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**(1991) 04 RAJ CK 0036**

**In the Rajasthan High Court**

**Case No :** Civil Special Appeal No's. 218 of 1990 and 24 of 1991

Gen. Manager (N. Rly.)

APPELLANT

Vs

Judge, Central Industrial Tribunal and Another

RESPONDENT

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**Date of Decision :** 23-04-1991

**Acts Referred:**

Industrial Disputes Act, 1947 — Section 25G

Rajasthan Industrial Disputes Rules, 1958 — Rule 77

**Citation :** (1992) 65 FLR 501 : (1994) 3 LLJ 754 : (1991) 2 WLN 92 : (1991) 1 WLN 37

**Hon'ble Judges :** Yad Ram Meeana, J; Jas Raj Chopra, J

**Bench :** Division Bench

**Advocate :** M.S. Singhvi, in Appeal 218/90, S.N. Trivedi, in Appeal 24/91, for the Appellant; S.N. Trivedi in Appeal 218/90, M.S. Singhvi in Appeal 24/91, for the Respondent

**Final Decision :** Dismissed

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## Judgement

Jas Raj Chopra, J.—These special appeals are directed against the Judgment of the learned single Judge of this Court dated 16.10.1990 passed in S.B. Civil Writ Petition No. 3740 of 1990 whereby the learned single Judge while dismissing the Writ Petition by General Manager, N.Rly, has upheld the Award of the learned Central Industrial Tribunal, Jaipur, dated 27.10.1989 with the modification that the respondent Prahlad Ku-mar (workman) will be entitled "to reinstatement with 50% back wages only.

2. Aggrieved against this Judgment of the learned single Judge, these two special appeals have been filed: one by the General Manager, Northern Railway, New Delhi and Others; and the other by the Railway Casual Labour Union. As they are directed against the same impugned Judgment of the learned single Judge, they were heard together and are being disposed of by a common Judgment.

3. The facts necessary to be noticed for the disposal of these appeals briefly stated are: that the casual labour Prahlad Kumar was appointed initially as a

Khalasi on 24.8.1979 by the Works Inspector, Northern Railway, Hanumangarh Junction. Later on, he was appointed by the Railway Traffic Inspector, Ahallabad on 9.5.1981. It is alleged that he was appointed as T.L.A. and his services were terminated by the Railway Traffic Inspector, Ahallabad in the afternoon of 5.8.81 and, therefore, an industrial dispute was raised by the Railway Casual Labour Union on behalf of the Workman Prahlad Kumar and that dispute came to be referred to the Central Industrial Tribunal, Jaipur, along with the dispute of one Prithviraj Singh. The industrial dispute of Prithviraj Singh was dismissed by the learned Central Industrial Tribunal but the termination of the services of workman Prahlad Kumar was held against the provisions of Section 25G of the Industrial Disputes Act, 1947 (for short "the Act") and Rule 77 of the Rajasthan Industrial Disputes Rules, 1958 (hereinafter referred to as "the Rules") and the workman Prahlad Kumar was ordered to be reinstated in service with full back wages. Before the learned Central Industrial Tribunal, both the parties filed affidavits and an opportunity of cross-examination was afforded and, thereafter, the learned Central Industrial Tribunal felt that in this case, there is a clear-cut violation of the provisions of Section 25G of the Act and Rule 77 of the Rules and, therefore, the aforesaid order was passed.

4. Against this order, a Writ Petition was filed on behalf of the General Manager, Northern Railway, New Delhi and Others and that writ petition came to be dismissed by the learned single Judge of this Court as aforesaid and hence these two special appeals.

5. In the appeal filed by General Manager, Northern Railway, New Delhi & Ors. it was claimed that it is not at all a case of termination of services but it is a case of relinquishment of services. It was further submitted that the provisions of Section 25G of the Act and Rule 77 of the Rules are not mandatory in character. It was contended that it has not been shown that anybody junior to the workman Prahlad Kumar has been retained in service and, therefore, the workman is not entitled to any relief specially with full back wages. It was further contended that in this case, the industrial dispute has been raised after about one year of the alleged termination of services of the workman Prahlad Kumar. Moreover, his work was of temporary labour allocation and whenever that work came to an end, he was not kept in service. It was claimed that the Workman has left his services voluntarily and it was because of this that he did not raise an industrial dispute for one year and, therefore, it does not amount to retrenchment and hence, this appeal should be allowed and the Award of the learned Central Industrial Tribunal as also the Judgment of the learned single Judge should be set aside.

