
(1975) 02 PAT CK 0019
In the Patna High Court

Basant Lal Sah

APPELLANT

Vs

Divisional Mechanical Engineer, (C.W.) N.E. Ry.

RESPONDENT

Date of Decision : 24-02-1975

Acts Referred:

Constitution of India, 1950 — Article 14, 226, 227, 311
Industrial Disputes Act, 1947 — Section 2, 25F, 25G, 25H, 2A

Citation : (1977) 2 LLJ 154

Hon'ble Judges : S. Ali Ahmad, J;B.D. Singh, J

Bench : Division Bench

Judgement

B.D. Singh, J.—This application by Basantlal Sah under Articles 226 and 227 of the Constitution of India is directed against an order dated 29.6.74/1.7.74 (Annexure 1) passed by the Divisional Mechanical Engineer, N.E. Railway, Katihar, (the respondent), whereby a notice under Rule 149 of the Indian Railways Establishment Code (hereinafter to be referred to as "the Code") Vol. I was given to the petitioner intimating him that his services would stand terminated from the date of expiry of one month's period of the notice from the date on which the notice was served on or tendered to the petitioner.

2. In order to appreciate the point involved in the application it would be necessary to state briefly the facts, The petitioner was appointed as a substituted carriage khalasi in the railway on 9.4.1969, and was continuing in service in that post for more than five years, as stated in paragraph 2 of the Writ application. He has also stated in the other part of his application that he had received increments and was medically examined for absorption in service. As a carriage khalasi he was a workman and was governed by the provisions, according to him, contained in the Industrial Disputes Act. (hereinafter referred to as "the Act") and was entitled to all the benefits thereof, including Chapter VA of the Act. It was also mentioned in the application that he was arrested on 8.5.74 and was taken into custody by Katihar police. He was lodged in jail custody on that day and was released on bail on 23.6.74. Therefore, he could not join his duty during the said period. When the petitioner went to join his duty on 28.6.74 he was not

permitted to do so, and was told that his services were terminated. On 4.7.74 he received the impugned order (Annexure 1) and thereafter he filed a memorandum of appeal to the Divisional Superintendent, N.E. Railway, Katihar, on 12.7.74 (Annexure 2) who had assured him that he would be reinstated but no action was taken thereon. Therefore, the petitioner filed the present application and obtained rule on 23.8.74. He has prayed therein for quashing of the impugned order contained in Annexure "1".

3. On behalf of the respondent a counter-affidavit has been filed on 11.10.74 wherein it was stated, inter alia that the petitioner was appointed as casual labour (substitute) from 7.5.69 and not from 9.4.69, as stated in paragraph 2 of the writ application. It was also asserted therein (that the petitioner was not a workman and, therefore, he was not governed by the provisions of the Act, so as to be entitled to the benefits provided therein, including the benefits under Chapter VA of the Act. In support of the impugned order it was stated that the petitioner was given one month's notice in accordance with law. The petitioner was not entitled to get anything from the railway, except his contribution to the provident fund, which the railway was prepared to pay and the petitioner might have taken the same whenever he liked.

4. The petitioner has also filed a rejoinder to the said counter-affidavit on 3.12.74 reiterating that this case was governed by the Act and he was entitled to the benefit under Chapter VA of the Act. On 8.12.74 he further filed a supplementary affidavit stating therein that subsequent to the filing of the application in this Court, he had come across an instruction issued by the Railway Board on 5.3.73 (Annexure 3).

5. Mr. B.C. Ghose, learned counsel appearing on behalf of the petitioner, has assailed the impugned order and has raised the following points for consideration:

(i) The case of the petitioner was governed by the Industrial Disputes Act and was entitled to all the benefits of the Act, including Chapter VA. According to him, Rule 149 of the Code was not applicable in his case.

(ii) The impugned order was bad as it was not accompanied by the amount payable to him on his retrenchment as provided u/s 25F of the Act. Alternatively, he contended that if it was held that Rule 149 was applicable to the petitioner, the said rule was ultra vires of Article 14 of the Constitution as:

(a) the said rule gave unbridled and unqualified power to the lowest officer of the railway to terminate the service of the employee concerned; and

(b) the said rule made discrimination between railway workmen and the workmen defined under the Act.

