

(1982) 08 DEL CK 0004
In the Delhi High Court
Case No : Civil Writ Appeal No. 36 of 1971

Jai Kishan

APPELLANT

Vs

Delhi Transport Undertaking

RESPONDENT

Date of Decision : 24-08-1982

Acts Referred:

Citation : (1982) 22 DLT 63 : (1982) 2 ILR Delhi 852

Hon'ble Judges : A.B. Rohtagi, J

Bench : Single Bench

Advocate : D.N. Vohra and S.N. Bhandari, for the Appellant;

Judgement

Avadh Behart Rohatgi, J.

(1) This is a case of a probationer. The petitioner Jai Kishan was employed by the respondent Delhi Transport Undertaking (CDTU) as a re- tainer crew conductor on 25th February, 1966. After some time he was appointed as a conductor on probation for a period of one year by letter dated 2-11-1966. On the expiry of one year his period of probation was extended by another year. His services were terminated with effect from 31st October, 1968 by letter dated 20/30th October, 1968.

(2) The petitioner raised an industrial dispute. The dispute was referred to the industrial tribunal on 30th September, 1969. The following were the terms of reference ; "(1) Whether the termination of services of Jai Kishan, Conductor, is illegal and j or unjustified and if so to what relief is he entitled?"

(3) The tribunal made the award on 16th July, 1970. It held that the order of termination of the petitioner's services was proper and that he was not entitled to any relief.

(4) On 2-1-1971 the petitioners brought the present writ petition under Article 226 of the Constitution for quashing the award of the industrial tribunal, Delhi.

(5) The question for decision is whether the services of the petitioner were

validly terminated. His services" were terminated under clause 9(a) (i) of D.R.T.A. (Conditions of Appointment and Services) Regulation, 1952. The said Regulation says : "9. Termination of Services (a) Except as otherwise specified in the appointment orders, the services of an employee of the Authority may be terminated without any notice or pay in lieu of notice (i) during the period of probation and without assigning any reasons thereof, (ii) for misconduct, (iii) on the completion of specific period of appointment, (iv) in the case of employees engaged on contract for a specific period, on the expiration of such period in accordance with the terms of appointment."

(6) The petitioner contends that in law the termination of his services amounted to retrenchment. The word "retrenchment" is defined in Section 2(00) of the Industrial Disputes Act, 1947 (the Act) in these terms : " "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 workman concerned contains a stipulation in that behalf ; or (c) termination of the service of a workman on the ground of continued ill-health;"

(7) The definition is extremely wide, almost admitting of no exception. Whatever may be the reason every termination spells retrenchment. Conversely every retrenchment is a termination. For practical purposes retrenchment and termination are synonymous. The term retrenchment is not limited only to a case of discharge of surplus labour. It is true that in common parlance it refers to retrenchment of redundant work force. But the words "for any reason whatsoever" mean what they say. They are the key-words. "Termination embraces not merely the act of termination by the employer, but the fact of termination howsoever produced." [State Bank of India v. N. S. Money Air 1976 Sc Uii 1114

(8) So retrenchment must include every termination of the services of a workman. The reference to "discharge on account of surplus age" in *Hari Prasad Shivshankar v. A.D. Divelkar* (1957) 11 Fjr 317 was explained as "illustrative and not exhaustive", in *Santosh Gupta v. State Bank of Patiala* (1980) 56 Fjr 594. Discharge on account of redundancy is only one kind of termination. There may be innumerable kinds of termination. The forms of dismissal are protean. This is now settled by a series of decisions of the Supreme Court.

