
(1991) 07 AHC CK 0071
In the Allahabad High Court
Case No : C.M.W.P. No. 2100 of 1980

Afsar Mian

APPELLANT

Vs

Labour Court and Others

RESPONDENT

Date of Decision : 11-07-1991

Acts Referred:

Industrial Disputes Act, 1947 — Section 2, 25F

Uttar Pradesh Industrial Disputes Act, 1947 — Section 2, 6(N)

Citation : (1991) 63 FLR 721 : (1994) 3 LLJ 589

Hon'ble Judges : S.R. Singh, J

Bench : Single Bench

Advocate : Shyam Narain, for the Appellant;

Final Decision : Allowed

Judgement

S.R. Singh, J.—This writ petition at the instance of a workman is directed against the Award dated 30th October, 1979 delivered by Labour Court, Bareilly in Adjudication Case No. 2 of 1979 between the petitioner on one hand and M/s. Synthetics and Chemicals Ltd. Fatehganj West, Bareilly (hereinafter referred to as the Employer of the Workman) on the other.

2. The dispute referred to by the State Government u/s 4-K of the U.P. Industrial Disputes Act for adjudication to the Labour Court, in substance, was whether the Employer was justified in terminating the petitioner's services with effect from 23rd September, 1977 on account of his absence from duty within eight days of extended period of leave.

3. The facts which emerge from the pleadings of the parties are that the petitioner was employed in the respondent's company initially on temporary basis in the year 1963 and thereafter, he was appointed on probation as a Fitter "C" by means of an order dated 26.7.1966 of the Factory Manager. He was confirmed and conferred the designation and given work of Machinist "C" in the Engineering Department of the Factory. It appears that on July 4, 1971, the

petitioner was taken into custody by Punjab Police and subsequent to his arrest, a request was made on his behalf by his mother for grant of leave to the petitioner-workman. The leave applied for was granted from 5th July, 1971 to 5th August, 1971 and a communication was sent in this regard to the mother of the petitioner by means of a letter dated 20th July, 1971, copy of which has been annexed to the counter- affidavit as "Annexure - C.A.2". In the said letter, it was mentioned that the leave applied for on behalf of the petitioner had been sanctioned as a special case and that he (the petitioner) may make it a point to report for duty on 6th August, 1971. It was also specified in the aforesaid letter that the company could not afford to keep the post vacant for indefinitely long period and also that no further request for extension beyond the period of leave granted to him, would be entertained. It was also made clear in the letter that in case the petitioner failed to report for duty on by 6th August, 1971, the company could have no other alternative except to proceed to take appropriate action against him in the light of the certified Factory Standing Orders as applicable to him, without any further reference communication being made to the petitioner or to his mother. As is indicated from the facts on record, the petitioner continued to languish in detention and as such, he was disabled from reporting for duty by 6th August, 1971 and by communication contained in letter dated 18th August, 1971, a copy which has been annexed to counter-affidavit as Annexure-CA-1, the petitioner was informed that since he had failed to report for duty after expiry of eight days of the leave had been granted to him, his name stood deleted from the roll of the Company in accordance with Clause 16.7 of the Standing Orders with immediate effect. In the letter dated 18th August, 1971, a reference has been made to another letter dated 9th August, 1971, allegedly written to the petitioner's mother on behalf of the Company thereby calling upon the petitioner to report for duty on or before 14th August, 1971, and in the event for his failure, it was specified therein, his name would be removed from the Rolls of the Company without any further reference in this regard. It appears that the letter dated 9th August, 1971, had been written by the Company in response to an application dated 5.8.1971 submitted to the Management by the petitioner's mother on his behalf for further extension of leave by one month, but the leave was extended upon 13th August only.

4. The case of the workman is that the striking off his name from the Rolls of the Company would entail termination of his services which in turn tantamount to retrenchment, but pre-requisites of retrenchment as contained in the Industrial Disputes Act, 1947, were not complied with and, therefore, he claims reinstatement with unbroken continuity in services and back wages.

5. The case of the employer on the other hand is that it was a case of abandonment of service and the communication contained in letter dated 18.8.71 was only an intimation of the consequences in terms of paragraph 16.7 of the Factories Standing Orders as applicable in the case of the petitioner. According to the Employer, it was not a case involving retrenchment or termination of service, the pre-requisites relating to retrenchment as

contemplated by the Industrial Law were not attracted to be complied with. Another contention it was advanced on behalf of the Employer is that since it was not a case entailing termination or retrenchment, the reference made to the Labour Court was incompetent and void and the Labour Court acquires no jurisdiction to decide the alleged dispute.

