
(1990) 07 KL CK 0027
In the High Court Of Kerala
Case No : W.A. No"s. 534 and 640 of 1989

Indian Airlines

APPELLANT

Vs

Sebastian

RESPONDENT

Date of Decision : 05-07-1990

Acts Referred:

Industrial Disputes Act, 1947 — Section 2, 25B, 25B(2), 25F, 25G

Citation : (1991) 62 FLR 755 : (1994) 3 LLJ 498

Hon'ble Judges : Paripoornan, J; Jagannadha Raju, J

Bench : Division Bench

Advocate : J.B. Koshy, for the Appellant; M. Ramachandran, G.P., for the Respondent

Final Decision : Allowed

Judgement

Jagannadha Raju, J.—These two Writ Appeals are filed by the management-petitioner and by the workers-respondents, as both the parties feel aggrieved by the judgment dated 7-4-1989 in O.P. No. 8218 of 1988-C. The Writ Appeals arise under the following circumstances. The appellants in W.A. No. 640 of 1989 are workmen working as casual workers on daily wage basis under the management, namely, the Station Manager. Indian Airlines, Ernakulam, hereinafter called the "management" for the sake of brevity. They worked as casual workers on daily wage basis during the years 1979 to 1982. They were entitled to be taken into employment for the specific days on which their services were needed. After 1982, the management started giving similar employment to other batch of workers. Then an O.P. was filed questioning the so-called retrenchment of the petitioners. That O.P. was dismissed, and then an industrial dispute was raised by the workers and it was ultimately referred to the Industrial Tribunal, Alleppey for adjudication as I.D. No. 37 of 1987. The Tribunal passed award dated 25.3.1988 which was published in the gazette on 16.7.1988. The operative portion of the award is as follows:

"11. By upholding the right of these workmen u/s 25H of the I.D. Act, direction is

hereby given to the management to engage them also on casual basis. They are entitled for preference in getting casual engagement....They had also acquired some vested right,...to meet the ends of justice, it would be advisable to have a viable formula so that at least 50 per cent of the casual engagement required shall be set apart to the workmen concerned herein. The other 50 per cent of the casual employment shall be given to the workmen who had been employed subsequently, i.e. from 1983 onwards. Separate panel shall be maintained by the management. From the two panels, casual employment shall be offered on rotation by choosing one each from the respective panels. In case, a workman who is chosen on rotation is failing to report for work, he will lose his right for that turn and he will have to wait for the next turn. Before the expiry of every calendar month, the management should ensure that casual employees from each panel get their due share of 50 per cent casual employment".

Questioning the award, the management filed O.P. No. 8218 of 1988. The basis of attack against the award is: that the workers are not entitled to the protection of Section 25H of the Industrial Disputes Act, as they do not satisfy the requirements of Sections 25B and 25F; in none of the years had they worked for more than 89 days; their employment is purely casual; they had no continuous service for 240 days, as contemplated by Section 25B, and unless the ingredients of Sections 25B and 25F are satisfied, the workers are not entitled to the benefits of Section 25H, these workers do not satisfy the requirements of "retrenched workers", the definition of "retrenchment" in Section 2(oo) is not satisfied by these workmen. In the present case, the award granting 50% of the casual employment for the 12 petitioners is arbitrary, and against the interests of workers, who worked earlier, and some others, who also worked during the years 1979 to 1982; the direction given by the Tribunal works hardship, in case sufficient number of workers do not turn up from out of the panel for being engaged. The Tribunal having noticed that the nature of employment is purely casual committed a mistake in granting relief. The O.P. was resisted by the workers. Ultimately the learned Single Judge allowed O.P. No. 8218 of 1988-C, by judgment dated 7.4.1989, upholding the claim of the workers, but at the same time modified the award so as to include workers who worked as casual workers prior to 1979 also in the first panel. The management feeling aggrieved by the judgment upholding the award and modifying it slightly filed W.A. No. 534 of 1989, challenging the judgment of the learned Single Judge and the award of the Tribunal. The workers, being aggrieved by the amendment of the award by the learned Single Judge, filed W.A. No. 640 of 1989 claiming that they are adversely affected by the modification introduced by the court, when those workers have not agitated the matter.

