

(2005) 09 DEL CK 0139
In the Delhi High Court
Case No : Writ Petition 5842 of 1999

Autocentre Workshop

APPELLANT

Vs

Delhi Administration and Others

RESPONDENT

Date of Decision : 07-09-2005

Acts Referred:

Constitution of India, 1950 — Article 226
Industrial Disputes Act, 1947 — Section 17B

Citation : (2005) 125 DLT 675 : (2006) 108 FLR 772 : (2006) 1 LLJ 1027

Hon'ble Judges : Mukul Mudgal, J

Bench : Single Bench

Advocate : S.N. Bhandari and Rakesh Kumar Garg, for the Appellant; R.K. Saini and Abhay Chauhan for respondents 3(i) and 3(ii), for the Respondent

Judgement

Mukul Mudgal, J.—By this writ petition the petitioner/employer challenges the award dated 5th July 1999 made by the Labour Court. On 4th August 1980 a reference at the behest of the respondent/workman has been made by the Secretary (Labour) Delhi Administration, Delhi on the following terms for adjudication:

"Whether the termination of services of S/Shri Abdul Hamid and Hayat Singh is legal and justified and, if not, to what relief are they entitled and what directions are necessary in this respect?"

2. The case set up by the respondent Nos. 3(i) Abdul Hamid and 3(ii) Hayat Singh, workmen in the statement of claim, before the labour court, is as follows:-

a) Respondents No. 3(i) and 3(ii) were employed by the management of the petitioner, M/s Auto Centre since 1962 as Head Motor Mechanic and Motor Mechanic respectively.

b) The motor repairing workshop was being run in the backyard of the petrol pump which was earlier run and managed by the same management.

c) The workmen were not being paid in accordance with law and a charter of demand was made by the workmen on 16th March 1979 demanding the payment of dearness allowance and linked the dearness allowance with the cost of living index apart from claim in increment and other benefits.

d) On 31st March 1979 another reminder was sent to the management to concede to their demands by 15th April 1979.

e) Irked and motivated by the demands raised by the workmen and instead of considering the demands of the workmen, the management started thinking of ways and means of getting rid of the workmen by terminating their services in the guise of closure.

f) It is further stated that the alleged closure was malafide. In fact there was no closure and the workshop is still running.

g) Consequently on 24th April 1979 a notice of closure was issued with effect from 1st May 1979 and the workmen were advised to collect their dues from the office on or before 30th April, 1979.

h) On 3rd May 1979 the alleged mala fide closure was objected to by the workmen and they sent a letter to the conciliation officer and requested the management to permit the workmen to attend to their duties.

i) The notice of demand was served upon the management and conciliation proceedings were unsuccessfully initiated and most of the workmen whose services were terminated on the pretext of the closure have been taken back by the management who are silencing the business of motor repairing workshop.

3. The petitioner company in their written statement before the labour court urged as follows:

i) The reference is not a valid one as the industry was a dead industry and no dispute, much less the dispute for the re instatement of the workmen can be raised against the dead industry.

ii) No valid demand was made and the the dispute could not have been said to have acquired a character of industrial dispute.

iii) The closure compensation as required under the law was tendered to all the workmen working in the workshop.

iv) The charter of demand has nothing to do with the closure nor was the closure mala fide since the licensee of the petitioner M/s Bharat Petroleum Corporation, licensor, of the premises withdrew their letter evincing their intention to run the workshop from the premises by its letter dated 30th March 1979.

v) Since the BPCL vide their letter dated 20th April, 1979 did not permit the running of the workshop, this consequently lead to the impugned notice of closure.

vi) Thereafter M/s BPCL restarted the business of running the workshop through Shri H.S. Bassi under the name and style of M/s Auto Services which is a separate independent partnership concern.

4. The following issues were framed by the labour court:

1. Whether this court has no jurisdiction to entertain this reference in view of preliminary objection No. 1 of the written statement?
2. Whether there has been no proper and valid demand upon the management and its rejection thereof, if not its effect?
3. Whether there has been valid closure of the business of the management as alleged by it, if so its effect?
4. Whether the management has restarted its business, if so its effect?
5. As in terms of reference?