6. In the appeal filed by Railway Casual Labour Union, it has been claimed that once it is held that the termination was illegal and against the Rules, it was incumbent on the learned single Judge to have upheld the Award of the learned Central Industrial Tribunal and to have granted full back wages to the Workman.

7. We have heard Mr. M.S. Singhvi, the learned counsel appearing for the

General Manager, Northern Railway, New Delhi and Others and Mr. S.N. Trivedi, the learned counsel for the Railway Casual Labour Union and have carefully gone through the record of the cases.

8. The learned Central Industrial Tribunal, after carefully scrutinising the evidence on record came to the conclusion that actually it is not a case of voluntary relinquishment but it is a case of retrenchment. This is a finding of fact about which no dispute can be raised and has not been raised. Thus, the two questions that arise for the decision of this Court, in these special appeals can be summarised as under:

(1) Whether the provisions of Section 25G of the Industrial Disputes Act, 1947 and Rule 77 of the Rajasthan Industrial Disputes Rules, 1958 are mandatory in character and their non-compliance results in making termination of the services of a Workman illegal?

(2) Whether in the facts and circumstances of this case, the learned single Judge was justified in allowing only half back wages to the workman Prahlad Kumar.

9. Mr. M.S. Singhvi, the learned counsel appearing for the General Manager, Northern Railway & Ors. (sic contended) that provisions of Section 25G of the Act and Rule 77 of the Rules are not at all mandatory in character but they are directory in nature. In support of his submission, he has placed reliance on a decision of this Court in *Bhanwarlal v. R.S.R.T.C.* 1984 RLR 619 (F.B.) : 1984 L.I.C. 1794 wherein Hon'ble G.M. Lodha and N.M. Kasliwal, JJ. observed as under:

"S.25-G of the Industrial Disputes Act required to be complied with even in cases where clause 13 of the Standing Orders, 1965 has been invoked. But, Section 25G of the Act does not recognise the principle of "last come first go" and "first come last go" in absolute form as it can be departed and deviated with in cases of agreement to the contrary or due to extraordinary reasons which must be "recorded in writing". Section 25G of the Act, to the above extent is directory and not mandatory in nature".

Thus it clearly says that the provisions of Section 25G of the Act are directory and not mandatory in nature.

10. Section 25G of the Act says that where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workman in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman. Thus, normally the compliance of this rule i.e. "last come first go" should be maintained but it is not an inflexible rule that an employer cannot terminate the services of person who may be senior to the last employed persons but if the employer wishes to do so then that can only be done by recording

reasons justifying such an action and, therefore, it has been held by this Court per majority in the aforesaid decision in Bhanwarlal's case (supra) that the provisions of Section 25G of the Act are directory in nature and they are not mandatory in character. So much so that this Court in Mahesh Chandra Sharma v. State of Rai-asthan and Anr. ILR 24 Raj. 817 held that where an employer retrenches a workman retaining his junior in service, it does not amount to breach of Section 25G of the Act nor Article 16 of the Constitution can be attracted in this matter.

11. This contention of Mr. Singhvi is seriously disputed by Mr. S.N. Trivedi, the learned counsel appearing for the Railway Casual Labour Union and in this respect, he has drawn our attention to a decision of this Court in State and Ors. v. Vinay Kumar and Ors. 1978 WLN (UC) 223, wherein a Division Bench of this Court has held that, the respondent was retrenched whereas the persons junior to him were retained in the employment without recording any reasons. Obviously, in the present case, the provisions of Section 25G of the Act have not been complied with and so, we have no hesitation to state that failure to comply with Section 25G will make the retrenchment of the respondent invalid. This authority does not lay down whether the provisions of Section 25G of the Act are mandatory in nature or directory in character. It only says that junior has been retained in service whereas the senior person has been retrenched from service without recording reasons for non-compliance of Section 25G of the Act and, therefore, such a retrenchment is held to be invalid.

