 is clear and same provides about the ban on engagement of casual workers on daily wages and it is clarified that in future, casual labours should not be recruited in any circumstances. The said ban was further reiterated by means of an order dated 10th March, 2004 and 2nd May 2005. In the absence of any letter of appointment , annexed along with the O.A., it is not proper to interfere in the present O.A.

6. As regard the circular dated 7.6.1988 and O.M. dated 10.9.1993 were subsequently superseded by another circulars issued by the Ministry of Finance dated 26th November, 2002 as well as reiterated by OM dated 10th March, 2004 and 2nd May, 2005 by virtue of which, there is a complete ban of engagement of casual workers on daily wages. Not only this, the observations of the Hon'ble Apex Court and also clear to in this regard to regularize the services of casual workers.

7. The Hon'ble Apex Court in the case of **Official Liquidator Vs. Dayanand and others reported in (2009)1 Supreme Court Cases (L&S) 943** has been pleased to observe as under:-

> **64. The next issue which needs to be address is whether the impugned orders can be sustained on the ground that by having worked continuously for 10 years or more as company paid staff as on 27.8.1999, some of the respondents acquired a right to be absorbed in the regular cadre or regularized in service and they are entitled to the benefit of the principle of equal pay for equal work and**

have their pay fixed in the regular pay scales prescribed for the particular posts.

65. The questions whether in exercise of the power vested in it under Article 226 of the Constitution of India, the High Court can issue a mandamus and compel the State and its instrumentalities/agencies to regularize the services of temporary/ad-hoc/daily wager/casual/contract employees and whether direction can be issued to the public employer to prescribe or give similar pay scales to employees appointed through different modes, with different condition of service and different sources of payment have become subject matter of debate and adjudication in several cases.

8. The Hon'ble Apex Court in the case of **State of Karnataka and others Vs. M.L.Kesari reported in (2010) 9 SCC 243** has been pleased to observe as under:-

"Appointment made against the sanctioned post or appointment of unqualified persons are illegal appointment"

9. The Hon'ble Apex Court in the case of **M.D., Hassan Cooperative Milk Producer's Society Union Limited Vs. Assistant Regional Director, Employees' State Insurance Corporation reported in AIR 2010 Supreme Court Cases 2109** has been pleased to observe as under:-

"18. It is not the case of any of the parties nor is there any evidence to show that the persons who did the loading and unloading were directly employed by the appellants. Section 2(9)(*i*) is, therefore clearly not attracted as it covers the workers who are directly employed by the principal employer. As a matter of fact, the thrust of the arguments centred round clause (*ii*) of Section 2(9). This clause, requires either (*a*) that the person to be an employee should be employed on the premises of the factory or establishment, or(*b*) that the work is done by the person employed under the supervision of the principal employer or his agent on work which is ordinarily part of the factory or establishment or which is preliminary to the work carried on in or incidental to the purpose of the factory or establishment. The expression "on the premises of the factory or establishment" comprehends presence of the persons on the premises of the factory or establishment for execution of the principal activity of the industrial establishment and not casual or occasional presence. We shall again assume in favour of ESI Corporation that for the purposes of loading and unloading the milk cans, the truck driver and loaders enter the premises of the appellants but mere entry for such purpose cannot be treated as an employment of

those persons on the premises of the factory or establishment. We are afraid, the said expression does not comprehend every person who enters the factory for whatever purpose. This is not and can never be said to be the purpose of the expression. It has to be held that the persons employed by the contractor for loading and unloading of milk cans are not the persons employed on the premises of the appellants' establishment.

22. Although the ESI Court in respect of the appellants in separate orders has recorded a finding that such workers work under the supervision of the principal employer and the said finding has not been interfered with by the High Court but we find it difficult to accept the said finding. The ordinary meaning of the word "supervision" is "authority to direct" or "supervise" i.e. to oversee. The expression "supervision of the principal employer" under Section 2(9) means something more than mere exercise of some remote or indirect control over the activities or the work of the workers. As held in *CESC Ltd.*7 that supervision for the purposes of Section 2(9) is "consistency of vigil" by the principal employer so that if need be, remedial measures may be taken or suitable directions given for satisfactory completion of work. A direct disciplinary control by the principal employer over the workers engaged by the contractors may also be covered by the expression "supervision of the principal employer". The circumstances, as in the case of HCMPSU Ltd., that the authorised representatives of the principal employer are entitled to travel in the vehicle of the contractor free of charge or in the case of BURDCMPS Union, that the principal employer has the right to ask for removal of such workers who misbehave with their staff are not the circumstances which may even remotely suggest the control or interference exercised by the appellants over the workers engaged by the contractor for transportation of milk. From the agreements entered into by the appellants with the contractors, it does not transpire that the appellants have arrogated to themselves any supervisory control over the workers employed by the contractors. The said workers were under the direct control of the contractor. Exercise of supervision and issue of some direction by the principal employer over the activities of the contractor and his employees is inevitable in contracts of this nature and that by itself is not sufficient to make the principal employer liable. That the contractor is not an agent of the principal employer under Section 2(9)(*ii*) admits of no ambiguity. This aspect has been succinctly explained in *CESC Ltd.*7 with which we respectfully agree. No evidence has been collected by ESI Corporation during the inspection of the appellants' establishments or from the contractors that the appellants have any say over the terms and conditions of employment of these employees or that the appellants have anything to do with logistic operations of the contractors. As a matter of fact, there is nothing on record to show that the principal employer had any knowledge about the number of persons engaged by the contractors or the names or the other details of such persons. There is also no evidence that the appellants were aware of the amount payable to each of these workers. In the circumstances, even if it be held that the transportation of

