

(1999) 02 GUJ CK 0007
In the Gujarat High Court
Case No : S.C.A. No. 402 of 1996 with others

Dabhoi Nagarpalika

APPELLANT

Vs

Omkarbhai Somabhai Patel and Others

RESPONDENT

Date of Decision : 17-02-1999

Acts Referred:

Industrial Disputes Act, 1947 — Section 25F, 25G, 25J

Citation : (2000) 3 LLJ 461

Hon'ble Judges : Rajesh Balia, J

Bench : Single Bench

Judgement

R. Balia, J.—This group of petitions are by Dabhoi Nagarpalika, challenging the common award by the Labour Court dated September 29, 1996, by which seven of its workmen retrenched on February 15, 1991, have been ordered to be reinstated with 75 per cent back wages on finding the retrenchment illegal and invalid. These 7 petitions are against 7 different workmen. The facts are not in dispute for the present case. All the 7 workmen-respondents were appointed on temporary basis as daily rated workmen. Their services were terminated by order dated February 15, 1991. During this period they were continuously in service. The order dated February 15, 1991 was to bring retrenchment into effect from that date. The order also recorded that along with the order in lieu of the notice period of one month the workmen are being paid wages for the notice period amounting to Rs. 711/- and that they were also simultaneously being paid Rs. 2488.50 as retrenchment compensation. A handwritten note also appears on the bottom of each notice that the aforesaid amount may be collected from the cashier. These terminations were made subject matter of 7 different references before the Labour Court No. 1, Vadodara, which were heard and decided by the award under challenge.

2. The contention of the workmen before the Labour Court was that the termination was in violation of Section 25-F of the Industrial Disputes Act, 1947 ("the Act" for brevity) for the reason that the wages in lieu of notice and

retrenchment compensation was not paid before the retrenchment was effected. It was, therefore, noncompliance of Sub-clauses (a) and (b) of Section 25-F of the Act. In this connection, it has also been the case of the workmen that in the retrenchment order, no reasons have been recorded in writing as required u/s 25-F(a). The other contention raised on behalf of the workmen was that there has been no compliance of Section 25-G of the Act. That is to say that while the workmen concerned have been retrenched, the persons who have been appointed after them on the establishment had been continued. Both the pleas found favour with the Labour Court. Hence the award under challenge,

3. In the first instance it has been urged by the learned counsel for the petitioner that the amount under Sub-clauses (a) & (b) of Section 25-F of the Act has been offered simultaneously to said workman before retrenchment. The mere fact that they were asked to take delivery of cash packet from the Cash Counter, which they did not take voluntarily, before leaving will not make the payment as post retrenchment and would not result in noncompliance of payment as envisaged u/s 25-F of the Act. The fact that the workers failed to take cash packet of compensation of retrenchment compensation and wages in lieu of notice offered to them simultaneously while retrenching from service with effect from February 15, 1991 before they left the job, which is necessitated sending of cheques by Registered Post /Act Due later on, would not result in default on the part of the petitioner-employer to comply with the mandate of Section 25-F(a) of the Act.

4. The learned counsel, Shri Rathod for the respondents vehemently urged that asking the workmen to collect wages from the cashier or cash counter when the notice as required u/s 25-F was given, cannot be considered payment at the time of retrenchment. He placed reliance on the decision of the Supreme Court in National Iron and Steel Co. Ltd. and Others Vs. The State of West Bengal and Another, .

Section 25-F of the Act reads as under: _

"25-F. Conditions precedent to retrenchment of workmen - No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until --

(a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of notice;

(b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and

(c) notice in the prescribed manner is served on the appropriate Government on such authority as may be specified by the appropriate Government by notification in the Official Gazette."

