
(2004) 11 KL CK 0047
In the High Court Of Kerala
Case No : W.A. No. 593 of 2000

Director, Tourism Department

APPELLANT

Vs

Industrial Tribunal

RESPONDENT

Date of Decision : 08-11-2004

Acts Referred:

Industrial Disputes Act, 1947 — Section 2

Citation : (2005) 1 ILR (Ker) 669 : (2005) 1 KLT 320

Hon'ble Judges : K.P. Balachandran, J;J.B. Koshy, J

Bench : Division Bench

Advocate : Roy Chacko, Government Pleader, for the Appellant; B. Reghunandan, B. Ashok Shenoy and Lakshmi B. Shenoy, for the Respondent

Final Decision : Dismissed

Judgement

J.B. Koshy, J.—Appellant/Petitioner approached this Court challenging the award of the Industrial Tribunal directing reinstatement of one Saraswathy, member of second respondent union, with backwages and other consequential benefits from 20.4.1993. Even though notice was received from the Industrial Tribunal, appellant/petitioner did not appear before the Industrial Tribunal. Union adduced evidence by examining workman and award was passed. It is admitted by the appellant/petitioner that they have received a notice. They also did not apply for setting aside the ex parte order in time before the Industrial Tribunal as provided under the Rules. In fact, the award was passed after considering the evidence adduced before it.

2. Smt. Saraswathy was employed as a sweeper on daily wage basis from 2.12.1989. She continued the above employment for more than three years. But, she was denied employment with effect from 20.4.1993. She was paid Rs. 24/- per day at that time. These facts are not disputed even in the Writ Petition. It is also not disputed that by terminating the services of Saraswathy, the conditions prescribed u/s 25F of the Industrial Disputes Act (hereinafter referred to as "the Act.") were not complied with.

3. Two main contentions are urged before us. First contention is that, being a Government undertaking doing sovereign functions of the State, petitioner's establishment is not an industry and the Industrial Disputes Act is not applicable on the appellant. The workman was employed in the Tourism Department, that too, as a sweeper in a guest house. There are manager and other employees in the guest house. Rooms are let on different rates to government employees as well as the public and a commercial activity is being carried on there. Government guest houses run by the Tourism Department are not doing any sovereign functions of the State and considering the decision in Bangalore Water Supply and Sewerage Board Vs. A. Rajappa and Others, , we are of the opinion that the contention that it is not an industry is not tenable. (See also: General Manager, Telecom Vs. A. Srinivasa Rao and Others, . We also note that in Mohanan v. State of Kerala 1994 (1) KLT 187 : 1994 (II) LLJ 1041, it was already held by this Court that tourism department is an industry and it is not discharging any sovereign functions.

4. Secondly, it was contended that though Saraswathy was continuously employed from 2.12.1989 on daily basis, she was not given employment from 20.4.1993 as per the terms of employment and hence it is not "retrenchment" as defined u/s 2(oo) of the Act. She was employed for a contingency and that contingency was over on 20.4.1993 and, therefore, in view of the amendment of Section 2(oo) of the Act by inserting Sub-clause (bb), her non-employment after 20.4.1993 is not retrenchment. "Retrenchment" is defined u/s 2(oo) of the Act as follows:

"(oo) "retrenchment" 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 on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; or

(bb) termination of the service of a workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein; or

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

Admittedly, Saraswathy was not appointed on contract basis. No written appointment order was given to her. She was not appointed for a period. She was not appointed for a project. If she was appointed for a specific period, termination of her service at the end of that period will not be retrenchment u/s 2(oo) of the Act in view of the insertion of Sub-clause (bb). If she was employed

on a project and her service was terminated at the end of that project, it will not be retrenchment as it is automatic termination of service. But, in this case, even though she was employed as a daily-rated worker from 2.12.1989, she continuously worked till 20.4.1993. It is true that she was a daily-rated worker. But, what was the contingency on which she was appointed was not mentioned in the Writ Petition. It is stated that appointment of the earlier sweeper was regularised and promoted and Saraswathy was appointed in that vacancy. Work of a sweeper is necessary in the guest houses. It is a regular work. There is no contention that appointment to the part-time sweeper's post can be made only through Public Service Commission as per the special rules and there is no pleading that she was being replaced on appointment of a regular hand through Public Service Commission. There is no allegation in the Writ Petition that her work was not satisfactory etc. Her services were terminated on the ipse dixit of the authorities without complying Section 25F of the Act.

5. A Constitution Bench of the Supreme Court in Punjab Land Development and Reclamation Corporation Ltd., Chandigarh Vs. Presiding Officer, Labour Court, Chandigarh and Others, , held that the expression "retrenchment means termination of the services of the workman for any reason whatsoever other than those expressly excluded by Section 2(oo) of the Act. The expression "retrenchment" does not mean only termination of surplus labour for any reason whatsoever. The expression "retrenchment" has to be understood not in its narrow and natural meaning; but, to be understood in its wider literal meaning to mean termination of the services of a workman for any reason whatsoever. The Apex Court in Mohan Lal Vs. Management of Bharat Electronics Ltd., , held that termination of temporary workman which does not fall in the exceptional categories will amount to "retrenchment". The learned Government Pleader pointed out the decision in Himanshu Kumar Vidyarthi and Others Vs. State of Bihar and Others, . In the above decision, the Supreme Court held that every government department is not an industry and further held that disengagement of a daily waged employee on completion of the work is not retrenchment. There, it was held that Co-operative Training Institute was not an industry and in that case it was further proved that they were appointed for an extra need and when that need was over, they were disengaged and it is not retrenchment. The Supreme Court also noticed in that case that the petitioners (workmen) did not contend before the Courts below that it is a case of "retrenchment". But their only contention was that the termination was arbitrary. The facts in this case are entirely different. She was appointed though as a daily rated worker, not for any extra need, but for doing the regular work of the establishment and the need continued even after the termination of her services. On the definite contention that termination of employment of Saraswathy is retrenchment coming u/s 25F, they approached the labour authorities and, on reference, the Labour Court found that there is violation of Section 25F of the Act as procedure u/s 25F was not complied with in terminating her service.

6. In this connection, we also refer to the decision of the Supreme Court in S.M.

Nilajkar and Others Vs. Telecom, District Manager, Karnataka, wherein the Supreme Court held that burden to prove the ingredients of Sub-clause (bb) is on the employer and merely because a person was employed on daily wages, it cannot be stated that her services can be terminated at any time. In this case, it is not disputed that Saraswathy was employed continuously for a period of more than three years and she was paid daily wages of Rs. 24/- and her services were terminated without complying with the provisions of Section 25F. Therefore, she is deemed to have continued in service and she is entitled to backwages. She is entitled to backwages only at the rate of last drawn wages till she is reinstated. We also note that the Tribunal rightly did not regularise her service. After reinstatement, for any valid reasons, if her services have to be terminated, it can be done only after complying with the provisions of Section 25F of the Act. There is no jurisdictional error or patent illegality in the impugned award passed by the Industrial Tribunal. We see no ground to interfere in the award of the Industrial Tribunal or in the judgment of the learned Single Judge. Learned Single Judge rightly did not interfere in the award of the Industrial Tribunal under Articles 226 or 227 of the Constitution of India. The Writ Appeal is dismissed.