

(2005) 08 KAR CK 0012

In the Karnataka High Court

Case No : Writ Petition No"s. 37333 of 2000 and 4945 of 2001

J. Benjamin

APPELLANT

Vs

The Management of Bharat Earth Movers Limited, Kolar Gold
Field

RESPONDENT

Date of Decision : 05-08-2005

Acts Referred:

Constitution of India, 1950 — Article 142, 21
Employees State Insurance (General) Regulations, 1950 — Regulation 98
Payment of Wages Act, 1936 — Section 15 (2)
Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 — Section 47

Citation : (2006) 108 FLR 625 : (2005) ILR (Kar) 6024 : (2005) 6 KarLJ 514 :
(2006) 1 KCCR 61 : (2006) 1 LLJ 975

Hon'ble Judges : N. Kumar, J

Bench : Single Bench

Advocate : K. Subba Rao for Subba Rao and Company in W.P. No. 37333 of 2000 and K. Kasturi, Counsel for Kasturi, Associates in W.P. Nos. 4945 of 2001, for the Appellant; K. Kasturi for Kasturi, Associates in W.P. Nos. 37333 of 2000 and K. Subba Rao for Subba Rao and Company in W.P. No. 4945 of 2001, for the Respondent

Judgement

N. Kumar, J.—In these two writ petitions the same award is challenged by the petitioners to the extent they are aggrieved. Therefore, they are taken up for consideration together and disposed of by this common order. For the purpose of convenience, the parties are referred to as they are referred to in W.P. No. 37333 of 2000.

2. The petitioner was appointed as mechanic helper B on 25-11-1969 in the respondent-establishment. On 19-4-1986, while examining the vehicle, accidentally he fell down from the top of the vehicle as a result of which he sustained multiple injuries and fractures. Immediately, he was taken to the hospital for medical treatment. The petitioner was a member of ESI Scheme and he was treated for a period of eleven months in the ESI hospital. He also took

medical treatment as an outpatient at NIMHANS for a period of six months. On 15-5-1989, the petitioner reported for duty along with fitness certificate issued by a Competent Doctor on 4-5-1989. He was refused employment. The petitioner was served with an order dated 3-6-1989 informing him that the Medical Board which examined the petitioner on 12-3-1987 has declared him as permanently disabled at 100% and they have recommended for award of permanent disability benefit. Therefore, as per Regulation 98 of the Employees' State Insurance (General) Regulations, 1950 (for short, hereinafter referred to as the "Regulations"), a declaration has been made holding that the petitioner is unfit and he is deemed to have been discharged from the company. Aggrieved by the aforesaid order of termination, the petitioner raised an industrial dispute. Conciliation having failed, the appropriate Government referred the industrial dispute for adjudication to the Second Additional Labour Court, Bangalore on 30-11-1992. Reference was numbered as Ref. No. 188 of 1992.

3. The points of dispute that were referred to the Labour Court for adjudication are:

1. Whether the management of BEML, KGF is justified in refusing work to Sri Benjamin, Mechanic, with effect from 15-5-1989?

2. If not, to what relief the workman is entitled?

4. The petitioner contended in the claim statement that the injury sustained was in the course of his employment. After he was fully recovered, as is clear from the medical certificate, he approached the respondent for employment. He was not even allowed inside the factory premises. The respondents have not followed the procedure prescribed u/s 98 of the Act, before terminating his services. Therefore, the impugned order of termination is illegal and is liable to be set aside. He submitted that he was paid Rs. 28-00 per day from the ESI Corporation from the date of his discharge from employment. He is not gainfully employed anywhere. Therefore, he sought for reinstatement, back wages and continuity of service.

5. The respondent filed counter contesting the said claim. The appointment of the petitioner, the injury which he sustained in the accident, the treatment which he has taken in different hospitals were not disputed. They contended that the petitioner filed an application u/s 15(2) of the Payment of Wages Act, 1936, before the jurisdictional Magistrate in CMC No. 45 of 1990 in which the respondents were directed to pay wages from 19-4-1986 to 3-6-1989. Therefore, the reference is bad as barred by principle of res judicata. As the petitioner was covered under the Act and he has been given benefit under the Act, he is not entitled to other benefits under any other enactments and accordingly he is not even eligible for wages. When once the Medical Board declared that petitioner is 100% disabled and has also determined the disablement benefit at the rate of Rs. 28.00 per day and when the petitioner is availing the said benefit, the respondents were fully justified in invoking Regulation 98 and discharging the

petitioner from service. As the petitioner has not challenged the decision of the Medical Board, it has become final. The petitioner is unable to perform any job or duty. The Medical Certificate produced by him cannot be accepted as valid one. Therefore, it was contended that there is no substance in the claim made by the respondent.