6. The Labour Court held against the Employer on the question of competency of the reference and the jurisdiction of the Labour Court, but it arrived at a finding in favour of the employer and against the workman on the question as to whether the termination of the petitioner's services was bad in law or it was valid in terms of Clause 16.7 of the relevant Standing Orders. Aggrieved against the Award, the petitioner workman has come up to this Court under Article 226 of the Constitution of India praying for a writ of certiorari quashing the impugned Award and for issuance of any other writ, direction or order as may be deemed fit and proper in the circumstances of the case.

7. I have heard Shri Shyam Narain, learned counsel for the petitioner and also Sri. N.B. Singh, learned counsel for the respondent-Company. Since the Labour Court has decided the dispute against the petitioner and in favour of the employer in terms of the Clause 16.7 of the Standing Orders, it would be useful to quote the aforesaid clause as under:

"16.7. In the event of a worker remaining absent in excess of the period of leave originally granted or subsequently extended he shall lose his lien on his appointment unless he returns within eight days of the expiry of the period of leave and give an explanation to the satisfaction of the Factory Manager of his inability to return before the expiry of the leave period. In case a worker loses his lien on his appointment, he shall be entitled to be kept on the list of Badlies".

8. The learned counsel for the petitioner contended before me that the expression "remaining absent" occurring in Clause 16.7 of the Standing Order does not visualise the case of a worker remaining absent from duty after expiry of the leave period due to reasons and circumstances beyond his control. The thrust of the argument of the learned counsel is that the absence of the petitioner from duty after August 13, 1971 was due to circumstances beyond his control and it being not a case of absence due to his own volition or absence due to avoidable reasons, Paragraph 16.7 was not attracted. Further it would be deemed to be an absence without leave which amounts to misconduct and termination of petitioner's service on that count without notice and proper enquiry or at any rate without complying with the minimal principles of natural justice, would not be valid in law. He submitted that the termination of services of a workman brought about by any reason whatsoever, would fall within the ambit of retrenchment" except where the case falls within any of the excepted categories as contemplated by Section 2(s) of U.P. Industrial Disputes Act 1947, (in short the U.P. Act) or Section 2(oo) of the Industrial Disputes Act, 1947 (In short the Central Act).

The learned counsel for the respondent on the other hand contended that paragraph 16.7 of the Factories Standing Orders holds good in the present case and, therefore, the Award given by the Labour Court, does not suffer from any infirmity or illegality. In support of his contention, the Counsel has placed reliance on a case reported in *Burn and Co., Calcutta Vs. Their Employees*, and followed in *Indian Iron and Steel Co., Ltd. and Another Vs. Their Workmen*,

9. First of all I take up for examination the ratio of case- law reported in *Burn and Co., Calcutta Vs. Their Employees*, In this case, the concerned workman, namely Ashima Nanda Banerji was arrested by the Government under the West Bengal Security Act and detained in jail from 25.1.49 to 5.4.1951. The Company terminated services of the said workman on 22.4.49. The tribunal made an Award that the workman be re-employed. The workman went up in appeal claiming entitlement for reinstatement. The Appellate Tribunal accepted the claim of the workman on the ground that he had been discharged without the company framing a charge or holding an enquiry and that the rules of natural justice have been violated. Hon. Supreme Court did not approve of the view taken by the Appellate Tribunal and held as under:

"We are unable to agree with this decision. The grounds of discharge is the continued absence of the employee and his inability to do the work and it is difficult to see what purpose would be served by a formal charge being delivered to him and what conceivable answer he could give thereto. The order of the Appellate Tribunal is manifestly erroneous and must be set aside".

The above extracted observation of the Hon. Supreme Court is of no avail to the employer for the reason that the Supreme Court was concerned with a case of termination of services of a workman effected prior to insertion of Section 2(oo) in the Central Act by the Industrial Disputes (Amendment) Act, 1953 with effect from 24.10.53. After the insertion of Section 2(oo) w.e.f. 24.10.53 every termination for whatsoever reasons it may be, is retrenchment excepting the categories of termination specified therein.

10. The observation of the Hon"ble Supreme Court in *Indian Iron and Steel Co., Ltd. and Another Vs. Their Workmen*, in no Delphic terms prop up the contention of the learned counsel for the employer but that was also a case pertaining to pre-amendment stage wherein large number of workmen had been arrested by the authorities incharge of law and order by reason of their questionable activities in connection with a labour dispute and their services were deemed to have been discharged with effect from 2nd October, 1953 under a notice dated 23.9.53 i.e. prior to the enforcement of Industrial Disputes (Amendment) Act, 1953 and it is in this backdrop that the Hon"ble Supreme Court observed as follows:-