5. By the impugned award the labour court came to the following findings:

(i) It was undisputed that the present workmen were the employees of M/s Auto Centre and a charter of demand was submitted by the workmen; a letter was received from M/s BPCL for acquiring of rear portion, leading to the notice of closure; M/s BPCL admitted that the letter has been issued in 1979 due to instructions received from the headquarters.

It was further held as follows

"Admittedly the management did not take any action on the charter of demand submitted by the workmen and devised the present way of closing down the workshop in order to get rid of these workmen. It was a meticulously planned way to put the workmen on road in the garb of closure."

(ii) The closure of the undertaking was not due to unavoidable circumstances beyond the control of management and in fact there was no valid closure of business as alleged.

(iii) The alleged closure was not bona fide and the business was still functioning. In fact there was no closure and the question of restarting the business by the management does not arise.

6. In view of the above findings, the award was delivered on 5th July 1979 by the Labour Court directing the reinstatement of workmen with continuity of services and full back wages.

7. The said award was challenged by way of present writ petition. The main grievance of the petitioner is that the factum of closure on which the issue was framed cannot be termed as incidental to the decision on the issue which was referred to for adjudication. It has been stated that the issue of closure was the principal issue and the issue of closure could not have been dealt with by the

Labour Court since such an issue was not referred for adjudication and thus the award to that extent was beyond the jurisdiction of the terms referred to the Labour Court for adjudication. What was referred for adjudication was only the consequential action of termination of services flowing from the action of closure, which, according to the learned counsel for the petitioner, is a closed chapter.

8. In my view, the above plea of the learned senior counsel for the petitioner is wholly untenable and if upheld would give a handle to the unscrupulous employers to effect a mock closure so as to contend that closure having taken place could not now be adjudicated not even as an incidental issue in adjudicating the validity and legality of the termination of the services of the workmen. The claim which arose for incidental adjudication was whether there was malafide closure by the employer which necessarily arose for determination so as to determine the referred issue of the legality of termination of services of respondents 3(i) and (ii). In my view in order to find out whether the termination of the services of the respondents 3(i) and (ii) was legal and justified and if in its defense the management pleaded that there was a closure, it was open to the labour court to inquire about the legality and validity and the bonafides of the termination of the services and in order to do so to find out whether the closure was genuine or merely a mock one so as to deprive the workmen of their dues. The rapid exchange correspondence from 30th March, 1979 to 29th July, 1979 between the BPCL and the petitioner and the eventual result of such correspondence salting in the BPCL withdrawing its desire to run the workshop eloquently demonstrates that the BPCL abandoned its desire to start the workshop. And such a premise at the desire of BPCL was merely a ruse to get rid of respondents 3(i) and (ii). Significantly the first letter of BPCL was only issued on 31st March, 1979 after the charter of demands was submitted by the workmen on 16th March, 1979 and consequently I have not the slightest doubt in affirming the finding that the action of the petitioner company pleading closure was a mala fide one and indeed in fact there was no closure but only a pretence of change of hands at the same premises. Significantly the prime cause for the alleged closure i.e. the desire by BPCL to run the workshop no longer subsisted and this lends substance to the finding that the closure was malafide. In any event the findings of fact recorded by the labour Court suffer from no such infirmity so as to invite interference under Article 226 of the Constitution of India.

9. It is not in dispute however, that the respondent's services were terminated in 1979. After this length of time the reinstatement of respondents 3(i) and (ii) would not be practicable, and indeed desirable on account of the workmen having attained the age of superannuation. I am, Therefore, of the view that but for the attainment of the date of superannuation by both the workmen compensation in lieu of reinstatement ought to have been granted to the respondents. I cannot lose sight of the fact that the petitioner has been found to have gone through a mock exercise of the alleged closure in order to avoid the demands of workmen and such action was motivated, occasioned and accentuated by the notice of demand given by the workmen. The normal incident

of reinstatement would be the reinstatement with full back wages. The learned counsel for the respondents No. 3(i) and (ii) submitted that if the reinstatement was ordered with full back wages and all consequential benefits, the amount payable to the respondents No. 3(i) Abdul Hameed would be Rs. 3,11,913/- and respondent No. 3(ii) Hayat Singh would be Rs. 4,44,458/- as discernible from the following table:-

WAGES PAYABLE TO SH. ABDUL HAMID AND HAYAT SINGH BY AUTO CENTRE WORKSHOP, AS PER MINIMUM WAGES ACT.