A reading of the provisions of the Act leaves no room for doubt that the

expression "has been paid" in Sub-clauses (a) and (b) refers to payment at the time of retrenchment, that is to say, not after the retrenchment becomes effective. The payment of wages in lieu of notice, if no notice is served of the requisite period and retrenchment compensation payable to workman must be a completed act at the time when retrenchment becomes effective. This is also clear that the condition is a condition precedent for a valid retrenchment. It follows that if requisite amount is not paid at the time of retrenchment, the retrenchment is not as per law and void. It is implicit in the statute that it envisages right of workman to get the compensation at the time of retrenchment and there is corresponding obligation imposed on the employer to pay the same. The question is when can an employer be said to have discharged his obligation to accord with requirement of law. The question that falls for consideration in each case is that what shall constitute the payment prior to or simultaneously with the retrenchment and what shall not. It cannot be assumed that law envisages a mode of payment at the time of retrenchment in a different ways than in the ordinary manner. It cannot also be assumed that actual payment is necessary in all cases even where though the requisite amount is offered at the time of retrenchment, but the workman refuses to accept it or in the event of refusal to accept retrenchment notice or order that may be accompanied with payment will amount to noncompliance. In that event offer of requisite amount at the time of retrenchment will fulfil the condition. The payment may be made in cash, may be by cheque or Demand Draft which may result in actual payment on presentation before Bank. But that fact will not amount to nonpayment of amount at the time of retrenchment. That only means that the same should be offered in the same mode as payments are made in ordinary course of business by transacting the payments if the payments are made at a particular office of the establishment and the payment has been made simultaneously available at that place at the time of bringing about retrenchment, the mere fact that the workman instead of accepting that payment in that natural mode of conducting transaction in ordinary course of business leaves it without accepting the payment offered to him, cannot be considered to be noncompliance with the provisions. There cannot be any strait-jacket formula as to in what cases, the mode in which payment has been made to the workman in connection with retrenchment would amount to compliance with the provisions. It may happen that without determining the amount, the determination of compensation and its collection may be left to someone else and retrenchment has been made effective before such determination is made giving reasonable ground to assume that payment has not been offered at the time retrenchment becomes effective. The case is otherwise where retrenchment compensation, etc. have all to be determined and the amounts available with the concerned officer who deals with the disbursement of cash and the workman asked to collect the cash from such officer before leaving.

5. Facts of the National Iron and Steel, on which reliance has been placed by the learned counsel for the respondent explains this position clearly. That was a case

in which the Court noticed that by notice dated November 15, 1958, the services of the workman were terminated with effect from November 17, 1958 and that the employer was to pay one month's wages in lieu of such notice, but employee was asked to collect his dues from the accounts office on or after November 20, 1958 during the working hours. This was a clear case in which termination was brought into effect from November 17, 1958 and the workman was directed to collect dues from cash office, three days after the date from which retrenchment was to be effective. This was found in clear breach of Section 25-F (a) and (b) of the Act. There being no actual payment or tender of amount of wages in lieu of notice or retrenchment compensation before retrenchment became effective. The Court in these circumstances has observed that if he was asked to go forthwith he had to be paid at the same time when he was asked to go and could not be asked to collect his dues afterwards. Here is a case where the workman has not been asked to collect his dues afterwards, but before he goes. The mere fact that he was asked to collect his dues which were to be paid simultaneously along with termination from the Cashier, no reasonable inference can be drawn that it was a direction to collect the amount payable u/s 25-F(a) & (b) of the Act sometime after the retrenchment comes into effect as was the case before the Supreme Court.

6. In this connection decision of the Supreme Court in Management of Delhi Transport Undertaking Vs. Industrial Tribunal, Delhi and Another, may be noticed. It was a case arising under proviso to Section 33(2)(b), which requires that no workman shall be discharged or dismissed unless he has been paid wages for one month. The payment at or before discharge or dismissal is a condition precedent as in the case of retrenchment u/s 25-F of the Act. Question arose, in the like circumstances as in the present case whether discharge or dismissal will be valid. In the said case order of dismissal was issued on October 30, 1961, specifying that he should report immediately to the Accounts Officer at the Head Office to receive the payment. The Tribunal found that one month's wages were not paid before the order coming into operation. The Apex Court found that;

"It appears to us that Hari Chand did not purposely receive the wages offered to him by the memorandum informing him of his dismissal from service because he intended to make a complaint..."

Considering the proviso the Court said;

"The proviso does not mean that the wages for one month should have been actually paid, because in many cases the employer can only tender the amount before the dismissal but cannot force the employee to receive the payment before dismissal becomes effective. In this case the tender was definitely made before the order of dismissal became effective and the wages would certainly have been paid if Hari Chand had asked for them. There was no failure to comply with the provision in this respect."

There is no conflict between the two decisions. There is no doubt that in either

case, whether retrenchment u/s 25-F of the Act or dismissal or discharge governed by proviso to Section 33(a) & (b), payment of wages before the termination of service becomes effective is condition precedent and failure to do so vitiates the order. Question is only what constitutes compliance. Actual payment in all circumstances or tender in some circumstance will be sufficient compliance. The fact of two cases make out the principle clear. In the case of The Management of Delhi Transport Undertaking, (supra), the employee had been asked to collect the dues payable under law from the Accountant, before he leaves, but the employee did not avail to get the payment before the order becomes operative. The Court did not put the fault or deliberate attempt of the employee to infructuate the compliance at a premium, and held that in such circumstance tender of wages was sufficient compliance. On the other hand in the case of National Iron and Steel Co., (supra), the order of termination which was to be effective from November 17, 1958. but directed the workmen to collect the dues from Accountant on November 20, 1958 or thereafter showing the tender of payment itself was 3 days after the order of termination was to become effective. Such direction to collect from cashier was held to be of no avail. It makes out clear that order will not fail merely because workman has refused to collect his dues from the Accountant. It depends on whether tender could be construed before or after he is asked to leave.