2. In these appeals, counsel for the management contends that neither the Industrial Tribunal, nor the learned Single Judge, dealt with the legal questions that have been raised before them. They failed to see that as per the law the workmen are not persons who have been "retrenched" as defined u/s 2(oo). The Tribunal as well as the learned Single Judge failed to notice the effect of the

amendment to Section 2(oo) in 1984, and blindly followed the earlier decisions. In fact Section 2(oo) has been amended and clause (bb) has been introduced to cure the defect created by The State Bank of India Vs. Shri N. Sundara Money, . Now in fact the Supreme Court has pronounced that N. Sundaramony's case does not lay down the law correctly. A Constitution Bench of the Supreme Court in Punjab Land Development and Reclamation Corporation Ltd., Chandigarh Vs. Presiding Officer, Labour Court, Chandigarh and Others, has clearly indicated that the wide definition of "retrenchment" given by Krishna Iyer, J is no longer valid after the amendment of the Act in 1984. The Constitution Bench also pointed out that the decision in N. Sun-daramony's case, was rendered without following the earlier Constitution Bench decisions. Counsel for the management also contends that the learned Single Judge as well as the Industrial Tribunal committed a mistake in giving benefit of Section 25H to these workmen, when they do not satisfy the requirements of Section 25B which deals with " continuous service", and Section 25F, which deals with "conditions precedent to retrenchment of workman". Unless the ingredients of Sections 25B and 25F are satisfied, one cannot claim the benefit of re-employment as a retrenched workman u/s 25H. Counsel for the management contends that the workers being purely casual employees, who are engaged every time for one day, can never seek the benefit of Section 25H, and they do not come within the meaning of "retrenchment" defined u/s 2(oo), subsequent to the amendment in 1984.

3. On behalf of the workers, Shri M. Ramachandran contends that casual workmen are also workmen, and they satisfy the definition of workman u/s 2(s). He claims that there is no substantial change in the law even after the amendment of Section 2(oo). According to him, the workers are deemed to be in employment continuously as they are willing to render services and do the work. He relies upon certain decisions in support of his argument, and then argued that in exercise of the extra ordinary jurisdiction under Article 226 of the Constitution of India, the learned Single Judge has taken a particular view, which is inconformity with the principles of equity and welfare of the workers. In such circumstances, there is no jurisdiction for this Court to interfere with the same in appeal. Shri Ramachandran contends that the Industrial Tribunal is certainly competent to impose obligations on the management, especially in cases where the result would be to abolish contract labour system.

4. The point for consideration in these appeals is whether Ext. P1 award passed by the Industrial Tribunal in I.D. No. 37 of 1987 is in accordance with law, and whether the judgment of the learned Single Judge in O.P. No. 8218 of 1988, which has slightly modified the award is in accordance with law.

5. The Point. Before deciding the legal questions involved in these Writ Appeals, it would be pertinent to mention a few dates and facts which assume a lot of importance in rendering a decision in these two appeals. So also, it would be necessary to set out a few statutory provisions to find out whether the Industrial Tribunal and the learned Single Judge have rendered decisions which are