6. Both the parties have adduced evidence in support of their contention.

7. The Labour Court considered the oral and documentary evidence on record, the arguments addressed on behalf of both the parties and the judgments relied on by them and came to the conclusion that though the Medical Board has declared that the petitioner is 100% disabled, it does not follow that he is unable to do any other work other than what he was doing prior to the date of accident. It further held that the respondent was under an obligation to offer alternative employment by way of light work to the petitioner. The respondent has not complied with the statutory requirement of issuing notice as contemplated under Regulation 98 of the Regulations. The purported termination of service of the petitioner under Regulation 98 is illegal. It took note of the fact that from the date of termination till the date of the award of the Labour Court, the petitioner is paid a sum of Rs. 28.00 per day as disablement benefit under the Act. Under these circumstances the Labour Court held that as the order of termination is illegal, the petitioner is entitled for reinstatement in a suitable post without backwages but with continuity of service for the purpose of terminal benefits. This award came to be passed on 30-6-2000. Aggrieved by the order denying backwages from the date of termination till the date of the award, the petitioner has preferred Writ Petition No. 37333 of 2000. The respondent has preferred Writ Petition No. 4945 of 2001 aggrieved by that portion of the award where a direction has been issued for reinstatement.

8. It is not in dispute, that the petitioner was not reinstated into service in terms of the impugned award. However, the petitioner reached the age of superannuation on 30-4-2003.

9. Sri Kasturi, learned Senior Counsel appearing for the respondent assailing the impugned award contends that when the Medical Board constituted under the Act has declared that the petitioner sustained permanent disablement which is 100% and recommended for payment of disablement allowance which has been paid, the Labour Court was not justified in ordering reinstatement ignoring the said medical opinion. The respondent was under no obligation to offer any alternative light employment to the petitioner. Though a notice as contemplated under Regulation 98 has not been given to the petitioner before discharging him from service, it is only a minor violation of law which makes no difference in the facts of this case, which the Labour Court has blown it out of proportion. No mala fides are alleged. It is not a case of victimisation or unfair labour practice. But it is an unfortunate accident and therefore no liability by way of backwages from the date of termination till the date of award of the Labour Court can be foisted on the respondent.

10. Per contra, Sri K. Subba Rao, learned Senior Counsel appearing for the petitioner contended that when once the Labour Court held that the order of termination is illegal, it ought to have awarded backwages from the date of termination till the date of the award which it has failed to do. On the material on record, the respondent has unjustly refused employment to the petitioner, therefore the petitioner is entitled to full backwages from the date of termination till the date of the award, and the payment of benefit under the Act cannot be taken into consideration while awarding backwages.

11. In the light of the aforesaid facts and rival contentions the points that arise for consideration are:

(1) Whether the order of discharge passed by the respondents under Regulation 98 is in accordance with law and the finding of the Labour Court on this aspect calls for interference?

(2) If the order of termination is held to be illegal, whether the Labour Court was justified in denying the backwages from the date of termination till the date of the award?

(3) In the facts of this case, to what relief the parties are entitled to?

12. Point No. 1.--It is not in dispute that the petitioner sustained an injury in an accident on 12-3-1987. The establishment is governed under the Act and the petitioner is a member. After the accident he has been given medical treatment under the Act. Thereafter he was called upon to appear before the Medical Board constituted under the Act on 12-3-1987. The Medical Board on examination of the petitioner has opined in their letter dated 21-5-1987 that the injury sustained by the petitioner amounts to permanent disablement of 100% and therefore he is entitled to be awarded disability benefit. Accordingly, petitioner has been awarded the said benefit under the Act. It is thereafter the petitioner has been served with this order of termination dated 3-6-1989 which reads as under:

"This is to inform you that consequent to the accident on 12-3-1986, you were under medical treatment and after prolonged treatment and in response to the call made by the Regional Director, ESI Corporation, you presented yourself for a medical examination before Medical Board on 12-3-1987 and the ESI Corporation authorities "vide their letter No. KAR/EIR/919/86, dated 21-5-1987 have declared you as permanent disablement at 100% and had awarded permanent disability benefit in their letter dated 21-5-1987 cited.