6. It will be convenient to deal with the submission of the learned Counsel for the petitioner under point No. (i) first. In order to find support to his contention under this head, learned Counsel has relied on a Division Bench decision of this Court in *Somu Kumar Chatterjee and Another Vs. District Signal Tele-*

Communication Engineer and Another, . In the case the application under Article 226 of the Constitution was filed by casual employees of the railway against an order of retrenchment, and the Railway Administration had taken the preliminary objection that the railway was not an industry so as to attract the provisions of the Act. Mr. Ghose drew our attention to paragraphs 9, 10, 11 and 12 of the judgment. In paragraph 9 the question before Untwalia and B N. Jha, JJ , was also as to whether the railway was an industry within the meaning of the Act. B.N. Jha, J., who delivered the judgment for the Court, observed in paragraph 9 that it was apparent that the railway was an industry within the meaning of the Act, and the dispute with its workmen could be resolved in accordance with the provisions of the Act. As it would appear from paragraph 10 thereof, his Lordship for this purpose had relied on a decision of the Supreme Court in the The State of Bombay and Others Vs. The Hospital Mazdoor Sabha and Others, . The second question, which arose for decision in that case is to be found in paragraph 12 of the judgment wherein the contention of the petitioner's counsel was that the railway had retrenched them in breach of the provisions of Sections 25F and 25G of the Act and. therefore, without raising an industrial dispute the individual workman had a right to come to this Court for quashing the order of retrenchment under Articles 226 and 227 of the Constitution; whereas on behalf of the Railway Administration it was contended that those petitioners had no right to come to this Court without having raised industrial dispute. B.N. Jha, J., observed.

...In my opinion, therefore, the petitioners have a right to come before this Court for the reliefs prayed for without raising an industrial dispute....

7. Mr. Jagdish Sahai, learned Counsel appearing on behalf of the respondent urged that in the instant case the principle laid down in Somu Kumar Charterjee's Case (supra) was not applicable. He drew our attention in Chapter VA of the Act which contains the provision for lay-off and retrenchment. Section 2(oo) of the Act defines the expression "retrenchment" which means "the termination" by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include.

(a) voluntary retirement of the workman; or

(b) retirement of the workman or reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; or

(c) termination of the service of a workman on the ground of continued ill-health.

The expression "lay-off" has been defined in Section 2(kkk) and it provides as:

lay-off (with its grammatical variations and cognate expressions) means the failure, refusal or inability of an employer on account of shortage of coal, power or raw materials or the accumulation of stocks or the breakdown of machinery or

for any other reason to give employment to a workman whose name is borne on the muster rolls of his industrial establishment and who has not been retrenched;

Explanation-Every workman whose name is borne on the muster rolls of the industrial establishment and who presents himself for work at the establishment at the time appointed for the purpose during normal working hours on any day and is not given employment by the employer within two hours of his so presenting himself shall be deemed to have been laid off for that day within the meaning of this clause:

Provided that if the workman, instead of being given employment at the commencement of any shift for any day is asked to present himself for the purpose during the second half of the shift for the day and is given employment then, he shall be deemed to have been laid off only for one half of that day: Provided further that if he is not given any such employment even after so presenting himself, he shall not be deemed to have been laid-off for the second half of the shift for the day and shall be entitled to full basic wages and dearness allowance for that part of the day.

He pointed out that in the instant case, it is neither a case of retrenchment, nor the ease of lay-off. The services of the petitioner being temporary, were terminated by the impugned order, without casting any stigma on him. He drew our attention to paragraph 5 of the counter-affidavit, where it was stated that the petitioner having completed six months' service as a substitute was entitled only to all rights and privileges of a temporary railway servant as per rule. He also drew our attention to paragraphs 8 to 10 of the counter affidavit, which contain disputed questions of facts and on that account alone, he submitted that the application was not maintainable. He submitted that Somu Kumar Chatterjee's case was a case of retrenchment, and not a case of termination simpliciter, which question has to be decided in the instant case. In order to find support to his contention he has relied on another unreported judgment of this Court in *Abdul Sattur v. The Senior Personnel Officer (CR), North Eastern Railway, Gorakhpur*, C. W.J.C. No. 105 of 1966, disposed of on 20.8.1967 where Nausimham, C.J., and K.B.N. Singh, J., were dealing with the case of a temporary employee of the railway. In that case on behalf of the petitioner reliance was placed on a decision of the Supreme Court in *Moti Ram Deka etc. Vs. General Manager, N.E.F. Railways, Maligaon, Pandu, etc.*, . Their Lordships observed that the decision of the Supreme Court applied only to a permanent railway servant and did not apply to temporary railway servants, whose tenure depended on the terms of the contract of the employment between the parties. Even a temporary servant was doubtless entitled to the protection of Article. 311(2) of the Constitution, if his services were terminated by way of punishment, as pointed out in *Jagdish Mitter Vs. The Union of India (UOI)*, case, but the case, which their Lordships were deciding did not cast any stigma on the petitioner; nor was there any adverse remark against him. Therefore, their Lordships held that that was a simple case of termination in exercise of the contractual right of