inconformity with the prevailing law. It is an admitted case that the workmen are casual employees, who were being engaged for each day, whenever there was need for their services. None of these 12 workmen was employed after 1.1.1983. It is also an admitted fact that in no year they have worked for more than 89 days as casual employees 23.3.1987 is the date of order of reference referring I.D. No. 37 of 1987 to the Tribunal for adjudication. The law that would be applicable in this case is the law that was prevailing on 23.3.1987. It is our unfortunate and painful duty to record, (as a matter of fact) that neither the Tribunal nor the learned Single Judge was conscious of the fact that the law as it stood on 23.3.1987 should be applied to the facts of the case, and a decision rendered. Several decisions have been quoted in the award as well as in the learned Single Judge's judgment, which dealt with the legal position existing prior to the amendment of Section 2(oo) with effect from 18.8.1984. The State Bank of India Vs. Shri N. Sundara Money, loomed large in the mind of the Tribunal as well as the learned Single Judge ignoring the fact that clause (bb) was introduced in Section 2(oo) specifically for the purpose of superseding the decision in N. Sundaramony's case. The amendment was effected by Section 2 of Act 49 of 1984 and the amended provision came into force with effect from 18.8.1984.

6. After having set out the necessary dates, it would be necessary for us to extract a few statutory provisions of the I.D. Act. Section 2(oo) reads as follows:

"2(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 workmen concerned contains a stipulation in that behalf; or

(bb) termination of the service of the 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".

Section 2(s) reads as follows:

"2(s) workman means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, electrical or supervisory work for hire or reward, whether the terms of employment be express or implied and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of,

that dispute or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person-

(i) who is subject to the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957); or

(ii) who is employed in the police service or as an officer or other employee of a prison; or

(iii) who is employed mainly in a managerial or administrative capacity; or

(iv) who, being employed in a supervisory capacity, draws wages exceeding one thousands six hundred rupees per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature".

Section 25B reads as follows:

"25-B. Definition of continuous service:

For the purposes of this Chapter,-

(1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock out or a cessation of work which is not due to any fault on the part of the workman;

(2) where a workman is not in continuous service within the meaning of Clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-

(a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made has actually worked under the employer for not less than-

(i) one hundred and ninety days in the case of a workman employed below ground in a mine; and

(ii) two hundred and forty days, in any other case;

(b) for a period of six months, if the workman, during a period of six calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-

(i) ninety-five days, in the case of a workman employed below ground in a mine; and

(ii) one hundred and twenty days, in any other case.

Explanation : For the purposes of Clause (2), the number of days on which a workman has actually worked under an employer shall include the days on which-

(i) he has been laid off under an agreement or as permitted by standing orders made under the Industrial Employment (Standing Orders) Act, 1946 (20 of 1946), or under this Act or under any other law applicable to the industrial employment;

(ii) he has been on leave with full wages, earned in the previous year;

(iii) he has been absent due to temporary disablement caused by accident arising out of and in the course of his employment; and

(iv) in the case of a female, she has been on maternity leave; so however, that the total period of such maternity leave does not exceed twelve weeks",

Section 25F reads as follows:

"25-F. Conditions precedent to retrenchment of workmen. -No workmen 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 the 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 or such authority as may be specified by the appropriate Government by notification in the Official Gazette",

Section 25-G reads as follows:

"25-G. Procedure for retrenchment-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 workmen 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".

Section 25-H reads as follows:

"25-H. Re-employment of retrenched workmen.-Where any workmen are retrenched and the employer proposes to take into his employ any persons, he shall, in such manner as may be prescribed, give an opportunity to the retrenched workmen who are citizens of India to offer themselves for re-employment, and such retrenched workmen who offer themselves for re-employment shall have preference over other persons".

7. As can be seen from Ext. P1 award, the industrial dispute referred to the

Tribunal for adjudication on 23.3.1987 is as follows:

"Whether the action of the management of Indian Airlines, Cochin, Kerala, in retrenching the service of following 12 workmen is justified and legal, if not, to what relief are they entitled to ?"