2. This is to inform you that under Regulation 98 of the ESI Regulations, a declaration of medical unfitness at 100%) has been done in your case, which would discharge you from the services of the Company and therefore, you are deemed to have been discharged from the Company. You may make your claim for the admissible benefits such as Gratuity, PF etc., on receipt of this letter. Kindly arrange to return the Company Badge and any other articles in your possession for ensuring that a no due certificate will be issued by the Personnel

Department for making final settlement".

It is this order of termination which was challenged by the petitioner by raising industrial dispute. The contention of the respondent-management is, in view of the opinion of the Medical Board under the Act, that the disablement is at 100%, in terms of the Regulation 98 of the Employees' State Insurance (General) Regulations, 1950 (for short hereinafter referred to as "Regulations"), they have terminated his service which is valid and legal. Therefore, it is necessary to find out whether the order of termination which is purported to have been issued under Regulation 98 is valid and legal. Regulation 98 reads as under:

"98. Discharge etc., of employee under certain conditions.--If the conditions of service of any employee so allow, an employer may discharge or reduce on due notice an employee.---

(i) who has been in receipt of disablement benefit for temporary disablement, after he has been in receipt of such benefit for a continuous period of six months or more;

(ii) who has been under medical treatment for sickness other than tuberculosis, leprosy, mental or malignant diseases or has been absent from work as a result of illness duly certified in accordance with these regulations to arise out of the pregnancy or confinement rendering the employee unfit for work, after the employee has been under such treatment or has been absent from work for a continuous period of six months or more,

(iii) who has been under medical treatment for any of the following diseases, duly certified in accordance with these regulations, after the employee has been under such treatment for a continuous period of 18 months or more, notwithstanding provisions of Clauses (i) and (ii)".

A reading of the aforesaid provision makes it very clear that for application of the said provision three conditions have to be satisfied.--

(1) Condition of service governing an employee should allow termination of an employee on the ground of continuous ill-health of an employee;

(2) The Medical Board on examination of the injured workman should opine his condition to fall within Clauses (i), (ii) and (iii); and

(3) Notice of the intention to terminate the services on those grounds should be given to the employee.

Therefore, it is clear that if the service conditions of an employee do not stipulate the conditions mentioned in Clauses (i), (ii) and (iii) as a ground for termination, the question of invoking Regulation 98 would not arise. Even if service conditions provide for such termination and if Medical Board constituted under the Act issues a certificate to that effect, then an obligation is cast upon the employer to issue notice to the employee bringing to his notice the medical opinion and the stipulation in the service conditions and then he should be given an opportunity

to say why his service should not be terminated. Principles of natural justice requires that such an injured workman should be heard before he is terminated. If any one of these conditions are not complied with then the termination under Regulation 98 would be vitiated.

13. A reading of the order of termination clearly demonstrates that termination is made solely on the ground of a declaration of medical unfitness by the Medical Board. There is no whisper in the entire termination order that the conditions of service of the petitioner do provide for such a ground. No such condition of service was pointed out before the Labour Court or this Court. Secondly before termination no notice of termination has been issued. Straightaway order of termination is passed purporting to be under Regulation 98. In that view of the matter, as the order of termination do not satisfy the statutory requirements contained in Regulation 98 it cannot be sustained. Therefore, the Labour Court was fully justified in holding that the order of termination is illegal and in setting aside the order of termination.

14. Point No. 2.--After holding that the order of termination of the petitioner is illegal, the Labour Court, proceeded to take note of the injury sustained by him mid came to the conclusion that he can do tighter work and, therefore, directed the respondent to reinstate the petitioner in a suitable post. However, taking note of the fact that the petitioner is paid a sum of Rs. 28.00 per day as disablement benefit till his life, it held he was not entitled to backwages. It is not in dispute that the petitioner reached the age of superannuation on 30-4-2003. By virtue of the interim order granted by this Court staying the operation of the decree the petitioner admittedly was not reinstated into service. Therefore, the question, that arise for consideration is, in the light of the facts of this case what is the appropriate relief to which the petitioner is entitled to from the date of termination, i.e., from 15-5-1989 till the date of his retirement.