the employer and Article 311(2) did not apply.

8. In my opinion, the observation of their Lordships in that case does not help the respondent in the instant case for holding that the railway is not an industry. It may be noticed that in paragraph 4 of the judgment their Lordships have clearly indicated that Mr. Ali Ahmad, who appeared on behalf of the petitioner, after some arguments, stated that he would not press the application reserving to him the right to seek appropriate relief under the Industrial Disputes Act, 1974, if so advised. Their Lordships further observed: "We, however, express no opinion as to whether the petitioner is entitled to the benefits conferred by the Industrial Disputes Act, 1947. This will have to be decided by the appropriate Tribunal under that Act...."

9. He also relied on a Bench decision of the Assam and Nagaland High Court in *Sujit Kantha Neogi v. Union of India* AIR 1970 Gau 131. In that case also Mr. B.C. Ghose, learned Counsel for the petitioner, had appeared. He drew our attention to paragraph 11 at page 136 of the decision, which is relevant for this case. It will be useful to quote below the said paragraph in extenso:

Mr. Ghose next contends (that the order being in violation of Section 25F of the Industrial Disputes Act is void and illegal and as such should be quashed in our writ jurisdiction. In this context, he draws our attention to the amended Rule 149 by adding Sub-rule (6) therein which runs as follows:

6. Notwithstanding anything contained in Clause(1), (2) and (4) of this Rule, if a railway servant or apprentice is one to whom the provisions of the Industrial Disputes Act, 1947, apply, he shall be entitled to notice or wages in lieu thereof in accordance with the provisions of that Act.

He, therefore, contends that since the termination in question on retrenchment within the meaning of Section 2(oo) of the Industrial Disputes Act. the provisions of Section 25F thereof are clearly attracted. In this case, Mr Ghose relied upon the *The State of Bombay and Others Vs. The Hospital Mazdoor Sabha and Others*, . He submits that the Supreme Court has approved of the decision of the Bombay High Court holding that the orders which do not comply with the mandatory provisions of Section 25F, were invalid and inoperative and did not interfere with the writs of mandamus issued by that Court. The learned Counsel has failed to take note of the concession made by the appellants that the case was one of retrenchment. The chief question that was canvassed in that decision is one centering round the meaning of industry u/s 2(j) of the Industrial Disputes Act. In the instant case, the respondents do not admit that it is a case of retrenchment within the meaning of Section 2(oo) of the Act. The Supreme Court has interpreted the definition of retrenchment in Section 2(oo) in *Hari Prasad Shukla v. A.D. Divakar* AIR 1957 S.C. 121 and has held that the ordinary meaning of retrenchment fulfils the requirements of Section 2(oo), that is to say when a portion of the staff or the labour force is discharged as surplus. The present termination of the service of the petitioner is, therefore, not a case

of retrenchment within the meaning of Section 2(oo) and as such he cannot invoke the provisions of Section 25F of the Act, which is mentioned in Sub-rule (6) of Rule 149, sought to be invoked in his favour. The objection on this ground is therefore, "without any substance".