7. In the present case the order was of February 15, 1991 and the order also spoke that specified amount payable under Clauses (a) and (b) of Section 25-F are being paid simultaneously and the employees were simultaneously asked to collect the wages from the Accountant, but the workmen did not before leaving collect the payment on that date and lodged complaint thereafter about invalidity of retrenchment for such noncompliance. The case clearly falls within the ratio of the case in The Management of Delhi Transport Undertaking (supra).

8. Learned counsel for the respondents further urged that the requirement of giving reasons under Sub-section (a) of Section 25-F of the Act is mandatory where one month's notice is not resorted to, the shortness of the notice period may be compensated by payment of wages in lieu of notice. Requirement indicating reasons for retrenchment which forms part of mandatory conditions of Sub-section (a) is independent of notice and still has to be complied with. Order of termination must indicate the reason for retrenchment.

9. The argument on the first flush appears to be facile, but it does not stand closer scrutiny. Sub-section (a) of Section 25-F of the Act postulates two alternatives. That is to say that services can be terminated by giving one month's notice in writing indicating reasons for retrenchment is effective after the expiry of the period of notice. Alternately, an employer can resort to termination simpliciter by paying wages for the period in lieu of such notice, that is to say, alternately, the requirement of giving notice is altogether dispensed with. If the employer resorts to make payment of wages in lieu of notice at the time of retrenchment, if the notice is not at all required to be given, the question

of there being reasons in writing in that notice also would not survive. Accepting the contention of the learned counsel for the petitioner would mean that the condition, . namely, recording reasons for retrenchment in the notice will be required independent of Clauses (a) and (b) by inserting a written reason de hors the notice itself.

10. In this connection reference may be made to the decision in *Bombay Union of Journalists and Others Vs. The State of Bombay and Another*, , wherein the Court said that Section 25-F(a) requires that the workman has to be given one month's notice in writing, indicating the reasons for retrenchment and the period of notice has to expire before the retrenchment takes place. It also provides that the workman can be paid in lieu of such notice wages for the said period. The latter part of Clause (a) requires careful consideration in dealing with the character of the requirement prescribed by Section 25-F(c). This latter provision allows the employer to retrench the workman on paying him his wages in lieu of notice for one month prescribed by the earlier part of Clause (a) and that means that if the employer decides to retrench a workman, he need not be given one month's notice in writing and wait for the expiration of the said period before he retrenches him; he can proceed to retrench him straightway on paying him his wages in lieu of the said notice. The Court further observed reading latter part of Clause (a):

"It seems to follow that in cases falling under the latter part of Clause (a) the notice prescribed by Clause (c) has to be given not before retrenchment, but after retrenchment; otherwise the option given to the employer to bring about immediate retrenchment of the workman on paying him wages in lieu of notice would be rendered nugatory."

The observation equally applied to the situation where the contention is raised for recording of reasons where latter part of Clause (a) is to be followed by the employer, namely, to retrench the workman by paying him wages in lieu of notice. In that event the notice as a matter of law need not come into existence at all and if that requirement fails the requirement of recording reasons, therein must also fail.

11. In this connection another decision of the Supreme Court in *Kashiram Agarwala Vs. Union of India (UOI) and Others*, , may also be noticed. The case had arisen under the provisions of the Income Tax Act, 1961, in somewhat like situation. Section 127 of the Act of 1961 provides to consider transfer of case of assessee from one Income Tax Officer to another Income Tax Officer. It provides that the Commissioner may after giving reasonable opportunity of being heard in the matter, wherever it is possible to do so, and after recording his reasons for doing so, transfer any case from one Income Tax Officer subordinate to him to another also subordinate to him, and the Board may similarly transfer any case from one Income Tax Officer to another. Proviso to Section 127(1) envisages that nothing in this sub-section shall be deemed to require any such opportunity to be given where the transfer is from one Income Tax Officer to another whose offices

are situate in the same city, locality or place. Transfer of assessee's case made under the proviso to Section 127(1) was challenged on the ground that the order of transfer does not record reasons of requirement of the substantial provisions of the Section. The Court while observing that the requirement that reasons must be recorded for making transfer of case u/s 127(1) held that it would not be unreasonable to assume that recording of reasons prescribed by Section 127(1) would be appropriate where a transfer is being made otherwise than in the manner prescribed by the proviso. It would also be seen reasonable to hold that in regard to cases falling under the proviso, an opportunity need not be given to assessee and corresponding need to record reason is also unnecessary.