12. Reliance was further placed on a decision of their Lordships of the Supreme Court in Workmen of Sudder Workshop of Jorehaut Tea Co. Ltd. Vs. Management of Jorehaut Tea Co. Ltd., wherein it has been held that the rule of "last come, first go" envisaged in Section 25G is not an inflexible rule and variations from it may be justified in extraordinary situations. The Management has a discretion to depart from the rule provided it acts bona fide and there are valid and justifiable reasons for such departure. Absence of mala fides by itself is no absolution from the rule and the burden is on the management to substantiate the special grounds. But once valid and justifiable reasons are made out, Section 25G will be vindicated and not violated. This authority was cited by Mr Trivedi to show that the burden of proving justifiable grounds lies on the management. However, this authority says that the rule of "last come first go" envisaged in Section 25G is not an inflexible rule and variations from it may be justified in extraordinary situations. It further says that the management has a discretion to depart from the rule provided it acts bona fide and there are valid and justifiable reasons for such departure.

13. Our attention has also been drawn to a decision of the Bombay High Court in Navbharat, Hindi Daily, Nagpur v. Navbharat Shramik Sangha 1984 L.I.C. 445. In that case, it was held that Ssl 25F and 25G of the Act are independent of each other and if there is a violation of Section 25F or for that matter Section 25G of the Act, the retrenchment will be invalid. There is no doubt about this fact that if

Section 25G of the Act is violated i.e. a junior is retained and a senior is retrenched without assigning any reasons then, of course, provisions of Section 25G of the Act will render that retrenchment invalid but it has to be proved by the workman that his junior has been retained in service and his services have been terminated. Unless that is proved, it cannot be held that the provisions of Section 25G of the Act have been violated. Of course, once a workman proves that a junior has been retained in service then the burden shifts on the employer to prove that the junior has been retained in service for some valid and justifiable reasons but initially, the burden to prove that junior has been retained in service is on the workman. Navbharat, Hindi Daily Nagpur's case (supra) does not say that the compliance of Section 25G of the Act is mandatory. It only says that the non-compliance of Section 25G of the Act will render the retrenchment invalid. There is no dispute about this principle which has been laid down in Navbharat, Hindi Daily, Nagpur's case (supra). It is, therefore, clear from the aforesaid authorities that the provisions of Section 25G of the Act are only directory in nature and they are not mandatory in character.

14. Now, this has to be considered whether the provisions of Rule 77 of the Rules are mandatory in character?

15. It was contended by Mr. Singhvi that the provisions of Rule 77 of the Rules are not mandatory in character but they are directory in nature because, firstly that the non-compliance of Rule 77 of the Rules has been made punishable under Rule 79 of the Rules, which provides that any breach of these rules shall be punishable with fine not exceeding fifty rupees; and secondly Rule 77 of the Rules increases the scope of the provisions of Section 25G of the Act. In this respect, he drew our attention to Section 38(1) of the Act, which relates to powers to make the rules and it provides that the appropriate Govt. may, subject to the conditions of previous publication, make rules for the purpose of giving effect to the provisions of this Act. Sub-section (3) of Section 38 of the Act provides that the Rules made under this section may provide that a contravention thereof shall be punishable with fine not exceeding fifty rupees. This is the only penal consequence which can follow in non-compliance of Rule 77 of the Rules. No other consequence can follow and, therefore, Rule 77 of the rules cannot be held as mandatory. Moreover, it cannot increase the scope and ambit of the main provision of Section 25G of the Act. In this respect, he drew our attention to a decision of their Lordships of the Supreme Court in Bombay Union of Journalists and Others Vs. The State of Bombay and Another, and specially drew our attention to paras 10, 11, 12 and 13 of the Judgment. They only show that the provisions of Section 25G of the Act are not mandatory in character and further that the R.80 of the Bombay Industrial Disputes Rules, 1947 is consistent with the policy underlying Section 25F(c) of the Act. It does not say that the subordinate legislation cannot increase the scope of the main legislation.

16. Our attention was next drawn to a decision of their Lordships of the Supreme

Court in State of Karnataka and Another Vs. H. Ganesh Kamath and Others, wherein it has been held as under:

"that though the substituted Clause (aa) inserted in Sub-section (2) of Section 21 confers power upon a State Govt. to make rules providing for the minimum qualifications of persons to whom licences to drive a transport vehicle are issued. Such power cannot include within its scope the power to make a rule contrary to the provisions of the Act conferring the rule making power. It is a well settled principle of interpretation of Statutes that the conferment of rule making power by an Act does not enable the rule making authority to make a rule which travels beyond the scope of enabling Act or which is inconsistent therewith or repugnant thereto."