"The same principle should apply in the present case. It is true that the arrested men were not in a position to come to their work, because they had been arrested by the police. This may be unfortunate for them; but it would be unjust

to hold that in such circumstances the Company must always be given leave when an application for leave is made. If a large number of workmen are arrested by the authorities incharge of law and order by reason of their questionable activities in connection with a labour dispute, as in this case, the work of the Company will be paralysed if the company is forced to give leave to all of them for a more or less indefinite period. Such a principle will not be just; nor will it restore harmony between labour and capital or ensure normal flow of production. It is immaterial whether the charges on which the workmen are arrested by the Police are ultimately proved or not in a Court of law. The Company must carry on its work and may find it impossible to do so if a large number of workmen are absent. Whether in such circumstances leave should be granted or not must be left to the discretion of the employer. It may be readily accepted that if the workmen are arrested at the instance of the Company for the purpose of victimisation and in order to get rid of them on the ostensible pretext of continued absence, the position will be different. It wilt then be a colourable or mala fide exercise of power under the relevant Standing Order; that, however, is not the case here. We are of the view that the two tribunals below have misdirected themselves as to the true scope and effect of the Standing Order in question and their decision with regard to the seven workmen mentioned above cannot be supported".

The case in hand pertains to a single workman who was prevented from joining attending to his duties on grounds of his arrest and detention from 5th July, 1971 to 21st September, 1971. Refusal to extend leave applied for beyond 13th August, 1971 does not appear to be justified. The termination of his services by order dated 18.8.71 even though done with the aid of paragraph No. 16.7 of the standing orders is tantamount to retrenchment not covered by the exceptions enumerated in Section 2(oo) of the Central Act or Section 2(s) of the U.P. Act. In L. Robert D'souza Vs. Executive Engineer, Southern Railway and Another, Hon"ble Supreme Court has held that the termination of service of a workman brought about for any reason whatsoever would be retrenchment except where the case falls within any of the excepted categories which are as under according to Section 2(oo) of the Central Act:

- (1) Termination by way of punishment inflicted pursuant to disciplinary action;
- (2) Voluntary retirement of the workmen;
- (3) Retirement of the workman at reaching the age of superannuation if the contract of employment between the Employer and the workman concerned contains a stipulation in that behalf; or
- (4) Termination of the services on account of continued ill-health.

11. Similar view has been taken by the Supreme Court in an earlier case reported in Mohan Lal Vs. Management of Bharat Electronics Ltd., In both these cases, the Supreme Court while interpreting Section 2(oo) read with Section 25F of the Central Industrial Disputes Act has laid down the principles that if the case

is not covered by any of the excepted categories, then the striking off the name of a worker from the Rolls without anything more is illegal and non-compliance of Section 25F of the Central Act, renders such retrenchment void ab initio. More or less the same result follows vis-a-vis Section s 2(6) and 6(N) of the U.P. Industrial Disputes Act, 1947.

12. From the above discussion I find that the Labour Court has erred in applying the provisions of paragraph 16.7 of the Factories Standing Orders and thereby holding that the present was not a case of termination or retrenchment of Service. The provision contained in para 16.7 of the Standing Orders cannot override the express provisions enacted in Section 2(oo) of the Central Act and Section 2(S) of the U.P. Act. Further the present was not a case of preventive detention under any law relating to the security of the State nor was it a detention based on any conviction. Rather, it was a mere detention on suspicion and extension of leave as sought for on behalf of the petitioner was promoted by the hope that he would be released before the expiry of the extended leave as sought for lastly.

13. In view of the aforesaid discussion, I hold that the present was a case of termination of service/retrenchment of the petitioner which was an act carried out without observing the prerequisites of a valid termination/retrenchment contemplated u/s 25F of the Central Act or Section 6-N of the U.P. Act. As such, a termination/retrenchment has to be held void ab initio and the petitioner is liable to be reinstated.

14. The next question to be considered for determination is whether the petitioner should be given back wages. From the above discussion, I feel that the employer cannot be ascribed any mala fide in taking the view that the petitioner lost his lien to the post held by him vis-a-vis his failure to report for duty within stipulated period of eight days of the expiry of extended period of leave by virtue of para 16.7 of the standing orders. Further, in the wake of termination retrenchment of the petitioner, the employer must have made an alternative appointment in the post held by the petitioner in order to keep the work doing. Under the circumstances, it would be unjust to the employer in particular and public in general, for a loss to the factory would in a sense be a loss to the general public as to the factory owner who in a sense holds it in trust for the public, to allow full back wages to the petitioner. In the totality of the facts and circumstances of the present case, it would meet the ends of justice if the petitioner is allowed 1/3rd of the back wages.

15. In the result, the petitioner succeeds and is allowed. The impugned order is quashed. The petitioner is held entitled to be reinstated to, the post held by him with unbroken continuity in the service and also to 1/3rd of the back wages from the date of termination to the 31st day of May 1991 and full wages w.e.f. 1st June, 1991.

These parties are directed to bear their own costs.