12. The principle well applies to the present case. Where there is need to give in writing a notice for one month, contents of notice have been prescribed. Where no notice in writing is contemplated, still the compliance with requisite contents of notice cannot be spelt out, where the employee opts of making payment of wages for the notice period in lieu of notice. The same view has also been adopted by the Orissa High Court in Babaji Charan Swain and Ors. v. Union of India and Ors. (1973 II LLJ 589) (Ori-DB). A Bench of the Orissa High Court opined that:

"The language of the Clause is plain and suggests that the two parts are completely independent. In other words, the employer has to either give one month's notice in writing indicating the reasons for retrenchment, and the retrenchment takes effect after the period of notice has expired, or without resorting to such a course it is open to the employer to make payment of wages as in lieu of such notice. The expression "in lieu of such notice" is significant. "Such notice" means the notice referred to in the first part of Clause (a) which prescribes that it should be in writing indicating the reasons for retrenchment. The first part of Clause (a) ends with a comma. We are, therefore, unable to accept the contention of Mr. Das that even if one month's wages are paid in lieu of the notice, still notice containing the reasons is mandatory."

13. I am in respectful agreement with the aforesaid observations. Accordingly I find that the Tribunal's order to the extent it holds the impugned retrenchment order to be invalid for violation of Section 25-F on the ground of noncompliance of making payment before the retrenchment is effected and for not giving reasons for retrenchment in the order cannot be sustained in law.

14. Learned counsel for the respondent urged that payment which was ultimately sent to each of the workmen by Registered Post on their not recovering the same from Accountant fell short of requisite amount. That question, which is of fact and requires evidence does not appear to have been raised before the Labour Court. I, therefore, am not examining the merit of such a plea, raised for the first time in this petition.

15. Coming to the second contention the learned counsel for the petitioners that the view of the Tribunal as to the noncompliance of Section 25G is also suffering

from error apparent on the face of the record, the learned counsel urged that the respondent-workmen were employed for the Drainage Project whereas no person junior to the respondent-workmen have been retained in the Drainage project. No comparison can be drawn to the persons employed in other projects, namely, Water Supply Section or other departments of the petitioner. There being no common cadre of the two departments, the plea raised on the basis of example given of appointments in the Water Supply Project cannot be considered for finding violation of Section 25G of the Act. He also pointed out that though admission on the part of the present petitioner has been made that no seniority list has been maintained, but at the same time it has been urged by the learned counsel that the Tribunal has neither considered the questions about commonness of the cadre between the Drainage Project and the Water Supply Project which could affect the question of violation of Section 25G of the Act, unless it is found that any person appointed after respondent-workman was allowed to continue, or workmen's services were brought to end, other persons have been appointed in their place in the Drainage Project. It has also been pointed out that even otherwise, there was justification for terminating the services of the respondent-workmen without inviting the applicability of Section 25G of the Act, namely "last come first go" principle to be applied. It was pointed out that the workmen in question were appointed temporarily as daily rated workmen. Attempt was being made to make regular appointment on the posts for which advertisement was issued in which the respondent-workmen had also an opportunity to seek regular employment. They, having failed to make good that opportunity, raised dispute about the regular selections being made and have failed there. Thereafter, if the employees regularly selected have been retained and the respondents who could have availed the opportunity of regular selection in pursuance of those selection process, but did not get regularly selected are asked to go, there cannot be any breach of Section 25G of the Act.

16, From the averments made in the claim and reply filed thereto, it appears that these contentions were in fact before the Labour Court. The fact about the issuance of advertisement for regular recruitment and attempt by the existing employees to thwart the process by first approaching the Industrial Court and thereafter by way of civil suit for obtaining interim relief to stay regular selections, which did not fructify in success. Present dispute had arisen thereafter. It is true that ordinarily while retrenching an employee the rule of "last come, first go" have to be applied. This is in consonance with the principles of Article 14 of the Constitution of India. However, this rule is not in absolute. Provisions of Section 25G of the Act itself envisage that for valid reasons the rule can be departed from. All these are questions of fact. Whether in fact any person junior to retrenched workmen was retained, whether persons alleged to be junior are still continuing in the establishment, are employees in the same establishment or different establishment of the same employer, whether there is a valid reason to depart from the principle of "last come, first go" have to be examined, particularly, when the question to that effect has been raised in the