Mr. Sahay also referred to *Hari Prasad Shiyashanker Shukla v. A.D. Divelkar* AIR 1957 S.C. 151, wherein Section 2(oo) of the Act was interpreted. He drew our attention to paragraph 11 of the judgment, which is to this effect;

There is no doubt that when the Act itself provides a dictionary for the words used, we must look into that dictionary first for an interpretation of the words used in the statute. We are not concerned with any presumed intention of the Legislature; our task is to get at the intention as expressed in the statute. Therefore, we propose first to examine the language of the definition and see if the ordinary, accepted notion of retrenchment fits in, squarely and fairly, with the language used. What is the ordinary, accepted notion of retrenchment in an industry? We have had occasion to consider this question in *Pipraich Sugar Mills Ltd. Vs. Pipraich Sugar Mills Mazdoor Union*, where we observed:

But retrenchment connotes in its ordinary acceptation that the business, itself is being continued but that a portion of the staff or the labour force is discharged as surplusage and the termination of services of all the workmen as a result of the closure of the business cannot, therefore, be properly described as retrenchment.

It is true that these observations were made in connection with a case where the retrenchment took place in 1951, and we specially left open the question of the correct interpretation of the definition of "retrenchment" in Section 2(oo) of the Act. But the observations do explain the meaning of retrenchment in its ordinary acceptation. Let us now see how far that meaning fits in with the language used. We have referred earlier to the four essential requirements of the definition, and the question is, does the ordinary meaning of retrenchment fulfil those requirements? In our opinion it does. When a portion of the staff or labour force is discharged as surplusage in a continuing business, there are (a) termination of the service of a workman; (b) by the employer; (c) for any reason whatsoever and (d) otherwise than as a punishment inflicted by way of disciplinary action. It has been argued that by excluding bona fide closure of business as one of the reasons for termination of the service of workmen by the employer, we are cutting down the amplitude of the expression "For any reason whatsoever" and reading into the definition words which do not occur there. We agree that the adoption of the ordinary meaning gives to the expression "for any reason whatsoever" a somewhat narrow scope; one may say that it gets a colour from the context in which the expression occurs; but we do not agree that it amounts to importing new words in the definition. What, after all, is the meaning of the expression "for any reason whatsoever"? When a portion of the staff or labour force is discharged as surplusage in a running or continuing business, the termination of service which follows may be due to a variety of reasons: e.g., for

economy, rationalization in industry, installation of a new labour-saving machinery, etc. The Legislature in using the expression "for any reason whatsoever" says in effect: "It does not matter why you are discharging the surplus; if the other requirements of the definition are fulfilled, then it is retrenchment". In the absence of any compelling words to indicate that the intention was even to include a bona fide closure of the whole business, it would, we think, be divorcing the expression altogether from its context to give it such a wide meaning as is contended for by learned Counsel for the respondents. What is being defined is retrenchment, and that is the context of the definition. It is true that is the context of the definition. It is true that an artificial definition may include a meaning different from or in excess of the ordinary acceptance of the word which is the subject of definition; but there must then be compelling words do show that such a meaning different from or in excess of the ordinary meaning is intended.

Where, within the frame work of the ordinary acceptance of the word, every single requirement of the definition clause is filled, it would be wrong to take the definition as destroying the essential meaning of the word defined." On the basis of the above observations Mr. Sahay contended that the expression "for any reason whatsoever" occurring in Section 2(oo) would not include termination simpliciter as in the instant case. Therefore, according to him, Chapter V.A. of the Act was not applicable to the petitioner in the present case.

10. Mr. Sahay further urged that in order to attract the provision of the Act it was essential that an industrial dispute was raised. As regards the consideration as to whether Rule 149 of the Code was ultra vires, he submitted that the observation of their Lordships in *Moti Ram Deka v. N.E. Railway* (supra) on which reliance was placed on behalf of the petitioner, is not applicable to the instant case. He submitted that in that case it was held that Rule 149 of the Code was intra vires so far as the non-permanent employees are concerned. In other words, it was held to be ultra vires only with regard to the permanent employees. Here it would be worthwhile to quote below Rule 149(1) of the Code;

(1) Temporary railway servants. When a person without a lien on a permanent post under Government is appointed to hold a temporary post or officiate in a permanent post, he is entitled to no notice of the termination of his service if such termination is due to the expiry of the sanction to the post which he holds or the expiry or the officiating vacancy or is due to mental or physical incapacity or to his removal or dismissal as a disciplinary measure after compliance with the provisions of Clause (2) of Article 311 of the Constitution of India. If the termination of his service is due to some other cause, he shall be entitled to one month's notice provided he was engaged on a contract for a definite period and the contract does not provide for any other period of notice, and to a notice of 14 days if he was not engaged on a contract. The periods of notice specified above shall apply on either side, and steps should be taken to bring this condition to the notice of the railway servants concerned.

