
(2000) 04 OHC CK 0022
In the Orissa High Court
Case No : O.J.C. No. 9367 of 1995

Executive Engineer, Orissa Lift Irrigation Division	APPELLANT
Vs	
Presiding Officer, Labour Court and Others	RESPONDENT

Date of Decision : 04-04-2000

Acts Referred:

Industrial Disputes Act, 1947 — Section 12(5), 2, 2(5), 25F

Citation : (2000) 89 CLT 750 : (2000) 85 FLR 632 : (2000) 2 LLJ 421

Hon'ble Judges : P.K. Mohanty, J;P.C. Naik, J

Bench : Division Bench

Advocate : Jitamitra Mohanty, A.K. Panigrahi and P.K. Misra, for the Appellant;
S.N. Misra, P.K. Chand, D. Satapathy, A. Mohanty and A. Mohapatra, for the
Respondent

Final Decision : Partly Allowed

Judgement

P.C. Naik, J.—What is assailed in this writ application is the ex-parte award dated October 18, 1995 passed by the Presiding Officer, Labour Court, Bhubaneswar, setting aside the order of termination of the workman (opposite party No. 2 herein) with a direction to reinstate the said workman (opposite party No. 2) with full back-wages.

2. The facts, in short, are that opposite party No. 2 was an N.M.R. employee under the Executive Engineer, Orissa Lift Irrigation Corporation, Dhenkanal. It is not disputed that he was on the rolls from 1982 on 89 days basis. He continued as such till May 17, 1987. On May 17, 1987, while working as such in the Store Yard, he was detected removing electric wire cables therefrom. A departmental enquiry was conducted and after due enquiry, he was not allowed to work under the Establishment and his services as an N.M.R. Watcher were terminated. Aggrieved with the said order of termination, opposite party No. 2 - workman made several approaches to the petitioner (hereinafter referred to as "the employer"). But getting no relief, he ultimately approached the Conciliation Officer-cum-District Labour Officer, Dhenkanal. The matter was taken up for

conciliation. But, as the conciliation failed, necessary report thereof was submitted to the State Government, it being the appropriate Government u/s 12(4) of the Industrial Disputes Act, 1947 (in short, "the Act"), who, on a due consideration thereof, in exercise of powers conferred under Sub-section (5) of Section 12 read with Clause (d) of Sub-section (1) of the said Act, referred the dispute for adjudication by the Presiding Officer, Labour Court, Bhubaneswar. The dispute was, accordingly, registered by the Presiding Officer, Labour Court, Bhubaneswar, as I.D. Case No. 52 of 1998.

3. Both the parties to the dispute, i.e. the employer and the workman, submitted their respective written statement.

4. The case of the employer is that as the workman was detected while removing electric wire cables from the Store Yard where he was on watch and ward duty, a proceeding was initiated and after due enquiry, he was served with "an order of termination of his service as N.M.R.". It was also contended that the provisions of Section 25F of the Act were not attracted in the case at hand.

5. In his statement of case, the workman contended that though he was terminated, no allegation was made against him regarding theft of cable, as alleged. No explanation was called for nor was he given an opportunity to defend himself and, accordingly, the order of termination was bad in law, it being in clear violation of principles of natural justice. It was further alleged that similar charges were laid against one J. mISHRA, a Pump Driver, who was said to be carrying the said cables, but he was exonerated and subsequently reinstated, though he (the present opposite party No. 2) has been singled out from punishment.

6. During the proceedings, the employer was proceeded ex-parte on December 15, 1993, but on February 25, 1994, the ex-parte order was recalled. Thereafter, the employer participated in the proceedings, but was again proceeded ex-parte on September 2, 1995 and ultimately, after hearing the workman, an ex-parte award, which is impugned herein, was passed.

7. The challenge in this writ application that the Labour Court erred in proceeding ex-parte, is mentioned to be rejected. The order sheets of the Labour Court indicate that on each date of hearing the next date for hearing was clearly indicated. On April 15, 1995, as the order-sheet indicates, both the parties were present and the matter was posted to June 21, 1995 for hearing. On June 21, 1995, the employer was, however, not represented and the matter was adjourned to July 29, 1995 on which date also, the employer was not represented. The next was fixed to September 2, 1995 on which date, the employer was set ex-parte and ultimately, after hearing the workman, an ex-parte award was passed on October 18, 1995. The order sheets clearly indicate that it was the inaction on the part of the employer which led to the passing of an ex-parte award. In the writ application also, no reason has been assigned by the employer for not being represented on the dates fixed. Since the employer

failed to appear, the Labour Court was justified in proceeding ex-parte. Accordingly, the contention that the Labour Court erred in passing the ex-parte award against the employer stands rejected.

8. What, therefore, remains for consideration is, whether or not, on the facts on record, the award can be justified.

9. There is no dispute to the fact and indeed it is so admitted by the workman that he was an N.M.R. employee under the employer from 1982 and continued as such till he was terminated. The employer averred in its statement of case that the workman was terminated after due enquiry, but this averment has not been substantiated. Thus, the fact remains that the workman, who was in the establishment from 1982 onwards, though on 89 days basis, was terminated. There is no averment that the provisions contained in Section 25F of the Act were complied with. The law clearly postulates that a workman, who has been in continuous employment for not less than one year under an employer, shall not be retrenched unless he is given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or in lieu of such notice, he is paid wages for the period of the notice, and at the time of retrenchment, he has been paid compensation equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months. Notice is also required to be given to the appropriate Government. Admittedly, this has not been done, as according to the employer, opposite party No. 2 was not a workman within the meaning of the Act and as such, the provisions relating to retrenchment were not attracted.

