

(1994) 10 BOM CK 0073
In the Bombay High Court
Case No : Writ Petition No. 5927 of 1987

G.D. Shinde.

APPELLANT

Vs

Associated Cement Cos. Ltd. and ors

RESPONDENT

Date of Decision : 20-10-1994

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Industrial Disputes Act, 1947 — Section 25F, 25G
Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 — Section 28

Citation : (1995) 70 FLR 541 : (1995) 1 LLJ 1245

Hon'ble Judges : B.N. Srikrishna, J

Bench : Single Bench

Judgement

B.N. Srikrishna, J

1. This petition under Articles 226 and 227 of the Constitution of India impugns an order of the First Labour Court, Thane, dated 31st July, 1987 made in Complaint (ULP) No. 22 of 1984, under the provisions of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (hereinafter referred to as "the Act").

2. The petitioner applied to the First Respondent for appointment as a Watchman in its service. After a successful interview by the Recruitment Committee, the First Respondent, by a letter of appointment dated 16th October, 1976, appointed the petitioner as a Watchman temporarily for a period of three months from 1st October, 1976. The basic salary payable at that time was Rs. 275/- per months in addition to the Dearness Allowance payable under the applicable rules. By a letter dated 2nd January, 1978, the petitioner, was confirmed in service as a watchman with effect from 1st January, 1978 and was fitted in the CATAD Grade "F" with effect from 1st June, 1978, in the Category of Watchman. It is the case of the petitioner that, even while he was working as a Watchman, he was occasionally required to do some driving work, for which he was paid an

additional allowance. The First Respondent had issued a Notice dated 8th February, 1982, calling for applications from suitable persons for appointment to the post of a Vehicle Driver. The petitioner applied for this post, was selected and appointed as Vehicle Driver on probation for a period of 6 months with effect from 18th October, 1982. He was transferred to the Chemical Division Offices located at the Central Research Station, Thane, with effect from 18th October, 1982. At the time of appointment as a Vehicle Driver, the petitioner was given the same basic salary which he was drawing as a Watchman i.e., Rs. 358/- per month. His letter of appointment contained a specific stipulation that, with effect from 15th June, 1982, the petitioner would be appointed on probation of 6 months and would be confirmed in his new position only on satisfactory completion of the probationary period. The first respondent had stipulated that it reserved the right to extend the probationary period or to revert the petitioner to his substantive position in the event of his work being found not satisfactory during the probationary period. By a letter of confirmation dated 15th December, 1982, upon satisfactory completion of probationary period, the petitioner was confirmed as a Vehicle Driver with effect from 15th December, 1982 on an increased salary of Rs. 350/- per month in CATAD Grade "E". On 1st November, 1983, the First Respondent displayed the Seniority List of several categories of workmen, including drivers. The reason for display of the Seniority List was that the First Respondent envisaged a situation of retrenchment and desired to comply with the provisions of Rule 81 of the Industrial Disputes Rules, 1987, requiring display of the Seniority List at least one week before the intended date of retrenchment. In the Seniority List of Vehicle Drivers, the petitioner was at Serial No. 5, as he was the junior-most. His date of joining in the category was shown as 15th June, 1982, the date on which he had been promoted to the category of Vehicle Driver on probation.

3. On 8th November, 1983, the petitioner retrenched a number of workmen in different categories. From the category of vehicle drivers, the first respondent retrenched two drivers - the petitioner and one driver immediately senior to him.

4. The petitioner challenged his retrenchment by his Complaint (ULP) No. 22 of 1984 before the First Labour Court, Thane, invoking Items 1(a), (b) and (d) of Schedule IV, read with Section 28 of the Act. In substance, the case made out by the petitioner in his complaint was that his retrenchment was contrary to the provisions of Sections 25-F and 25-G of the Industrial Disputes Act, and, therefore, the retrenchment amounted to an unfair labour practice within the meaning of the relevant items. The Labour Court turned down the challenge to the retrenchment and held that there was no contravention of any statutory provision, nor did it amount to an unfair labour practice. Consequently, the Petitioner's complaint was dismissed and he is before this Court by this writ petition.

5. Mr. Gupte, learned Advocate appearing for the petitioner, reiterated the same contentions which were advanced before the Labour Court. First, he contended

that there was no compliance with the mandatory provisions of Section 25-F of the Industrial Disputes Act, 1947, before retrenchment. Then, he contended that the retrenchment was bad in law, because of contravention of the rule of "Last come, first go" contained in Section 25-G of the Industrial Disputes Act, 1947.