Period	Rates	Months	Abdul Hameed	Hayat Singh
25.04.79-31.12.79	Not available	8 months	01.01.80-28.02.82 320/-	2 year and 1 month 8000/- - 8000/-
01.03.82-05.06.84	400/-	2 year and 3 month	10800/-	10800/-
06.06.84-29.09.85	472/-	1 year and 3 month 23 days	7080/-	7080/-
30.09.85-30.04.87	552/-	1 year and 7 month	10488/-	10488/-
01.05.87-15.03.88	651/-	10 month	6510/-	6510/-
16.03.88-30.04.89	749/-	1 year and 2 month	10486/-	10486/-
01.05.89-31.01.90	1017/-	8 months	8136/-	8136/-
01.02.90-31.07.90	1043/-	5 months	5215/-	5215/-
01.08.90-31.01.91	1104/-	5 months	5520/-	5520/-
01.08.91-31.01.92	1141/-	5 months	5705/-	5705/-
01.02.92-31.07.92	1208/-	5 months	6040/-	6040/-
01.08.92-31.01.93	1259/-	5 months	6295/-	6295/-
01.02.93-31.07.93	1328/-	5 months	6640/-	6640/-
01.08.93-14.02.94	1369/-	6 months	8214/-	8214/-
15.02.94-31.07.94	1806/-	5 months	9030/-	9030/-
01.08.94-31.01.95	1844/-	5 months	9220/-	9220/-
01.02.95-31.07.95	1919/-	5 months	9595/-	9595/-
01.08.95-31.01.96	1969/-	5 months	9845/-	9845/-
01.02.96-31.01.97	2101/-	11 months	23111/-	23111/-
01.02.97-31.01.98	2208/-	11 months	24288/-	24288/-
01.02.98-31.01.99	2361/-	11 months	25971/-	25971/-
01.02.99-31.01.00	2772/-	11 months	30492/-	30492/-
01.02.00-31.07.00	2843/-	5 months	14215/-	14215/-
01.08.00-31.01.01	2948/-	5 months	14740/-	14740/-
01.02.01-31.07.01	3003/-	5 months	15015/-	15015/-
01.08.01-31.01.02	3016/-	5 months	15080/-	15080/-
01.02.02-31.07.02	3091.40/-	5 months 28 days	6182.8/-*	15457/-
01.02.02-31.01.03	3103.70/-	11 months	34140.7/-	
01.02.03-31.01.04	3207.90/-	11 months	35286.9/-	
01.02.04-31.07.04	3286.90/-	5 months	16434.5/-	
01.08.04-31.01.05	3318.90/-	5 months	16594.5/-	
01.02.05-31.08.05**	3468.90/-	6 months	20813.4/-	
Total= 311913/- 4,44,458/-				

Abdul Hamid attained the age of superannuation i.e. 60 years on 28th March, 2002 and Hayat Singh on 31st August, 2005.

10. The counsel for the respondents 3(i) and (ii) Shri Saini is right in submitting that the above amount only reflects the amount payable as back wages and in addition the respondents 3(i) and (ii) would be liable to be reinstated and any compensation in lieu of reinstatement must take into consideration to decide both the quantum of back wages consequent to reinstatement after the setting aside an illegal order of termination and amount in lieu of reinstatement.

11. However, certain circumstances enumerated above such as the occupation of

mechanics which the respondent/workmen are, and such a category is unlikely to be totally unemployed and the long passage of time by which at the petitioner's behest, the implementation of the award had been stayed since 5th July, 1999, has led me to order reduced amounts towards back wages as both the workmen due to the prolonged pendency of the dispute have attained the age of superannuation. There have been allegations made by the petitioner that the respondents were running their workshops and it is not possible to believe on the facts of the present case that the mechanics working in a workshop would have been totally idle for such a long time. Accordingly, I am of the view that while the fact that respondents 3(i) and (ii) may have been working cannot be totally ruled out, however, such employment as self occupation cannot be treated to be employment in an establishment as contemplated by Section 17B of the Industrial Disputes Act as per the settled position of law so as to completely deny back wages. Since I can not grant reinstatement due to superannuation of the workmen, the amount payable to the workmen has to be quantified so as to arrive at a reasonable figure after taking into account the above factors.