It is clear from the order of reference made on 23.3.1987 that the main question referred for adjudication is whether the retrenchment is justified, and what is the relief the workers are entitled to. The dispute referred to the Tribunal never contemplated re-employment of the retrenched workers. When we see Ext. P2, copy of the claim statement filed by the workers, we find that these 12 workmen approached the Labour Department on 10.8.1984 and in due course the dispute was referred to the Industrial Tribunal for adjudication. Throughout Ext. P2 there is no reference to Section 25H under which now relief is granted by the Tribunal as well as the learned Single Judge. In the last paragraph which deals with the prayer, it is claimed that the retrenchment complained of is illegal and the workers wanted that a direction may be issued to reinstate them in service with the benefit of continuity of service and backwages. Obviously, the claim statement is drafted on the assumption that they are workers who are entitled to the benefit of Section 25H, and on the assumption that they are retrenched employees as per law. In paragraph 4 it was averred that for years together they had put in continuous and uninterrupted service and their services were orally terminated by November and December, 1982. Not a scrap of paper is produced to establish the fact that for years together they had put in continuous and uninterrupted service. They now categorically admit that they are casual workers, who were being employed on daily wage basis on the days on which the Airport needed their services. They also admit that all of them are persons who cannot be absorbed into the service of the management as they are age barred. In Ext. P3, written statement, filed by the management, very elaborate statements have been made to indicate that these workmen did not have continuous service of 240 days and that these people are not entitled to the benefits of Sections 25B, 25F and 25H. It was clearly stated that they cannot claim continuous or uninterrupted employment as envisaged u/s 25B of the I.D. Act. It was also stated that they are not entitled to any notice or pay or compensation u/s 25F of the Act. In paragraph 10 it was specifically averred that there is no retrenchment of these workers as defined in Section 2(oo). In paragraph 12 it was clearly stated that these workers are not entitled to reinstatement with or without backwages. Impliedly rights u/s 25H were also disputed.

8. In the light of the claim statement and the written statement, if we peruse the award, Ext. P1, we find that the Industrial Tribunal failed to consider the essential questions that have to be decided for granting relief u/s 25H. Paragraph 2 of the award clearly mentions that when these workers approached this Court, this Court dismissed the O.P. remarking that they can agitate their claims under the I.D. Act. Then in paragraph 3 it is clearly mentioned as follows:

"Initially, when the workmen challenged their non-employment before the High Court, they had contended that they were denied of retrenchment compensation. Since they had not worked for 240 days in any year, they were not entitled to retrenchment compensation".

Thus it is clear that earlier what the workmen sought was retrenchment compensation and not reinstatement on the ground that they are retrenched employees. In the very same paragraph, the Tribunal categorically mentions that none of them had worked for more than 89 days in any consecutive period of 12 months. Then the Tribunal stated that according to the management the workers cannot claim continuous employment or uninterrupted employment as envisaged u/s 25B of the I.D. Act. They do not satisfy the requirements of Section 25B. While discussing the various questions in paragraph 5, the Tribunal categorically, stated that these workmen are ineligible for direct recruitment or permanent absorption in view of the age bar prescribed in the Recruitment Rules. In the end portion of paragraph 5, the Tribunal noticed that in an identical case, the Industrial Tribunal, Madras, declined to accept the claim of workmen for regular employment. From paragraph 6 onwards, the Tribunal went in a totally wrong direction. It ignored the provisions of Section 2(oo) as amended and it also ignored Sections 25B & 25H and suddenly jumped to the conclusion that Section 25H is applicable to these workmen simply because they are workmen. Had the Tribunal looked into the statutory provisions, Sections 2(oo), 25B and 25F, it would not have committed this fundamental mistake. In paragraph 7 the Tribunal recorded a finding to the effect that Ext.M5 proves payment of wages to these workers on daily wage basis, and that none of them worked for more than 89 days in any year. When argument was raised that they are not entitled to the relief u/s 25H, as they do not satisfy the requirement of 240 days of continuous employment, the Tribunal simply remarked, overlooking the statutory provisions, in the following manner:

"In order to establish that right, (right of reinstatement of retrenched employees u/s 25H) it is not necessary that he should have completed 240 days of service in any of the years".