6. Taking the second contention first, it is that, merely because, for a short period, the petitioner was taken up as a Vehicle Driver, the first respondent was not justified in retrenching him from service. In the submission of the learned Advocate, the first respondent was bound to revert the petitioner to his original post as Watchman-cum-Driver, without retrenching him from service. He claims that he petitioner was entitled to have the length of his service reckoned from 6th October, 1976, when he had been initially appointed as a Watchman and the reckoning of his service only from 15th June, 1982, as done by the first respondent was a clear violation of the rule of "Last come, first go", contained in Section 25-G of the Industrial Disputes Act, 1947. He strongly places reliance on the judgment of the Supreme Court in *Suraj Prakash Bhandari Vs. Union of India (UOI)*, . Drawing inspiration from the observations in paragraph 4 of the said judgment, Mr. Gupte contended that the petitioner's case is identical and the principle laid down by the Supreme Court in *Suraj Prakash* (supra) would apply, with the same result. Having gone through the judgment in *Suraj Prakash* (supra), I am not inclined to accept the contention advanced by Mr. Gupte. In *Suraj Prakash*, the facts were that the Appellant, who was in the pay scale of Rs. 125-185 in Central Tractor Organisation, had been transferred to Dandakaranya Development Authority on January 31, 1959. When he was redesignated as Senior Welder in Dandakaranya Project, his pay scale was Rs. 175-240 and the pay he would get on such redesignation remained the same. On January 1, 1973, he was declared a surplus and was relieved from duty. The Supreme Court frowned upon this stratagem of the employer and observed :

"If this action could be justified, then it would be to arm the employers with a new weapon to promote an employee after creating a new post, abolish it after some time and relieve him of his duties on the plea of surplusage. We cannot countenance this procedure. The easiest course for a reasonable management to adopt in such cases would have been to revert the employee to the place wherefrom he was promoted and give him the emoluments which he was drawing before such promotion. In this case, the appellant would have had no complaint at all if such a course was adopted, since, as indicated above, there was no change in the emoluments that he was receiving at the time he was promoted".

In the case of the petitioner, however, the circumstances appear to be much different. It was not as if a new post was created in order to kick the petitioner up and then dump him from there on the ground of surplusage. Facts on record show that 5 posts of drivers existed in the first Respondent-establishment. In addition to these 5 posts, some of the Watchmen, who were appointed substantively as Watchmen, were also doing occasional driving work. From what Mr.

Gupte stated at the bar, it would appear that he occasional driving work was confined to the premises and precincts of the establishments - perhaps, like driving the car from the porch to the parking lot and vice versa, or such similar duty. Mr. Gupte does not dispute that, while the petitioner was working as a Watchman, he was not substantively employed as a driver. The facts on record also indicate that the grades of the two posts are different. Upon confirmation as a watchman, the petitioner was placed in "F" Grade and given appropriate basic salary but upon confirmation as a Vehicle Driver, he was placed in a higher grade, i.e., "E" Grade, and was given a higher basic salary. Again it is not as if the petitioner had to involuntarily suffer a promotion. The Company had notified the vacancies of Vehicle Drivers and invited applications and the petitioner voluntarily applied for the said post, presumably with full knowledge of the conditions and tenure of service. The petitioner was once again interviewed and selected by a Selection Committee. Upon an over all consideration of the material facts of the present case, I am not inclined to accept the contention that the promotion of the petitioner was a mere stratagem for getting rid of him in the manner as frowned upon in *Suraj Prakash*. On the other hand, I am inclined to agree with the Labor Court's finding that it was a case of genuine promotion to a higher grade entailing higher responsibility and higher emoluments. I am also of the view that, once the petitioner was confirmed in the post of a Vehicle Driver, there was no question of reversion to the post of a Watchman. Consequently, it follows that the length of service of the petitioner as a Vehicle Driver in the employment of the first respondent could only be reckoned from the date he was confirmed as a Vehicle Driver, i.e., from 15th June, 1982. The argument that the seniority of the petitioner should have been considered vis-a-vis the Watchmen's category is unsustainable. Even though it was a fact that some of the watchmen were required to carry out occasional driving work, the petitioner ceased to be a watchman of such nature after he had been taken up and confirmed in the post of a vehicle driver. The contention therefore, that watchmen junior to him had been retained in service and that, consequently, there is contravention of the provisions of Section 25-G of the Industrial Disputes Act is unsound and has to be rejected.