(9) The first case is *The State Bank of India Vs. Shri N. Sundara Money*, . That was a case of a workman whose appointment was a purely temporary one for a period of 9 days. The court held that termination of his services was retrenchment because he continued in service for much longer after 9 days. The second is *Hindustan Steel Ltd. v. Labour Court, Orissa* 49 (1976) Fjr 397. That was a case where the services of certain workmen had come to an end by efflux of time. It was held that these were also cases of retrenchment. The third case is

Delhi Cloth & General Mills Ltd. v. Shambhu Nath inukherji 1979 (55) Fjr 210. In that case the name of the workman was struck off from the rolls of the employees under the standing orders for continued absence. Striking off the name of the workman from the rolls by the management was held to be a case of termination of his services. The fourth case is Santosh Gupta v. State Bank of Patiala (supra). A woman worker in that case had failed to pass the test which would have enabled her to be confirmed in service. She was discharged on this ground. The court held that this amounted to retrenchment within the meaning of the Act. The fifth case is Mohan Lal Vs. Management of Bharat Electronics Ltd., . It was a case of a temporary workman. Mohan Lal was a probationer to begin with. His period of probation was extended. He was held to be either a temporary employee or permanent employee but not a probationer. The termination of his services on account of unsatisfactory work was held to be a case of retrenchment. The sixth case in the series is the latest decision in L. Robert De'Souza v. Executive Engineer, Southern Railway (1982) 60 Fjr 144. The services of the workman in that case were terminated because he absented himself from duty. He was a daily worker, though he had served for 20 years. The termination of his services was held to be a case of retrenchment. Nearer home there is a division bench case of this court in Mulkhan Singh v. Union of India 1981 (42) Flr 401. That was a case of substitutes. Four persons were employed as substitutes by the Railway. Their services were terminated. The court held that all these were cases of retrenchment covered by section 2(00) of the Act.

(10) Now comes the important point. The Act requires the employer to comply with the provisions of the Act when he passes an order of retrenchment. Section 25F reads : "25F. No workman 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: Provided that no such notice shall be necessary if the retrenchment is under an "agreement which specifies a date for the termination of service"; (b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent of 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.)"

(11) The section is worded in negative and prohibitory terms. It opens with the words "no workman". The strong language in which section 25F is worded is indicative of the fact that notice and compensation are pre-conditions. Failure to comply with the pre-conditions makes the order void ab initio. The use of the word "until" suggests this. "The wording is too strong to justify the idler view." Negative words alone are a deciding factor to compel a mandatory construction

for a statute of this kind. Where the statutory restrictions are couched in negative terms they are almost invariably held to be mandatory. Negative words compel an imperative construction. The whole aim and object of the legislature would be completely defeated if the command to do the thing in a particular manner is not obeyed. Ignoring the requirement of an Act which prescribed how something is to be done will invalidate the thing being done.

(12) The Supreme Court in *The State of Bombay and Others Vs. The Hospital Mazdoor Sabha and Others*, held that section 25F provides that clauses (a) and (b) constitute conditions precedent for the retrenchment of the workman. This means that no workman shall be retrenched until the conditions in question have been satisfied. The conditions precedent are mandatory in nature. Non-compliance with the conditions laid down by the section will render the retrenchment invalid and inoperative. Following this decision all the above cases to which I have referred uniformly lay down two conditions. Firstly the workman has to be given one month's notice in writing indicating the reasons for retrenchment. Or he has to be paid in lieu of such notice, wages for the period of the notice. Secondly at the time of retrenchment the workman has to be paid compensation which shall be equivalent of 15 days' average pay for every completed year of continuous service. These conditions must be observed if the services of a workman are to be terminated. But it is essential that such a workman must have been in continuous service for not less than one year under the employer. If he has served the employer for not less than 240 days (this is the meaning of one year) he is entitled to one month's notice indicating the reasons for retrenchment or wages in lieu thereof and compensation. If these conditions are not satisfied the termination is void ab initio. This has been laid down in *Sundara Money*, *Hindustan Steel*, *Delhi Cloth Mills*, *Santosh Gupta*, *Mohan Lal and De Souza*. The termination of the services of the workman in all the cases was held to be void ab initio. Case by case the Supreme Court has ensured the presence of industrial justice in individual employment relationships in a mixed economy by the importation of general notions and standards of public law. "Whatever is arbitrary is offensive to legality". From *Money* to *De Souza* this is the dominant theme. This is the perennial problem.