This was a case where the licence for driving heavy motor vehicle can be granted to a person if he shows that he has experience in driving Motor Vehicle for a period of at least two years. The rule that was made provided that he must also show that he has experience of driving medium motor vehicle. In those facts, it was held that:

"While from Clause (a) of Sub-section (7) of Section 7, it automatically follows that a person who passes the test in driving a heavy motor vehicle is to be deemed also to have passed the test in driving any medium motor vehicle, under Sub-rule (2) of R.5, he cannot obtain a licence to drive a heavy motor vehicle unless he has already possessed a licence to drive a medium motor vehicle and has experience in driving it for a period of at least two years which licence he could not obtain unless he has previously passed the test in driving a medium motor vehicle. Thus, the provisions of the said sub-r.(2) of R.5 are obviously inconsistent with the provisions of Sub-section (7) and (8) of S. 7. The said sub-rule does not merely prescribe a qualification not provided for in the Act, but prescribes a qualification which is contrary to that provided in the Act."

Here it is not like this. In this case, Section 25G of the Act provides that normally, the services of the workman should be terminated only on the basis of last come first go rule. A departure can only be made for the reasons to be recorded. The Govt. of Rajasthan framed the Rajasthan Industrial Disputes Rules, 1958. Rule 77 of the Rules reads as follows:

"Rule 77. Maintenance of seniority list of workmen. - The employer shall prepare a list of all workmen in the particular category from which retrenchment is contemplated arranged according to the seniority of their service in the category and cause a copy thereof to be paste on a notice-board in a conspicuous place in the premises of the industrial establishment at least seven days before the actual date of retrenchment".

This rule ensures the compliance of the rule "last come first go". It is neither contradictory nor it increases the scope of Section 25G of the Act. It provides that the employer shall prepare a list of all workmen in the particular category from which retrenchment is contemplated arranged according to the seniority of

their service in that category and shall cause a copy thereof to be pasted on a notice-board in a conspicuous place in the premises of the industrial establishment at least seven days before the actual date of retrenchment. Thus, this rule ensures that a seniority list is to be published at least before 7 days of retrenchment so that the person concerned may object to it and show that particular seniority which has been assigned to him in a particular category is wrong and if the management is satisfied then that error can be rectified and the persons who are retrenched may know that they are juniormost persons and if anybody junior to them is allowed to work in the Organisation then they may be able to know that a junior person has been retained in service and they can make a grievance about it. In that circumstance, such an order can only be sustained if the Management satisfies the Court that a junior man has been retained in service for sufficient and valid reasons. Thus, it is clear that to ensure the compliance of Section 25G of the Act, this Rule 77 has been incorporated. It is neither contrary to the provisions of Section 25G of the Act nor it travels beyond the scope of the Act and therefore, to this extent, the submission of Mr. Singhvi cannot be sustained.

17. Now this has to be seen whether compliance of Rule 77 of the Rules is mandatory or not?

18. In this respect, we may gainfully refer to a decision of this Court in Bhanwarlal's case (supra) wherein Hon"ble G.M. Lodha and N.M. Kasliwal, JJ have observed:

"that this Court cannot insist on the principle of "last come first go" for employees who lost confidence of the employers but in such cases, the Management" is required to record the reasons and further comply with the provisions contained in Rule 77 of the Rajasthan Industrial Disputes Rules, 1958 before making a departure from Section 25G of the Industrial Disputes Act."

This Court has clearly held that the management has to comply with the provisions of Rule 77 of the rules before making a departure from Section 25G of the Act. Thus, the provisions of Section 25G of the Act are directory but a departure of the principle "last come first go" is permitted only when sufficient ground is shown by the Management and one of those grounds can be that the employees have lost confidence of the employer but even in doing so, the list as required by Rule 77 of the Rules has to be published and, therefore, so far as Rule 77 of the Rules is concerned, its compliance is mandatory in character and the rationale behind it is that the worker may be able to know his place in the seniority list and may be further able to ascertain as to whether a junior to him in the service has been retained in service or not.