October 20, 1994.

6. The next contention urged by Mr. Gupte is that he retrenchment of the petitioner was contrary to the provisions of Section 25-F of the Industrial Disputes Act, in as much as the obligations under Causes (a) and (b) of Section 25-F had not been carried out. He urges that the first respondent had retrenched the petitioner from service with effect from 10th November, 1983 by the Notice dated 8th November, 1983, which was received by the petitioner 15 days from 8th November, 1983, on which date it was despatched by Registered A.D. Hence, the purported retrenchment on 10th November, 1983 was in contravention of the mandatory provisions of Section 25-G, as, on that date the petitioner was neither paid the notice pay and retrenchment compensation, nor was there unconditional tender thereof. A look at the Notice dated 8th November, 1983 makes it clear

that, by the said letter, the service of the petitioner was retrenched and an amount of Rs. 14,892.41 inclusive of notice pay of Rs. 1,482.30 and retrenchment compensation of Rs. 5,986.21 had been despatched to the petitioner by a bank draft along with the said letter. It is quite obvious that the termination of the Petitioner's service did not take place by reason of any other notice, except the Notice dated 8th November, 1983, which was received by him by Registered A.D. If that be so, it is difficult to appreciate how the service of the petitioner could have come to an end, in law, from 10th November, 1983. It is well settled law that a termination of service cannot operate retrospectively and can operate only from the time the notice in connection therewith is made known to the employee. The earliest point of time when this notice came to the knowledge of the petitioner was on 23rd November, 1983. At best, it may be said that he continues to be in service up to that date and that he stood retrenched from 23rd November, 1983 when he received the Notice dated 8th November, 1983. It is not disputed that, contemporaneous with the receipt of the Notice dated 8th November, 1983, the bank draft for Rs. 14,892.41, including payments towards the notice pay and retrenchment compensation, was also received. Hence at the moment of retrenchment i.e., on 23rd November, 1983, there was compliance with the provisions of Section 25-F of the Industrial Disputes Act. When I asked Mr. Gupte as to what was there on record to show that the Petitioner's service had been retrenched at any time prior to the date on which he received the notice, his answer was that the evidence on record showed that, on and from 8th November, 1983, he had been orally told by the Personnel Officer not to report for duty from the next date, i.e., from 9th November, 1983. It is in the evidence of the petitioner that he had not received any letter terminating his service on 8th November, 1983, that, when he reported for duty on 9th November, 1983, he was not allowed to enter the factory and that he received the Notice dated 8th November, 1983 after about 15 days. In these circumstances, it is possible to take the view that, during the period 8th to 22nd November, 1983, there was no termination of service and that despite the petitioner not being allowed to work and not being paid wages during the said period, he continued in the employment of the First respondent.

7. Mr. Vaidya, learned Advocate appearing for the first respondent, states that the petitioner has been paid wages upto 11th November, 1983 and that the first respondent shall, without hesitation, pay his wages for the period 11th November, 1983 to 22nd November, 1983 (both days inclusive). In my view, the mere fact that in the notice dated 8th November, 1983 the first respondent had declared that the retrenchment would be made effective from 10th November, 1983 makes no difference since the letter itself was received and communicated to the petitioner only on 23rd November, 1983. In my view, the retrenchment became effective from 23rd November, 1983 and, on that date, there was full compliance with the provisions of Section 25-F of the Industrial Disputes Act. There is no dispute that the petitioner must be deemed to have continued to be in service upto and including 22nd November, 1983 as the first respondent admits

its liability to pay his wages for the period of 8th November, 1983 to 22nd November, 1983, mounting to about Rs. 545/- Mr. Vaidya says that the Company is prepared to round off the sum to Rs. 600/- and pay it to the petitioner.

8. In the result, I find that there is no merit in the petition. I have not been persuaded to interfere with the order of the Labour Court impugned in the writ petition. The petition is dismissed and the rule discharged. The first respondent shall, within a period of 15 days from today, remit the amount of Rs. 600/- to the petitioner's address by money order. No order as to costs.

9. Certified copy expedited.