(13) Applying these principles it must be held that the petitioner's services were not validly terminated. He was neither given one month's notice indicating the reasons for his retrenchment nor one month's pay in lieu thereof. Nor any compensation was paid to him at the time of the termination of his services. The order of termination must be held to be invalid and inoperative. He was not told why his services were being dispensed with. He was simply asked to go. His period of probation was going to expire on 31st October, 1968. By letter dated 29/30th October, 1968 he was informed as follows :

" THE services of Shri Jai Kishan S/o Sh. Raj Mat, Conductor Badge No. 4483 of 1. P. Depot are hereby terminated with effect from 31-10-1968 under Clause 9(a) (i) of the D.R.T.A. (Conditions of Appointment & Services) Regulations, 1952."

(14) Counsel for D.T.U. mainly relies On regulation 9 (a) and the terms of the contract of employment contained in the letter of appointment. He submits that the petitioner being a probationer is not entitled to challenge the termination of his services on the ground of non-compliance with the provisions of section 25F of the Act. This. argument overlooks the origin and purpose of the legislation. The law of retrenchment originated in the defects of the common law of wrongful dismissal. The Amendment Act of 1953 which introduced section 2(00) and Chapter 5A in the Act represeted a reaction to the inadequate protection afforded to the workman by his contract of employment. The common law had developed in such a way that the law of wrongful dismissal left the worker exposed and unprotected in two main respects. First, it accorded to the employer so wide an implied right of summary dismissal that the workman's chances of successfully challenging a dismissal for cause were slight indeed. Secondly, the wrongfully dismissed worker was entitled to so extremely limited a set of remedies that it was hardly worth his while to sue in the courts. In the generality of cases the wrongfully dismissed worker faced the prospect of obtaining at best an award of compensation more or less limited to his remuneration for the period of notice required to terminate his contract and had no chance of obtaining an order of reinstatement. Because the doctrine concerning the equitable remedies of specific performance and injunction were rigorously opposed to the positive implementation of employment relationships. It was this unavailability of the remedy of reinstatement which was the main reason for the reform of the law.

(15) The common law was obsolete, inadequate, and in consequence unjust. There were two specific stimuli to labour legislation. The first was the need for industrial justice which was closely linked with social justice. The second stimulus was the need to translate the Directive Principles of State Policy into action. So the legislators set out on a "workers" mission" to provide a protective "armour" of section 25F and section 2(00) (N.S. Money) (supra). The amendment of 1953 was the vehicle for the expression of a new set of attitudes towards the employment relationship. A new set of principles were created, and so created as to free the law from the shackles of the contract of employment. Freedom of contract has been made more of a chimera by legislation. The law is moving away from contract in this field and towards status. The common law believed in the sanctity of contract. "The labour legislation is a radical departure from the common law of the contract of employment 14 HCD/82 9

(16) In De'Souza's case the Supreme Court has said that the rules governing the worker's service will have to be read subject to the provisions of the Act. If they are in conflict with the Act they will be over ridden by the statutory provisions. Freedom of contract remains the. shaky pedestal upon which the theory of labour law ultimately rests. In England Professor P.S. Atiyah, in his Rise and Fall of Freedom of Contract, charts the rise and decline of the classical theory of contract based upon individual free choice pointing to the decline in the latter and the increasing extent to which heteronomy norms govern a relationship still theoretically based upon free contract. The classical theory

proclaims the freedom of the individual to select the person with whom he wishes to contract and on such terms as he can secure. In a sense labour law in this country largely represents the erosion of individual freedom to settle the norms which are to govern the employment relationship. It is a paradox of our labour law that terms and conditions of employment are settled collectively for the great mass of the working population while the individual contract of employment continues to be treated as "the corner-stone of the edifice", to use Prof. Otto Kahn-freund's famous phrase. In America Professor Grant Gilmore in a book of telling title. *Death of Contract*, has shown how in the field of social security the freedom of contract has been eroded to a vanishing point.