12. It is contended that in *State of UP v. Jaibir Singh* 2005(2) CLR 534, it was held that worker oriented approach of the definition of "industry" unmindful of the employer's or the public would be one sided and not in accordance with the provisions of the Act. The above position of law laid down by the Hon'ble Supreme Court is binding and indeed being applied in the present case where inspired of finding that the closure lacked bonafides and was a ruse, this Court is not granting reinstatement with full back wages and only granting a reduced amount against the back wages claimed up to the date of this judgment. Reliance was also placed on *Central Council for Research in The Central Council for Research in Ayurveda and Siddha and Another Vs. Dr. K. Santhakumari*, , and *Uptron India v. Shammi Ban* (1998) 6 SCC to submit that a wrong concession made on a question of law can not bind the client. This finding was made in *Uptron's* case only on an issue of law and in the context of an earlier case and cannot ipso facto be applicable to the presents where the petitioner contested the entire dispute before the Labour Court and only after failing in the Labour Court sought to contest this in this Court. Even if the conduct of the petitioner's counsel before the Labour Court could be construed to a concession it was not necessarily a concession in law. The relevant applicable judgment in my view is 1984 Supp. S.C. 661 in *Sohan Singh v. G.M. Ordnance Factory* cited by *Shri R.K. Saini* appearing for the respondents where the following position law has been laid down by Hon'ble Mr. Justice N.L. Untwalia:-

"The High Court seems to have taken the view that the trial of such an issue was beyond the competence of the Labour Court; but it has rightly been pointed out on behalf of the appellants that instead of challenging the competence or the jurisdiction the Labour Court to try issue No. 4, the respondents went to trial, submitted to its jurisdiction and when a decision was given against them by the Labour Court, they, for the first time, challenged its jurisdiction to try that issue in the High Court.

On the facts of this case, Therefore, we are satisfied that the High Court ought not to have entertained the point of jurisdiction urged on behalf of the respondents and set aside the order of the Labour Court on that ground alone."

13. In view of the above categorical position of law laid down by the Hon''ble Supreme Court which is directly applicable to the facts of the present case there is no merit in the plea of the learned counsel for the petitioner Shri Bhandari about the lack of jurisdiction of the Labour Court. This position of law in Sohan Singh's case (supra) was followed by the Hon''ble Supreme Court in R.D. Kodre Vs. Management of The Deccan Education Societies, in the following terms:-

"28. The appellant also never raised any contention with regard to lack of jurisdiction on the part of the Govt. of NCT. Although in a given case the court may entertain such a plea although raised for the first time in a case of this nature, the Court may not intervene in the event it is found that substantial justice has been done to the parties. In Sohan Singh and Others Vs. General Manager, Ordnance Factory, Khamaria, Jabalpur and Others, such a question of jurisdiction was not permitted to be raised."

14. On the issue whether the referred terms in the present case could encompass the issue of the bonafides of closure the position of law has been succinctly and felicitously laid down by the learned Single Judge of this Court (Vikramajit Sen, J.) in M.C.K.R. Hospital v. Secretary Labour 2001 VII AD (DELHI) 942 in the following terms:-

"10. I find no substance in the argument of Mr. S.N. Bhandari, Learned Senior Counsel for the petitioner that a reading of the Terms of Reference would disclose that there was an assumption that the Lock-out also took place on 11.2.1995. On a plain reading it is mentioned that the strike occurred on 11.2.1995. It would, Therefore, be open to the Management to disclose and prove before the Presiding Officer, Industrial Tribunal that the Lock-out was as a consequence of the strike and occurred much after 11.2.95. As mentioned above if the strike is held to be illegal it would become a foregone conclusion as conceded by Smt. Shyamla Pappu, Learned Senior Advocate for the respondent that the Workmen would not be entitled to much relief. In this vie, the Terms of Reference as they are presently cast undoubtedly take within their sweep the entire dispute between the parties. Even if this is not so, it would be quite in order for the Industrial Tribunal to frame additional issues, in conformity with the extant practice. So long as these issues are incidental to and flow out of the Terms of Reference it would not tantamount to enlarging the scope of the Reference or proceeding beyond it. The central and local issue is the alleged strike and not is cause or genesis. If the Management considers it necessary that the question of the suspension of Ms. Nair should also be gone into, this may at best be an incidental issue, and, Therefore, could quite easily and appropriately be brought into the adjudication .