15. Once an order of termination is held to be illegal and if it is shown that the workman is not gainfully employed, from the date of termination till the date of order setting aside the termination, as a rule he is entitled to all the benefits such as reinstatement, continuity of service and backwages. If any of these relief's is to be denied, it ought to be for good and sufficient reason to be recorded in writing. In this context the order passed by the Tribunal, that because the petitioner was granted disablement benefit of Rs. 28.00 per day would not constitute a good cause for denying the entire backwages. Certainly that payment can be taken note of and the backwages to be paid is to be reduced to the extent he has been compensated by way of disablement benefit.

16. The Parliament has passed the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 to meet a contingency of the nature of this case. Section 47 provides that, no establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service. However, the said enactment which came into force from 1st January, 1996 is prospective in operation. In this case the accident arose on 19-4-1986. As such,

the Act has no application. Therefore, we have to find out what was the law prior to this enactment. In this connection both the learned Senior Counsels have brought to my notice several judgments of the Supreme Court on the point.

17. The Supreme Court in the case of Anand Bihari and others Vs. Rajasthan State Road Transport Corporation, Jaipur and another, was dealing with a case of number of drivers employed by the Corporation, on examination by the Medical Board were found that their eyesight was not sufficient for driving heavy motor vehicles. Therefore, the Corporation though it fit in the interest of public at large and the Corporation to retrench them on the ground of continued ill-health. In that context the Supreme Court held, from the provisions of the ESI Act that the present case, viz., that the sub-normal eyesight or loss of the required vision to work as a driver would not be covered by the provisions of that Act as an employment injury or as an occupational disease, for no provision is made therefore compensation for a disability to carry on a particular job. The present workmen cannot be said to have suffered either a permanent, total or partial disablement to carry on any job or to have developed cataract due to infrared radiations. The workmen are and will be able to do any work other than that of a driver with the eyesight they possess. Hence, a provision for the compensatory relief for such workmen has to be made separately on a different basis suitable to the peculiar loss that they suffer on account of the premature retirement necessitated by their unfitness to work as drivers.

18. In view of the helplessness shown by the Corporation, the Supreme Court evolved a scheme giving relief as best as it can to the workmen and they have stipulated the mode in which compensation is to be paid to workmen who are retired from service on the ground of unfitness to work. If that principle is followed in addition to the retire mental benefits to which those workmen are entitled to, persons who have put in more than 20 years of service are to be paid compensation equivalent to two months salary per year of the balance of service. Provision was also made for providing alternate job. Option was given to the workmen either to opt for compensation or for alternate job.

19. Learned Counsel for the respondent contended the said scheme is not applicable to the facts of the case because the Supreme Court was evolving a scheme for large number of workmen in the absence of a statutory provision. Therefore, the said scheme may not aptly apply to individual case. Moreover that was not a case of a workmen sustaining an injury in the course of employment. On the contrary he relies on a judgment of the Supreme Court in the case of Narendra Kumar Chandla Vs. State of Haryana and others, where they were dealing with a workman whose right arm was completely amputee due to Sarcoma (Cancer) who was discharged on that ground. In that context, the Supreme Court held as under:

"7. Article 21 protects the right to livelihood as an integral facet of right to life. When an employee is afflicted with unfortunate disease due to which, when he is unable to perform the duties of the posts he was holding, the employer must

make every endeavour to adjust him in a post in which the employee would be suitable to discharge the duties as a Carrier Attendant is unjust. Since he is a matriculate, he is eligible for the post of L.D.C. For L.D.C., apart from matriculation, passing in typing test either in Hindi or English at the speed of 15/30 words per minute is necessary. For a clerk, typing generally is not a must. In view of the facts and circumstances of this case, we direct the respondent-Board to relax his passing of typing test and to appoint him as an L.D.C. Admittedly on the date when he had unfortunate operation, he was drawing the salary in the pay scale of Rs. 1400-2300. Necessarily, therefore, his last drawn pay has to be protected. Since, he has been rehabilitated in the post of L.D.C. we direct the respondent to appoint him to the post of L.D.C. protecting his scale of pay of Rs. 1400-2300 and direct to pay all the arrears of salary".