(17) The law has increased the security of employees In a quest for security the law protects the workers by making it difficult to dismiss them. The law compels the employer to formulate his reasons for dismissing and to be prepared, if necessary, to defend them. The employer best knows his mind and can justify his own conduct. The object is to confer job security. This has been done by the statutory intervention in the area of termination of employment. The rights with which we are concerned are creatures of the statute. Retrenchment is essentially a statutory concept The termination is hedged with restrictions and conditions. The workman has hopes and aspirations. He looks to a permanent relationship with the job and the employer. "This has been called "industrial marriage". The termination is "a species of industrial divorce", as Honor calls it. "We can truthfully say that dismissal from work has been infused with law in the absence of a better term, jurisdified". (1982 Hamlyn Lectures by Tony Honore *The Quest for Security : Employees, Tenants, Wives* p. 8). So dismissal is "a juristic act" (Honore p. 23). For the rupture of employment relationships the employer has to pay compensation to the worker. The workman is the weaker party. He is the underdog. This is the social philosophy of the statute. To protect the weak against the strong (N.S. Money *supra*). The traditional terms "master" and "servant" have long sounded like relics of a dead social order. The master has now become the employer. The servant has become the workman in the new age.

(18) The rule of law has been introduced in what was increasingly seen to be an embattled field where the law had an inadequate presence. The dismissal cannot be summary now. It cannot be arbitrary. "Whatever is arbitrary is offensive to legality." This is the essential principle underlying section 25F. Dismissal contrary to the statute has been held to be void ab initio. (Mohan Lal's case). Dismissal in defiance of the provisions of the Act is a nullity. "And there are no degrees of nullity". Lord Reid has told us. (*Anisminis v. Foreign Compensation Commission* (1969) 2 AC 147. Therefore reinstatement in his old job is recognised universally as the primary relief in industrial justice. By comparison with the old law the new Chapter Va is what may be called an employees' charter. The law entitles the workman to challenge the disruption of the relationship. He is entitled to compensation for termination of services. Because that is a breakdown of employment relationship. It is a "species of industrial divorce" which ought to be compensated.

(19) Counsel for D.T.U. says that the workman should not be allowed to raise a new point in the writ petition, a point which he never took before the industrial tribunal. His submission is that the question of invalidity of termination with reference to section 2(00) and 25F was not raised in this form before the tribunal. There is no substance in this argument. The workman in so many words complained that his services were terminated arbitrarily and without showing any reason (see para 8 of the petition). Before the tribunal it was specifically argued on his behalf that "the order was arbitrary, capricious and mala fide as there was no reason as to why the services of probationer be dispensed with even if the terms of the appointment and the provision of the relevant regulation so empowered the management." (see para 9 of the tribunal's award). He alleged that his termination was ""arbitrary, illegal and without rhyme and reason". What more is required of the petitioner? He is not pleading a new case in the writ petition. This has been his case throughout. The Supreme Court has said that in industrial adjudication tribunals are loath to apply the law of pleadings in -31 its strictness (Tandur and Navandgi Stone Quarries (P) Ltd. v. Their workman 1964 (8) Fjr 277.

(20) Counsel for D.T.U. referred me to Bharat Kala Kendra P. Ltd. v. Labour Court (1980) Fjr 242 and Management of Sri Ram Institute v. N. L. Kakkar 1978 (37) Flr p. 1 and Lachman Dass v. Indian Express Newspapers, 1977 34 Flr 130 in support of his submission that new point cannot be allowed to be raised for the first time. I do not agree. Where a new ground raised on behalf of a party is purely one of law on the admitted facts of the case, the party should be allowed to raise it. (Management of 867Hamdard Laboratory v. Raunaq Hussain 11,R 3973 (1) Delhi 308.