Mr. Sahay submitted that in the instant case the above provision of the rule is attracted as here, we are concerned with the substituted service of a casual employee. Besides, he urged that vires cannot be challenged regarding the Central rules, unless notice is given to the Attorney-General as required under Rule 1 or Order 27A of the Code of Civil Procedure.

11. In my opinion, it will be convenient to deal with the question as to whether the petitioner in the instant case could have come to this Court, without industrial dispute having been raised. According to Mr. Sahay, as mentioned earlier, he could not have come without industrial dispute having been raised. In order to find support to this contention he relied on a Bench decision of this Court in Ahmad Ali Ansari and Others Vs. Shree Chaudhary Sia Saran Sinha and Others, , where Ramaswami, C.J., and R.K. Choudhary, J., while dealing with the provisions contained in Section 2(k) of the Act, observed that the definition of the expression "industrial dispute" in Section 2 of the Act, though wide enough to cover a dispute between the employer, on the one hand, and its individual employees, on the other yet considered in the light of the object for which the Act was enacted left no room for doubt that an individual dispute of one or more of the employees simpliciter, was not intended to be covered by the expression "industrial dispute." The reason was that in an individual dispute of one or more of the workmen with which the rest of the workmen or a substantial number of them were not at all concerned or interested, and the cause had not been taken up by the trade union concerned, there was no possibility of any industrial strife or unrest, nor was there any possibility of good relations between employers and employees becoming insecure. In order that there be an industrial dispute contemplated by Section 2(k) there must be a collective dispute on behalf of the employees as a class, either being represented by all or a substantial number of them or by the trade union concerned, so as to necessitate the resolving of the same in order to prevent industrial strike and unrest and to promote measures for securing and preserving good relations between employers and employees so far as an individual dispute of any of the workman was concerned, he had got his remedy by a suit under the common law right, and not under the Act as it was not an industrial dispute.

12. In my opinion, in view of the provisions contained in Section 2A. which has been introduced by the Amending Act 35 of 1965, the above observation is no longer applicable. Section 2A of the Act provides:

Where any employer discharges, dismisses, retrenches or otherwise terminates the services of an individual workman, any dispute or difference between that workman and his employer connected with, arising out of, such discharge, dismissal, retrenchment or termination shall be deemed to be an industrial dispute notwithstanding that no other workman nor any union workmen is party to the dispute.

Reference may also be made to paragraph 12 of the judgment in Somu Kumar Chatterjee's case (supra), at page 187 where it was clearly held that the

petitioner had a right to come before this Court for the reliefs prayed for without raising an industrial dispute under Articles 226 and 227 of the Constitution. It may be noticed that in that case also a similar argument was advanced on behalf of the railway. Therefore, in my opinion, there is no merit in the contention of Mr. Sahay in this regard.

13. On the submission of the counsel for the parties another question, which is for consideration is as to whether the railway was an industry within the meaning of the Industrial Disputes Act. In my opinion this question is also now firmly settled in view of the decision in *Somu Kumar Chatterjee and Another Vs. District Signal Tele-Communication Engineer and Another*, it was clearly laid down, relying on *The State of Bombay v. The. Hospital Mazdoor Sabha* (supra) that the railway is an industry. In that case it was held that the railway is an industry within the meaning of the Act and the provisions of the Act are applicable in appropriate cases relating to railway.