10. Reliance was placed on the order dated July 14, 1994 passed in O.J.C. No. 8677 of 1993 (Balaji Biswal v. State of Orissa and Anr.) which was dismissed at the admission stage. It was held therein that an N.M.R. employee has no right to the post nor can he make a complaint that no opportunity was given to him to explain the charges, as in fact question of levelling charges against such N.M.R. employee does not arise. In that case, the petitioner was disengaged as he was involved in the commission of offence under the Indian Penal Code. That writ application was rejected on the grounds mentioned above. The Court, however, observed that "if the petitioner gets himself exonerated from the criminal charges, he may approach the Corporation and the Corporation would undoubtedly consider his case," which, we feel, would necessarily mean "for reinstatement". The above decision cannot be of any assistance to the petitioner in the case at hand, because the questions involved herein did not come up for consideration in that writ petition.

11. Section 2(s) of the Act lays down that "workman" means, "any person including an apprentice employed in any Industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of the employment be expressed or implied....." This section further goes to lay down four categories of persons who do not come within the definition, but obviously, as the present opposite party No. 2 does not fall within

any of those four categories, reference is not being made thereto.

12. In *H.R. Adyanthaya Vs. Sandoz (India) Ltd., etc. etc.*, a five Judges Bench, while interpreting Section 2(s) of the Act, observed, "Hence the position of law as obtained today is that a person to be a "workman" under the Industrial Disputes Act, must be doing the work under the categories of manual, unskilled, skilled, technical, operational, clerical or supervisory. It is not enough that he is not covered by either of the four exceptions to the definition. We reiterate the said interpretation. The fact, as it has been referred to above, that the workman-opposite party No. 2 herein was employed as an N.M.R. and has been continuously working on 89 days basis under the establishment from 1982 onwards till the date of his termination, indicates that there was work in the establishment which required the services of opposite party No, 2-workman. The nature of the work was manual and unskilled. The fact remains that opposite party No. 2 workman was being treated as a member of the establishment and was rendering, services on more or less regular basis, though not appointed to a regular post and that there was relationship of master and servant between the parties. Considering these facts, we do not feel that any error was committed by either the appropriate Government or the Labour Court in treating opposite party No. 2 to be a workman in the employment of the petitioner. Accordingly, the reference made to the Labour Court cannot be said to be illegal or unwarranted.

13. The expression "retrenchment", as defined in Section 2(oo) of the Act, means "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, cases falling under Sub-clauses (a), (b), (bb) and (c) thereof have been expressly excluded from the said definition. It is no doubt true that initially in view of the judgment of the Apex Court in *Barsi Light Railway Co. v. K.N. Joglekar* (1957 I LLJ 243) (SC) the word "retrenchment" was interpreted as "termination by the employer of service of surplus staff for any reason whatsoever". But, in the case of *Punjab Land Development & Reclamation Corpn. Ltd., Chandigarh etc. and Ors. v. Presiding Officer, Labour Court, and Ors.* 1990 11 LLJ 70) (SC) it has been laid down that the expression "retrenchment" is not to be understood in its narrow natural contextual meaning, but it is to be understood in its wider literal meaning to mean "termination of service of workman for any reason whatsoever".

14. In the present case, the employer had pleaded that the case at hand is not a case of retrenchment. But, this plea was taken in view of the averment that opposite party No. 2 workman was terminated after due enquiry because he was found removing electric wire cables from the Store Yard. In other words, his plea seems to be that the termination was after enquiry for misconduct by way of disciplinary action and as such, it was not a case of "retrenchment" within the meaning of the Act. However, the fact there was an enquiry and that the termination followed for proved misconduct, has not been established by the employer. Thus, as there was admittedly a termination, but no proof that it was

for proved misconduct by way of a disciplinary action, it follows that it would be a "retrenchment" within the meaning of Section 2(oo) of the Act.

15. The contention of the petitioner-employer that on the facts and in the circumstances of the case, the Labour Court erred in passing the order for reinstatement of opposite party No. 2 workman with full back-wages, has to be considered.

16. From the impugned order, it appears that the Labour Court has issued a direction which would amount to regularising the service of opposite party No. 2 workman with full backwages. This, in our opinion, was not proper. The Labour Court ought to have borne in mind the fact that though opposite party No. 2 workman was continuing to serve the employer regularly from 1982 on 89 days basis, he was not a permanent employee. If his removal from the rolls was found to be illegal, the only appropriate order that could be passed would be an order directing the petitioner-employer to take the workman-opposite party No. 2 back and restore his status which had been withdrawn from him by the order of his termination, that is, restore his position in the N.M.R. establishment. The Labour Court could not pass an order of the nature it did which would have the effect of regularising his service merely because he may have worked for 740 days or more in the previous couple of years. In case the persons junior to him had in the meantime been regularised, it would have been for the employer to consider his case for regularisation from the date his juniors have been regularised. To this extent, the award by the Labour Court has to be modified.

17. This brings us to the question of awarding back-wages to the workman. It was not seriously disputed that the establishment where opposite party No. 2 workman was working, namely, Orissa Lift Irrigation Division, Dhenkanal, is finding it difficult to keep above water and is barely able to survive. It also does not have any appreciable business. Thus, considering the above circumstances and by taking an over-all view of the situation, we feel that it would be appropriate to grant the workman a lumpsum payment of Rs. 30,000/-(Rupees thirty thousand) in lieu of backwages. We order accordingly.

18. For the reasons aforesaid, the writ application is party allowed with the modification of the impugned award passed by the Labour Court, as indicated in the foregoing paragraphs. But on the facts and in the circumstances, there shall be no order as to costs.

P.K. Mohanty, J.

19. I agree.