20. Though Supreme Court passed such an order it cannot be said that it is the law declared by the Supreme Court. The Supreme Court under Article 142 of the Constitution has the power to pass such orders to do complete justice between the parties and such a power do not vest in this Court. But, the aforesaid judgment shows the mind of the Court and the direction in which the law has to grow. The award of compensation to a workman in the course of employment is covered under the provisions of the Workmen's Compensation Act, 1923. The said Act was enacted to provide for payment by certain classes of employers to their workmen of compensation for injury by accident. Similarly, the Employees' State Insurance Act, 1948, is enacted to provide for certain benefits to employees in case of sickness, maternity and employment injury and to make provision for certain other matters in relation thereto. Workmen's Compensation Act deals with compensation for injury and the Employees' State Insurance Act deals with benefit to an employee for employment injury. Therefore, the aforesaid two enactments do not deal with payment of compensation for loss of service. Therefore, for any loss of service on account of the injury one has to fall back on common law. That is how the Courts have awarded compensation having regard to the facts of that particular case whenever an injury has resulted in loss of employment. Probably it is because of this, as the area was not covered by any legislation, the Parliament thought it fit to pass the aforesaid Act 1 of 1996. As the preamble to the said Act discloses to give effect to the Proclamation on the Full Participation and Equality of the People with Disabilities in the Asian and Pacific Region, when the meeting to launch the Asian and Pacific Decade of Disabled Persons 1993 to 2002 convened by the Economic and Social Commission for Asian and Pacific held at Beijing on 1st to 5th December, 1992, adopted the Proclamation on the Full Participation and Equality of People with Disabilities in the Asian and Pacific Region and India being a signatory to the said proclamation the aforesaid enactment was passed. Thus, statutory recognition was given to the common law which held the field till such time. It is in this background one has to see on account of an employment injury whether a workman is to be provided a lighter suitable employment and if that is not possible how he has to be compensated in terms of money.

21. In the instant case it is not in dispute that the petitioner sustained the injury in the course of his employment. He was working as a mechanic. After such injury he was treated for sufficiently long time. As he was a member of the ESI his entire medical care was taken under the Act. As the injury sustained by him was permanent total disablement, under the Act he was entitled to the benefit under the Act and he is paid the said benefit to which he is entitled to during his lifetime. When the employer who is under an obligation to provide him a lighter job or a suitable job he has not performed such an obligation. On the contrary by wrongly invoking Regulation 98 of the ESI Regulations his services came to be terminated on the ground that he is not physically fit to perform any work. Now, the said order of termination is held to be illegal. Once the order of termination is held to be illegal, in law the petitioner is entitled to all consequential benefits, such as reinstatement, continuity of service and full backwages. However, the petitioner has been paid benefit under the ESI Act. Though initially it was Rs. 28.00 per day it is submitted at present he is paid about Rs. 78.00 per day. It would be just to give reduction to the aforesaid payment which has been paid to the petitioner out of the wages. Though an order of reinstatement was made, he was not reinstated and in the meanwhile he was superannuated. Therefore, no reinstatement is possible. However, he should be paid full backwages less the amount paid by way of benefit under the Act. The respondent is a Public Corporation, a Government of India undertaking. They should be more sensitive to these human sufferings and a model employer. It is also a social responsibility. Under these circumstances, petitioner is entitled to continuity of service as well as full backwages less the amount of benefit paid to him under the Act. Hence, I pass the following order:

ORDER

- (1) Writ Petition No. 4945 of 2001 is dismissed,
- (2) Writ Petition No. 37333 of 2000 is allowed in part. In substitution of the award passed by the Labour Court, the petitioner is entitled to the following reliefs.--
 - (a) The petitioner is entitled to continuity of service and all consequential benefits from the date of termination till the, date of reaching the age of superannuation;
 - (b) The petitioner is entitled to full backwages from the date of termination till the date of his attaining the age of superannuation less the disablement benefit paid to him under the provisions of the Employees' State Insurance Act, 1948;
 - (c) Petitioner would be entitled to all retirement benefits;
 - (d) No costs.