milk is incidental to the purpose of factory or establishment, for want of any supervision of the appellants on the work of such employees, in our opinion, these employees are not covered by the definition of "employee" under Section 2(9) of the Act."

10. The Hon'ble Apex Court in the case of **Union of India and others Vs. Vartak Labour Union (2) reported in (2011) 4 SCC 200** has been pleased to observe as under:-

"17. We are of the opinion that the respondent Union's claim for regularization of its members merely because they have been working for the BRO for a considerable period of time cannot be granted in light of several decisions of this Court, wherein it has been consistently held that casual employment terminates when the same is discontinued, and merely because a temporary or casual worker has been engaged beyond the period of his employment, he would not be entitled to be absorbed in regular service or made permanent, if the original appointment was not in terms of the process envisaged by the relevant rules."

20. In light of the settled legal position and on a conspectus of the factual scenario noted above, the impugned directions by the High Court cannot be sustained. These are set aside accordingly."

11. Again the Hon'ble Apex Court in the case of **Brij Mohan Lai Vs. Union of India and others reported in (2012) 6 Supreme Court cases 502** has been pleased to again observe that "absorption in service is not a right". Further, Hon'ble Apex Court observed as under:-

"172. The prayer for regularization of service and absorption of the petitioner appointees against the vacancies appearing in the regular cadre has been made not only in cases involving the case of the State of Orissa, but even in other States. Absorption in service is not a right. Regularization also is not a statutory or a legal right enforceable by the persons appointed under different rules to different posts. Regularization shall depend upon the facts and circumstances of a given case as well as the relevant rules applicable to such class of persons.

173. As already noticed, on earlier occasions also, this Court has declined the relief of regularization of the persons and workmen who had been appointed against a particular scheme or project. A Constitution Bench of this Court has clearly stated the principle that in matters of public employment, absorption, regularization or permanent continuance of temporary, contractual or casual daily wage or ad hoc employees appointed and continued for long in such public employment would be dehors the constitutional scheme of public employment and would be improper. It would also not be proper to

stay the regular recruitment process for the posts concerned. [Refer to *Umadevi (3)*Z.]"

12. As observed by the Hon'ble Apex Court in the case of **Union of India & Ors. v. Debika Guha & Ors.** reported in **(2000)9 Supreme Court Cases 416** it has been observed by the Hon'ble Apex Court that the substitute does not have any legal right for regularization. It is held by the Hon'ble Apex Court that:-

"Working for more than 180 days continuously, held, cannot be a basis for legal claim in matters of regularization – However, on the basis of their working for long periods their cases could be appropriately considered by the Department for absorption."

13. The Hon'ble Apex Court has observed that substitutes have no legal claim on the basis of having worked continuously and if there are cases where the substitute have worked for a longer period , it is for the department to consider as to whether there is proper cause for absorption or not and pass appropriate orders.

14. The Apex Court in **Post Master General & Ors. v. Tutu Das(Dutta)[(2007)2 SCC(L&S)-179** has held as under:-

"No policy decision can be taken in terms of Article 77 of Article 162 of the Constitution which would run contrary to the constitutional or statutory schemes. No regularization is, thus, permissible in exercise of the power conferred under Article 162 of the Constitution if the appointments have been made in contravention of the statutory rules.

The completion of 240 days of continuous service in a year would be attracted only in a case where retrenchment has been effected without complying with the provisions contained in Section 25-F of the Industrial Disputes Act, but would not be relevant for regularization of service."

Equality is a positive concept. Therefore, it cannot be invoked where any illegality has been committed or where no legal right is established. Hence the fact that a similarly situated person was granted regularization does not advance the case of the respondent."

14. Considering the averments made by the learned counsel for the applicant and also perused the counter reply filed by the respondents, I

do not find any justified ground to interfere in the present O.A. Accordingly, the O.A. is dismissed. No order as to costs.

V.R. Agrawal

(Navneet Kumar)
Member(J)

Vidya