pleadings and parties join issue thereon. The Labour Court in a very casual manner has drawn inference of violation of Section 25G only on the basis of the statements of the witnesses of the petitioner, namely, Harivadanbhai that Municipality engages 18 workmen in the Water Supply Department of which 12 persons are permanent and 6 are temporary daily wagers. They have been working since 1986. Whether Water Supply Department and Drainage Department are part of the same establishment so as to draw this inference has not at all been examined, when it was specific case of the present petitioners that the concerned workmen are employees of Drainage Project, whereas the other workmen are the employees in Water Supply Project. The plea that the retrenchment of the concerned workmen as a result of regular selection at which either the respondents did not offer themselves or if they offered themselves were not successful has also not been considered by the Labour Court. Thus, the finding as to violation of Section 25G suffers from the vice of nonconsidering the relevant material in the light of correct legal principles. This finding also therefore, cannot be sustained.

17. Thus, both reasons, which weighed with the Labour Court for grant of reinstatement by holding the termination to be invalid, cannot be sustained.

18. The learned counsel for the petitioner has also urged that because the petitioner is a State and local authority in the category of State the provisions of Chapter V-A of I.D. Act does not apply. It is not the case that the incumbents were employed by the petitioner in the activity which can be considered to be in discharge of sovereign function of the State. It cannot be argued that all the departments of the State are immune from the provisions of Industrial Disputes Act as it stands today. The only exception is where the person is engaged by the State in the activity in discharge of sovereign function of the State the provisions of Industrial Disputes Act would not apply inasmuch as that activity cannot be considered to be an industry. The other contention that the terms of conditions are governed by the rules is also not well founded in view of the statutory mandate u/s 25-J of the Act.

19. As a result of the aforesaid discussion this petition succeeds. The impugned award is set aside with the direction to the Labour Court to decide the dispute referred to it afresh in accordance with law keeping in view the findings and observations made above. It is clarified that the order of reinstatement has been made on September 29, 1995 and this petition was filed on January 19, 1996. The petition had been opposed at the admission stage by lodging a Caveat. An affidavit has been filed on behalf of respondent No. 3 that he is unemployed and that he is not gainfully employed elsewhere. The Court while admitting the Special Civil Application said that individual affidavits are required to that effect in terms of Section 17-B of the Act. The affidavit of respondent No. 3 shall be treated only for and on behalf of respondent No. 3. Stay of the award was made subject to the provisions of Section 17-B of the Act. That is to say that while operation of impugned award was stayed, a workman who has filed affidavit

referred u/s 17-B, he was entitled to last drawn wages for the period since the date of reinstatement during the pendency of the proceedings before this Court or until the order was vacated on satisfaction of the Court by the employer the other way- Other employees were permitted to file affidavits to the effect that they were not gainfully employed, such affidavits were filed by all workmen. An Affidavit-in-reply was filed sworn by Harivadan Purshottambhai Patel, Chief Officer of the petitioner-Nagarपालिका stating that Ramanbhai Jesingbhai Patel, Prabhatsingh Ramsingh Rana, Kanchanbhai Muljibhai Patel and Jayantibhai Somabhai Kachiya are engaged in agricultural activities being in occupation of agricultural lands and respondent No. 6, Iqbal M. Garasia is running small factory and/or a repair shop repairing electrical motor and is also doing business of rewinding electric motors. Each of the workmen filed affidavit-in-rejoinder denying all these assertions specifically. It is to be seen that the affidavit of the petitioners are lacking in particulars. While it gives that the respondents are in occupation of agricultural lands and are cultivating the lands, it has failed to specify or identify the lands which each of the workmen is alleged to be in occupation by providing any documents in support of it from the land records. Affidavit does not show the location or place where Iqbal is running factory or repair shop. In these circumstances I am satisfied that the petitioner has not discharged its burden to prove satisfactorily the fact that the respondent-workmen are gainfully engaged, contrary to what they have stated in their respective affidavits. In these circumstances, during the period this petition remained pending and operation of award stayed, the respondent-workmen become entitled to the benefit u/s 17-B of the Act by operation of law. The petitioner shall make payment of last drawn wages to each of the respondent-workmen for the period this petition was pending in this Court, that is to say, with effect from January 12, 1996 to February 17, 1999 (Date of this Order). The Labour Court is further directed to make an award afresh within nine months. There shall no no order as to cost of the petition.