The Tribunal completely overlooked the requirements of Sections 25B and 25F. It should be remembered that Sections 25B, 25F, 25G and 25H are all inter-linked provisions and they all come under Chapter V-A. Section 25B deals with definition of "continuous service". u/s 25B(2)(a)(ii), unless a person had worked for 240 days continuously in a year, he cannot be deemed to be in continuous service. Section 25F deals with "conditions precedent to retrenchment of workmen" and it mentions that no workman employed in any industry who has been in continuous service for not less than one year shall be retrenched.....Section 25G deals with procedure for retrenchment. Section 25H deals with re-employment of retrenched workmen. In view of the fact that these workmen were not in continuous service as contemplated u/s 25B and as they do not satisfy the requirements of Section 25F, they are not entitled to the benefits

of Section 25H.

9. Section 2(oo) prior to the amendment of 1984 was in a particular manner. Subsequent to the amendment in 1984 and introduction of Clause (bb), termination of the service of the workman as a result of the non-renewal of the contract of employment on its expiry or of such contract being terminated under a stipulation in that behalf, such termination of the employee will not come within the meaning of retrenchment". This amendment, as indicated earlier, was brought in specifically to rectify the situation created by the wide definition given to "retrenchment" in N. Sundaramony's case.

10. In this context it may be observed that the law, as laid down by the Supreme Court in *The State Bank of India Vs. Shri N. Sundara Money*, is no longer good law, in view of the recent Constitution Bench decision of the Supreme Court in *Punjab Land Development and Reclamation Corporation Ltd., Chandigarh Vs. Presiding Officer, Labour Court, Chandigarh and Others*. In this decision the Supreme Court considered elaborately the effect of the judgment of Krishna Iyer, J, in N. Sundaramony's case, and as to how that judgment was rendered without referring to the earlier Constitution Bench decisions. The Court dealt with these matters in paragraphs 36 to 39 and in paragraph 42, at page 503, it was clearly pointed out that the judgment in N. Sundaramony's case is bad law as it did not follow the earlier binding precedent of the Supreme Court and that the Constitution Bench decisions bind smaller Divisions of the Court. In paragraph 58, the Supreme Court referred to the subsequent decision of Ranganatha Misra, J. in *Management of Karnataka State Road Transport Corporation, Bangalore Vs. M. Boraiah and Another*, and then dealt with the question of interpretation of Section 2(oo) of the Act from paragraph 61 onwards. Paragraph 62, which is the most important paragraph, reads as follows:

"62. When we analyse the mental process in drafting the definition of "retrenchment" in Section 2(oo) of the Act we find that firstly it is to mean the termination by the employer of the service of a workman for any reason whatsoever. Having said so the Parliament proceeded to limit it by excluding certain types of termination, namely, termination as a punishment inflicted by way of disciplinary action. The other types of termination excluded were (a) voluntary retrenchment; or (b) retrenchment of the workman on reaching the age of superannuation, if the contract of employment between the employer and the workman concerned contains a stipulation on that behalf; or (c) termination of service of a workman on the ground of continued illhealth. Had the Parliament envisaged only the question of termination of surplus labour alone in mind, there would arise no question of excluding (a), (b) and (c) above. The same mental process was evident when Section 2(oo) was amended inserting another exclusion Clause (bb) by the Amending Act 49 of 1984, with effect from 18.8.1984, "termination of the service of workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry of such contract being terminated under a stipulation in

that behalf contained therein".

Then after an exhaustive discussion, the Court postulated the scope of the different provisions of Sections 25F, 25G and 25H, and remarked that there is no conflict between the definition of "retrenchment" in Section 2(oo) and the provisions of Sections 25F, 25G and 25H, and there is room for harmonious construction. After discussing the techniques and methods of interpretation, in paragraph 82 at page 515 the Court laid down the law as follows:

"82. Applying the above reasonings, principles and precedents, to the definition in Section 2(oo) of the Act, we hold that "retrenchment" means the termination by the employer of the service of a workman for any reason whatsoever except those expressly excluded in the section.