19. A similar question arose before a Division Bench of the Patna High Court in Gaffar v. Union of India 1984 LIC. 645 wherein it has been held that Rule 77 requiring maintenance of seniority list of workmen has been included in the Rules so that the object of 5.25-F of the Industrial Disputes Act may be effectively

achieved. The minimum time of seven days allowed for this purpose is not unnecessarily long, for, the workmen should get an adequate opportunity to scrutinise the correctness of the seniority list before he is thrown out. Viewed from this angle, it held that the requirement mentioned in Rule 77 is mandatory and its violation renders an order of retrenchment illegal. It was a case where the seniority list was published before six days but that also was held to be inadequate. It may be stated here that Rule 77 of the Rajasthan Industrial Disputes Rules, 1958 is in pari materia with Rule 77 of the Industrial Disputes (Central) Rules, 1957.

20. In *Navbharat Hindi Daily, Nagpur's case* (supra) Industrial Disputes (Bombay) Rules were framed under the provisions of the Industrial Disputes Act, 1947 and R.81 of those Rules provided for the preparation of such a seniority list. Rule 81 reads as follows:

"Rule 81. The maintenance of seniority list of workmen-The employer shall prepare a list of workmen in the particular category from which retrenchment is contemplated, arranged according to the seniority of their service in that category and cause a copy thereof to be pasted on the notice-board in a conspicuous place in the premises of the industrial establishment at least seven days before the actual date of retrenchment."

Rule 81 of the Industrial Disputes (Bombay) Rules is also in pari materia with Rule 77 of the Rules and it has been held by the Bombay High Court that non-compliance of Section 25G of the Act read with Rule 81 of the Rules makes the retrenchment itself illegal. It was also held that requirement regarding maintenance of seniority list is mandatory and its strict compliance is necessary. The list to be prepared under Rule 77 of the Rules should be categorywise and not according to the place of posting and this is what has been held by a Division Bench of the Allahabad High Court in *Sriram Bachan v. G.M., N.E. Railway, Gorakpur* 1981 L.I.C. 1196.

21. Thus the list has to be prepared keeping the length of employment under consideration and category to which that workman belongs and that seniority cannot be maintained on the basis of place of posting of a particular person. In this case, it is admitted case (...illegible?) of the category to which workman Prahlaad Kumar belongs and, therefore, it is clear that no such seniority list was prepared and it was not published and therefore, the provisions of Rule 77 of the Rules have clearly been violated, the compliance of which is mandatory. Thus, the learned single Judge was perfectly right in maintaining the Award of the learned Central Industrial Tribunal, Jaipur holding the termination of service of workman Sri Prahlaad Kumar as illegal. The learned Central Industrial Tribunal has rightly ordered for the reinstatement of workman Shri Prahlaad Kumar. It is no doubt true that his services were terminated on 5.8.1981 but he did not raise any industrial dispute for about one year and thereafter, the Railway Casual Labour Union has raised such a dispute. It has been mentioned in para 6 of the affidavit of Shri Ashwini Kumar Sharma that the workman Shri Prahlaad Kumar

was again re-employed as T.L.A. on 1.3.1983 and that work was completed on 20.4.1983. Thereafter, he was again employed on 2.8.1983 and his employment continued upto 29.11.83 and on that date, as he has worked for 120 days he was granted C.P.C. Grade with effect from 30.11.1983 as per the Railway Rules. Thus he has been in gainful employment during this period and he is guilty of laches because the industrial dispute has been raised after one year of his retrenchment and, therefore, the learned single Judge was perfectly justified in awarding only half back wages to him.

22. Mr. S.N. Trivedi, the learned counsel appearing for the Workman Prahlad Kumar has drawn our attention to a decision of their Lordships of the Supreme Court in Sukhdev Raj v. Union of India 1987 SCC (L&S) 281 wherein it has been observed:

"Having held that the retrenchment was bad and that it should be set aside, the High Court was not justified in not awarding back wages to the petitioner."

That was a case where back wages were not at all awarded. Here, half of the back wages have been awarded by the learned single Judge and there are cogent reasons to award half back wages, which have been mentioned by us hereinabove.

23. Keeping in view all these facts and circumstances of this case, we find no force in these two appeals, and, therefore, they are dismissed without any order as to costs.