
(2005) 03 AHC CK 0168

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 11501 of 2001

Basti Sugar Mills Co. Ltd., Basti

APPELLANT

Vs

State of U.P. and others

RESPONDENT

Date of Decision : 07-03-2005

Acts Referred:

Constitution of India, 1950 — Article 226
Uttar Pradesh Industrial Disputes Act, 1947 — Section 6N

Citation : (2005) 03 AHC CK 0168

Hon'ble Judges : Rakesh Tiwari, J

Final Decision : Dismissed

Judgement

Rakesh Tiwari, J.—Heard Counsel for "the parties and perused the record.

2. This writ petition has been filed for quashing of the impugned Award dated 23.6.2000 (Annexure 1 to the writ petition) passed by the Presiding Officer, Labour Court, Betiahata, Gorakhpur in Adjudication Dispute No. 234/89.

3. By the impugned award, the Labour Court has directed reinstatement of Nathu Ram Singh, respondent No. 3 along with back wages.

4. The facts in brief are that the petitioner Sugar Mill is a company registered under Indian Companies Act, 1956 having its registered office at Delhi. The Company has a manufacturing unit at Basti which is engaged in the manufacture of crystal sugar by vacuum pan process. Respondent No. 3 was engaged by the petitioner as a Cane Development Supervisor on 13.2.1988. The petitioner claims that the respondent workman was a "trainee supervisor" on probation appointed on a consolidated salary of Rs. 900/ per month whereas the respondent workman claims that he was appointed as "Cane Development Supervisor". Since the whole dispute centers around the nature of duties it would be necessary to reproduce the letter of offer of appointment dated 5.2. 1988 which is as under:
"P/3605 5.2.88

APPOINTMENT ADVICE

Shri Nathu Ram Singh,
Cane Supervisor,
Saraya Sugar Mills Pvt. Ltd.,
P.O. Sardar Nagar,
District Gorakhpur

With reference to your application and subsequent interview held on 25.1.1988, we are pleased to inform you that you have been selected for the post of Development Supervisor on the term and condition settled with you. A Formal appointment letter will be issued to you after you join us.

Please let us know the tentative date of your joining per return.

S/D illegible,

General Manager."

5. It appears from the record that the work of respondent No. 3 was not found satisfactory and his services were terminated. Aggrieved, respondent No. 3 raised an industrial dispute, which was registered as C.B. Case No. 10/89. Since no amicable settlement could be arrived at during the conciliation proceedings, the following matter was referred by the State Government to the Labour Court, Gorakhpur where it was registered as Adjudication Case No. 234/89:

6. The case of respondent No. 3 was that from a bare perusal of the letter of offer for appointment it is crystal clear that he was selected on the post of "Cane Development Supervisor" and a formal appointment letter was to be issued which in fact was never issued and that it is also evident from the letter dated 5.2.1988 that he was neither a trainee nor was on probation but his appointment was permanent.

7. Counsel for the petitioner submits that from the perusal of the order of reference as well as letter dated 5.2.1988 it is evident that the petitioner was a supervisor and not a workman. It is also submitted that there is no finding by the Labour Court that respondent No. 3 had worked continuously for 240 days or not and there was any violation of the provisions of Section 6N of the U.P. Industrial Disputes Act, 1947. It is stated that from the perusal of written statement and evidence before the Labour Court also, it is undisputed that the workman had been interviewed for the supervisory post and was appointed as the Development Supervisor. Reliance has been placed by the Counsel for the petitioner on the decisions rendered in (1) Krishnadevaraya Education Trust and another v. L.A. Balakrishna, 2001 (88) FLR 753; (2) Management of M/s. OTIS Elevator Co. (India) Ltd.. v. Presiding Officer, Industrial Tribunal III and another, 2003 (98) FLR 53 and (3) Kalyani Sharp India Ltd., v. Labour Court No. 1, Gwalior and another, (2002) 9 SCC 655, in support of his contention that the services of a person on probation is not illegal even if his services were

terminated due to his unsatisfactory work and such termination would not amount to termination by way of punishment.