11. It is now well established that the law laid down by the N. Sundaramony's case is no longer good law. The Tribunal committed a fundamental mistake in not considering the case in the light of the amended Section 2(oo) and in not considering the requirements of Section 25B and Section 25F, before applying Section 25H.

12. The learned Single Judge pronounced judgment on 7.4.1989 in O.P. No. 8218 of 1988. It should be remembered that the learned Single Judge was dealing with a situation which arose after the amendment of Section 2(oo) in the year 1984. The discussion portion of the judgment is from paragraph 3 onwards. In paragraph 3 reference is made to various judgments which were all reported prior to the amendment of Section 2(oo), and without mentioning what exactly are the principles laid down in those decisions, the learned Single Judge remarked as follows:

"4. The proposition of law as laid down in these decisions cannot be disputed".

With respect to the learned Single Judge, we are constrained to point out that the learned Single Judge did not consider the effect of the amendment of the law by reason of introduction of Clause (bb) in Section 2(oo). Though Section 25B has been referred to in paragraph 4 of the judgment, the learned Judge did not indicate how and in what manner the ingredients of Section 25B were satisfied. The learned Judge remarked in paragraph 4 at page 6 as follows:

"If the management has not given work for casual employees on certain days, on account of non-availability of work, or on account of the rotation system followed, such interrupted service on account of a cessation of work is to be considered as continuous service under Sub-section 1 of Section 25B. Whatever be the reason every termination spells out retrenchment."

With respect to the learned Judge, we are unable to find any statutory support for the above quoted remarks by the learned Single Judge. However, much we search the language of Section 25B we are unable to find any support for the remarks made by the learned Judge. The last remark that "whatever be the reason, every termination spells out retrenchment" is not applicable to the law as

it stood after the amendment of Section 2(oo). Obviously the learned Judge was only relying upon the unamended law.

13. The Court did not consider the scope of Section 25F and never tried to find out whether the workmen involved in these cases satisfy the requirements of Section 25F, so that they can claim the benefit of Section 25H. In paragraph 6 of the judgment, the learned Judge was pleased to modify the award on grounds of equity so as to give relief for casual workers, who worked prior to 1979 also, and accordingly directed modification of the award.

14. With respect we are constrained to point out that the judgment of the learned Single Judge is not based upon the correct appreciation of the statutory provisions. The legal effect of Section 2(oo) the requirements of Sections 25B, and 25F were not borne-in-mind, while rendering the judgment. It should be remembered that these particular aspects have been highlighted in the written statement and they were also argued both before the Tribunal and before the learned Single Judge. We hold that the judgment has not laid down the law correctly. The judgment is vitiated as it is based upon several assumptions which do not have any factual or statutory basis.

15. In our considered opinion, the Tribunal went wrong in not considering the real questions involved in the adjudication of the dispute. It assumed that once certain workmen satisfied the definition of "workmen" u/s 2(s), Section 25H would automatically apply to them, if their services are terminated. Tribunal moved bothered to know whether they satisfy the requirements of Section 2(oo) as amended and whether they come within the category of "retrenched employees" as contemplated by law. The judgment of the learned Single Judge is not sustainable under law, as the learned Single Judge did not consider the effect of Section 2(oo) as amended in 1984, and the Court did not test the case in the light of the provisions of Sections 25B and 25F before awarding relief u/s 25H. The judgment is unsustainable.

16. In the result, W.A. No. 534 of 1989 is allowed. The judgment dated 7.4.1989 in the O.P. is hereby set aside. The award, Ext.P1, passed by the Industrial Tribunal in consequently quashed as illegal and unjustified.

17. In view of our decision in W.A. No. 534 of 1989, W.A. No. 640 of 1989 is dismissed as unnecessary. In the peculiar circumstances of these cases, each party shall bear its own costs throughout.