14. Now I propose to deal with the question as to whether the term "retrenchment" as defined in Section 2(oo) of the Act would mean termination of service as affecting the petitioner by the impugned order. As mentioned earlier Mr. Sahay has relied on the observations of their Lordships in AIR 1957 SC 121 where Section 2(oo) of the Act was construed in paragraph 11 of the judgment which I have quoted earlier in extenso. In my opinion, the above observation of their Lordships is of no avail in the instant case to decide the question as to whether termination of service would also come under the term "retrenchment." It may be noticed that in that case their Lordships were considering the case of closure. With due respect I differ from the views taken by their Lordships in AIR 1970 G&N 131 (supra) which of course deals with a case of termination. In my view the definition of the word "retrenchment" u/s 2(oo) of the Act is wide enough to include "termination of service" as affecting the petitioner by the impugned order. Section 2(oo) of the Act lays down that retrenchment means termination by the employer of the service of a workman for any reason whatsoever. The expression "any reason whatsoever" occurring there is of very wide import, which, however, is curtailed by: (a) voluntary retirement of the workman, or (b) retirement of workman or reaching the age of superannuation of the contract of employment between the employer and the workman concerned contains a stipulation in that behalf, or (c) termination of the service of a workman on the ground of continued ill-health. Therefore, in a case where there is contract of employment between the employer and the workman concerned containing stipulation in that behalf that termination would not be a retrenchment. Similarly, termination of service of a workman on the ground of continued ill-health would also not be a case of retrenchment. In the instant case the service of the petitioner was not for stipulated period. As mentioned earlier, the petitioner was holding the post of substituted exercise khalasi. In this connection reference may be made to Rules 2313 and 1318 of Chapter XXIII, Section "A", relating to non-gazette staff, of the Terms and Conditions Applicable to Railway Servants and Substitutes in Temporal Service, printed at pages 9 and

10 of the Indian Railway Establishment Manual (Second Edition). Rule 2315 defines the word "substitutes" and it provides as follows:

"Substitutes" are persons engaged in Indian Railway Establishments on regular scales of pay and allowances applicable to posts against which they are employed. These posts may fall vacant on account of a railway servant being on leave or due to non-availability of permanent or temporary railway servants and which cannot be kept vacant.

Rule 23 8 relates to rights and privileges admissible to the substitutes and it provides thus:

Substitutes should be afforded all the rights and privileges as may be admissible to temporary railway servants, from time to time on completion of six months continuous service. Substitute school teachers may, however, be afforded temporary status after they have put in continuous service of three months and their services should be treated as continuous for all purposes except seniority on their eventual absorption against regular posts after selection.

NOTE:-The conferment of temporary status on the substitutes on completion of six months continuous service will not entitle them to automatic absorption/appointment to railway service unless they are in turn for such appointment on the basis of their position in select lists and/or they are selected in the approved manner, for appointment to regular railway posts.

15. The view, which I have taken, also finds some support from the observation in *State of Bombay v. The Hospital Mazdoor Sabha* (supra). In that case appeal was filed in the Supreme Court by the State of Bombay and two others, and it arose from a writ petition filed against it by the Hospital Mazdoor Sabha, a trade union registered under the Industrial Trade Unions Act XIV of 1926, and two of its members Mrs. Vatsala Narayan and Mrs. Ruth Issac, respondents 1 to 3. The respondents 2 and 3 were employed as Ward servants in the J.J. group of hospitals. The Superintendent of the said group of hospitals informed the said respondents by notices issued respectively against them that their services would be terminated with effect from the dates mentioned in the said notices and in accordance with the said notices their services were in fact terminated; subsequently in their place two State servants who were discharged from the Civil Supplies Department were appointed. The writ petition filed by the respondents alleged that the retrenchment of respondents 2 and 3 was void as it did not comply with the mandatory provisions of Section 25F and 25H of the Act. Their Lordships in paragraph 6 at page 613 observed:

On a plain reading of Section 25F(b) it is clear that the requirement prescribed by it is a condition precedent for the retrenchment of the workman. The Section provides that no workman shall be retrenched until the condition in question has been satisfied. It is difficult to accede to the argument that when the Section imposes in mandatory terms a condition precedent, noncompliance with the said condition would not render the impugned retrenchment invalid....

It may be noticed that Section 25F of the Act also falls within Chapter VA of the Act, which deals with "lay-off" and "retrenchment." In that view also their Lordships held in that case that the respondents, since their services were terminated, would be entitled to the benefits available u/s 25F of the Act, which benefits are available under retrenchment. Therefore, I hold that the petitioner was entitled to the benefits under Chapter VA of the Act, since those benefits have not been accorded to him under the impugned order and, therefore, the same cannot be sustained)

16. in the result, the application is allowed and the impugned order contained under Annexure 1 is quashed. In the circumstances, however, there will be no order as to costs.

S. Ali Ahmad, J.

I agree.