8. Counsel for the petitioner then submits that the case of the petitioner before the Labour Court was that while respondent No. 3 was working in the Cane Development Department as trainee on probation his work was not satisfactory and his services were terminated during the period of probation; that he was only a trainee on probation and not a workman, hence no notice of termination of service was required to be given to him. It was also their case that there was no vacancy on the post of Cane Development Supervisor at the time when he was engaged and even thereafter. Therefore, he cannot be continued in service on a post which is not available; that the petitioner was denied an opportunity to lead evidence also as the Labour Court passed order to proceed *ex parte*.

9. Shri Shyam Narain, Counsel for the respondent workman has vehemently argued that the letter dated 5.2.1988 or "appointment advice" clearly shows that the appointment of the respondent was against a permanent post and he was neither a probationer nor a trainee. He further submits that since no formal letter of appointment setting aside the terms and conditions of appointment had been issued in terms of letter dated 5.2.1988, hence the nature of appointment has to be construed on the basis of the aforesaid letter. It is also submitted that it is not the designation of the workman which is material for determining the question as to whether an employee is a workman or not but the nature of duties assigned to him and since no evidence whatsoever was produced by the employer to establish the nature of duties of the workman as to whether he was a trainee supervisor or a probationer he has rightly been held to be a workman. He has placed reliance upon paragraph 8 of the award which is as under:

10. Taking the arguments further it is emphasized that the employer in Clause 6 of their written statement have clearly averred that the officers were not satisfied with the work of the workman and as a result thereof his services were terminated w.e.f. 31.12.1988, which itself shows that the order of termination though innocuously worded was meted out to the workman as a measure of punishment. Support has been drawn by the Counsel in this regard from the decision in *V.P. Ahuja v. State of Punjab and others*, 2000 (85) FLR 197, wherein it has been held that if the services of the employee are terminated during the period of probation without enquiry or giving any opportunity it would be deemed to be as a measure of punishment and illegal.

11. It is next contended that even trainee is a workman. He has relied upon the decision in this regard rendered in *Trambak Rubber Industries Ltd. v. Nashik Workers Union and others*, (2003) 6 SCC 416. The Apex Court in *Trambak Rubber Industries Ltd.* (*supra*) held that where the entire production activity was carried out only by the trainees for more than one and half years and in the absence of the trainers the trainees on the facts were workmen. Reliance has also been placed upon the decision rendered in *National Engineering Industries Ltd. v. Shri Kishan Bhageria and others*, AIR 1988 SC 329, wherein in paragraphs

7, 8 and 9 it has been held that the question whether a person was performing supervisory or managerial work was the question of fact to be decided bearing in mind the principal as to what was the main work of the workman which must be found out from the main duties. In the facts and circumstances of that case it was held that the supervisor was one who could bind the company to take some kind of decision on behalf of the company. One who was reporting merely as to the affairs of the company and making assessment for the purpose of reporting was not a supervisor. The main thrust of the judgment in that case was whether the supervisor had any right or authority to take a decision binding on the workman.

12. He has then relied upon paragraph 5 of the judgment rendered by the Hon"ble Supreme Court in *Indian Farmers Fertilizer Cooperative Ltd. v. Industrial Tribunal I, Allahabad and others*, (2002) 3 SCC 544. In paragraph 5 it has been held:

"5. Before us, the contentions urged before the High Court are reiterated. The learned Counsel for the appellant urged that the Tribunal had travelled far beyond the scope of the reference inasmuch as the question referred to it was only limited as to whether the appellant had wrongly terminated the services of 88 workmen. The question whether 88 workmen were employees of the appellant was completely outside the scope, of the reference. Even otherwise the findings recorded by the Tribunal had been recorded ignoring completely the material evidence on record and in this context, the learned Counsel relied upon the decision in *Steel Authority of India v. V.S. Yadav*. The claim of the workmen has been that they have been employed by the appellant. When the stand of the appellant is that the workmen were not employees of the appellant but they were working under a contractor, necessarily the issue arose as to the nature of their employment inasmuch as the relief that would be granted to them would depend upon the same. In the circumstances, the nature of their employment, whether directly under the appellant or through the contractor, was necessarily to be decided. Even otherwise, a full reading of the reference would show that there was no indication that they had been employed by a contractor but their services had been terminated from the respective date shown against them and whether the same was justified or not. In such a case, when a question was raised that the workmen in question were not the employees of the appellant, necessarily the Tribunal had to go into the question whether they were the employees of the appellant or not. On due appreciation of evidence, the Tribunal came to the conclusion that they are the employees of the appellant and that finding of fact was based on evidence. In our opinion, the conclusion reached by the Tribunal could not be seriously assailed by the learned Counsel for the appellant. We find no justification to interfere with the award as affirmed by the High Court."

13. Shri Syam Narain has next placed reliance upon paragraph 11 of the decision rendered in *M/s. U.P. Drugs and Pharmaceuticals Co. Ltd. v. Ramanuj Yadav and others*, 2003 LLR 1097 (SC), in support of his contention that Section 2 (g) of

the U.P. Industrial Disputes Act, 1947 does not require a workman to avail the benefit of the deeming provision of completion of one year of continuous service in the industry, to have worked for 240 days during "preceding" period of 12 calendar months. The Apex Court in paragraph 11 considered the scope of Section 25B of the Industrial Disputes Act in the background of the decision taken in Mohan Lal v. Management of M/s. Bharat Electronics Ltd.(1981) 3 SCC 255, and held that:

".....The decision in the case of Mohan Lal does not lay down that if a workman had worked for more than 240 days.in any number of years and if during the year of his termination, he had not worked for the said number of days, he would not be entitled to the benefit of Section 25B. The question with which we are concerned was not under consideration in Mohan Lal's case. If the view point propounded by the management is accepted, then in every year the workman would be required to complete more than 240 days. If in any one year the employer gives him actual work for less than 240 days, the service of the workman can be terminated without compliance of Section 6N of the U.P. Act, despite his having worked for number of years and for more than 240 days in each year except the last. Such an intention cannot be attributed to the U.P. Act. In the present case, as already noticed, the finding of the Labour Court is that the respondents worked for more than 240 days in each year from 1983 to 1986 but not having worked for termination was held by the Labour Court not to be violative of Section 6N....."

14. He has also relied upon the decision rendered by the Hon"ble Supreme Court in C.A. No. Nil of 1996, Chandrika Prasad v. M/s. Nirmal Organics (P) Ltd., on 15.4.1996 and held that requirement of employment for 240 days is necessary for regularization and not that the said employment would also run over a period of 12 calendar months. It was held that the High Court was wrong in denying the benefit of the U.P. Industrial Disputes Act merely because 240 days of employment was within a period of 12 months. Relying upon the averments made in paragraphs 9 (b), 9 (c), 9 (d), 10 (a) and 20 of the counteraffidavit he urged that sufficient opportunity was given too the employers but they did not produce any evidence and the Labour Court had no option but to proceed with the case.

15. The aforesaid cases cited by Shri Shyam Narain are not applicable to the present case and are clearly distinguishable from the facts and circumstances of this case. The action of the management is biased as on the one hand they have not paid the retirement dues of the workman and on the other hand they have not made any efforts to get necessary funds.

16. From the record it appears that at the time of admission, the following interim order was passed on 29.3.2001:

"Issue notice.

Till further orders, the operation of the impugned award dated 23.6.2000 shall

remain stayed provided the petitioner reinstates respondent No. 3 within one month from today and pays the salary for the period he works. In respect of back wages the award shall remain stayed.

Sd/ Sudhir Narain, J.

29.3.2001."