15. In the light of the above position of law laid down by this Court with which I

am in full agreement with, I am unable to agree with the position of law laid down by the Bombay High Court in *Mazdoor Congress v. N.L. Bhalachandra* 1993 (2) CLR 788, where it was held that a factum of closure was not incidental to the reference as to the legality of termination of a workman's services. In any event in the above case there was no question of the bonafides of the alleged closure raised or decided. In view the judgments of the full Bench of this Court in *Indian Tourism Development Corporation Vs. Delhi Administration and Others*, and 1998(1) LLN 269 in *Eagle Fashions v. Secretary (Labour)* are not applicable as the real dispute between the parties was referred for adjudication in the present case.

16. I have already held that the determination of the bonafides of the closure was certainly incidental to adjudicating the legality and validity of the termination of respondents 3(i) and (ii)'s services. There is no doubt that the court under Article 226 of the Constitution ought to consider the interest of both the parties and should counter weigh the conflicting rival claims without paying undue weightage to either the workmen or the employer. Compensation in lieu of reinstatement particularly where the termination is motivated and malafide as in the present case, leading to reinstatement has to reflect two factors:

(a) The amount payable as back wages and

(b) The amount payable in lieu of reinstatement which may be denied due to myriad factors.

17. However, in the facts of the present case, insofar as Abdul Hamid is concerned, he achieved the age of superannuation on 28th March 2002 and cannot, Therefore, be granted either reinstatement or compensation in lieu of reinstatement. In so far as Hayat Singh is concerned, he also attained the age of superannuation on 31st August 2005. Therefore, he is also not entitled to compensation in lieu of reinstatement. Thus, in the facts and circumstances of the present case and the figures available, the respondents are not entitled to compensation in lieu of reinstatement as both the respondents have now attained the age of superannuation i.e. Abdul Hamid on 28th March 2002 and Hayat Singh 31st August 2005. Normally compensation in lieu of reinstatement has to reflect both the payment of back wages payable as a result of illegal order of termination leading to the reinstatement as well as compensation in lieu of reinstatement if not ordered on the facts and circumstances of the case. In the facts and circumstances of the present case since both the respondents are not entitled to be reinstated because of their having attained the age of superannuation, I am satisfied that only certain reduced amount towards backwages should be paid to the respondent Nos. 3(i) Abdul Hamid and respondent No. 3(ii) Hyat Singh.

18. Accordingly, in my view the interests of justice will be fully met if compensation to the tune of Rs. 1,75,000/- is granted to the respondent No. 3(i) Abdul Hamid as opposed to the figure of Rs. 3,11,913/- claimed up to the date of

superannuation at the rate of minimum wages and Rs. 2,50,000/- is granted to respondents No. 3(ii) Hayat Singh as opposed to the figure of Rs. 4,44,580/- calculated and claimed at the rate of minimum wages up to the date of superannuation to be paid by the petitioner within six weeks from today. If the awarded compensation amount is not paid within six weeks, it will carry interest @ 9% from the date of award till today and 6% from the date of judgment till it is totally paid to the respondents.

19. With the above observations the present petition stands disposed of with costs quantified at Rs. 5,000/- each to be paid to both the respondents No. 3(i) and 3(ii) within six weeks from today.

20. Mr. R.K. Saini was appointed as amicus curiae by this Court and has graciously assisted the Court. The Member Secretary, Delhi High Court Legal Services Committee, is directed to pay a sum of Rs. 7,500/- to Mr. Saini for appearing as amicus curiae in the case including all expenses incurred by him.