17. The Counsel for the petitioner informs that the interim order has been complied with and that the workman is working in terms of the interim order and is being paid salary on the basis of last pay drawn by him. Sri Shyam Narain does not dispute the fact that the workman has been reinstated but submits that once the workman has been reinstated in service he becomes entitled to the same salary which other workmen are getting in the same pay scale. The wages last drawn by him are to be paid only if the workman is not reinstated in service and he does not perform any work.

18. The Apex Court in a recent decision in *U.P. State Electricity Board v. Shri Shiv Mohan Singh and another*, 2004 AIR SCW 5623, has held that the trainees are not workmen. The question whether the respondent was a workman or not is dependent on the terms and conditions of appointment as well as the nature of duties. From the record I find that the employers had not given any evidence whatsoever in this case and, therefore, their case must fail. I am supported in my view by the judgments of this Court rendered in *V.K. Raj Industries v. Labour Court and others*, 1979 (39) FLR 70; *Airtech Private Limited v. State of U.P. and others*, 1984 (49) FLR 38; *Range Forest Officer v. S.T. Hadimani*, 2002 (94) FLR 622 and *Meritech India Ltd. v. State of U.P. and others*, 1996 FLR (sic).

19. In *Krishnadevaraya Education Trust (supra)*, it has been held that where appointment is on probation and the services are terminated during the period of probation, the order of the termination would not be illegal because of mere fact that in response to the challenge the employer states that the services of the probationer were not satisfactory would not ipso facto mean that the services of the probationer were being terminated by way of punishment. The probationer is on test and if the services are found not to be satisfactory, the employer has, in terms of the letter of appointment, the right to terminate the services.

20. In *Management of M/s. OTIS Elevator Co. (supra)* it has been held that where the respondentworkman is engaged as "trainee" by the Company he does not come under the definition of "workman", hence reference made was incompetent. It is further held that the "stipend" being paid to the respondentworkman is not wages. The Delhi High Court in that case came to the conclusion that the respondentworkman would not come within the definition of "workman" as defined under Section 2(s) of the Industrial Disputes Act and set aside the conclusions arrived at by the Industrial Tribunal in the award.

21. In *Kalyani Sharp India Ltd. (supra)*, the services of the probationer were terminated. It was held therein that the termination of the services of the

probationer without notice under Section 25F of the Industrial Disputes Act were not attracted as the facility of training provided reserving the management's discretion to withdraw that facility at any time without assigning any reason.

22. The Hon'ble Supreme Court has in *Hindustan Antibiotics Ltd. v. The Workmen*, AIR 1967 SC 948, held that the question whether a foreman drawing less than Rs. 500/ per mensem was a workman within the provisions of Section 2 (s) of the Industrial disputes Act. The finding of fact recorded by the Tribunal holding that he was a workman must be accepted. In *The Andhra Scientific Co. Ltd. v. A. Seshagiri Rao*, AIR 1967 SC 408, the Hon'ble Supreme Court has held that when the Labour Court has on a consideration of the evidence come to the conclusion as regards the functions that were actually being performed by an employee that he came within the definition of workman in Section 2 (s) of the Industrial Disputes Act the High Court will not interfere under Article 226 of the Constitution except in cases where there is a clear error on the face of the record. What function the employee was actually performing is a question of fact. Thus, the finding of Industrial Tribunal on consideration of evidence that an employee is "workman" would not require any interference by the High Court until and unless the finding is totally perverse or there is an error apparent on the face of the record.

23. The Labour Court has also given a finding of fact that respondent No. 3 was a workman. Admittedly also no formal appointment letter had been issued setting out the terms and conditions of appointment but this is clearly established from the letter of offer for appointment that the respondent was not appointed as a trainee or a probationer. He has already been reinstated in service in terms of the interim order and is working. The employers have failed even to substantiate before this Court or Subordinate Court that there was no vacancy.

24. For the reasons stated above and in view of the laws discussed above there is no illegality or infirmity in the impugned award.

25. The writ petition is accordingly dismissed. The interim order dated 29.3.2001 is vacated. No orders as to costs. Petition dismissed.