(21) What was it that was referred to the tribunal? It was precisely this question of the validity of termination which was the subject of industrial dispute. Whether the termination of the services of the petitioner was illegal and unjustified. This is what was adjudicated upon by the tribunal. Before the tribunal reason turn termination of the petitioner's services was sought to be given. It was said that the petitioner's services were found unsatisfactory because there were "lapses" on his part in as much as he did not issue tickets to passengers on several occasions and was found in possession, of excess cash. Admittedly there was no enquiry into these "lapses". Admittedly no show cause notice was issued. No charge sheet was given. If this was the reason there was a clear breach of the principles of natural justice. Reason for termination of services cannot be disclosed for the first time before the tribunal. It must be indicated in the notice. The law compels the employer to formulate his reasons for dismissing. It was a great advance when employers were compelled by law to give reasons and to defend those reasons. This was an attempt to cheek arbitrariness. Because the workman was the weaker party. This shows haw administrative law is weeping into the interstices of the law .of contract.

(22) Counsel strongly relied on Air India corporation v. V. A. Rebello 41 (1972)

Fjr 436 to justify the action of D.T.U. In my opinion that case has nothing to do with) the question before me. In Rebello's case the Supreme Court was concerned only with the question whether the impugned action of termination of Rebello's services was for misconduct as contemplated by section 33. His services were terminated because of a suspicion about his private conduct and behavior with air hostesses whose names were considered not proper to disclose. The Supreme Court held that it was not a case of dismissal turn misconduct and dismissed the employee's petition under s. 33 (a) of the Act.

(23) REBELLO'S case was of a different hue. Here the simple question is of a failure to comply with; the provisions of section 25F in the case of a probationer. A probationer is a workman even though he is on trial. No one will deny this. A nine days employee, a daily worker, a substitute, were all held entitled to statutory protection because they had served for more than 240 days. A probationer is not in a worse position. He also puts his labour, on agreed terms, at the disposal of another. There is an employment relationship. The relationship of employment is that which exists between one who works and the person for whom he is working.

(24) The petitioner worked for more than two years in the service of D.T.U. He was put on probation. His probation was to last one year. It was extended for another year. The termination of his services is "retrenchment" within the meaning of section 2(00) of the Act. "A termination takes place where a term expires either by the active step of the master or the running out of the stipulated term." (Money's case p. 1114). Admittedly the provisions of section 25F (a) and (b) were not complied with by the employer. The order of termination must be held to be of no effect. The provisions of the Act are mandatory. Any order of retrenchment in violation of these two peremptory conditions precedent must be held to be invalid.

(25) Lastly counsel for D.T.U. says that in any event this is not a fit case for ordering reinstatement. I cannot accept this argument. In all the cases to which I have referred in the earlier part of this judgment reinstatement was invariably ordered. Reinstatement and back wages is the normal rule when" termination is found to be void ab initio. "The specter of common law doctrine that contract of personal service cannot be specifically enforced or the doctrine of mitigation of damages does not haunt this branch of law." If after such a protracted time and energy consuming litigation during which period the workman just sustains himself, ultimately he is to be told that though he will be reinstated he will be denied the back wages which would be due to him, the workman would be subjected to a sort of penalty for no fault of his and it is wholly undeserved. (Hindustan Tin Ltd. v. Its Employees 1978 (2) Lj 474. The purported termination here is a nullity. The workman continues in the employ of D.T.U. Having held that the termination is void I must order reinstatement with full back wages.

(26) George Orwell once wrote. "How right the working classes are . . . to realise that the belly comes before the soul not in the scales of values but in point of

time!" Orwell was indeed perceptive of the difficulties of the working classes in industrial societies. If a workman is able to keep his body and soul together some how during the period of retrenchment and reinstatement there is no reason why he should be denied the consequential benefits of the declaration which flow from it.

(27) For these reasons the petition is allowed. The award of the industrial tribunal dated 16-7-70 is set aside. I hold that the termination of services of the petitioner was void ab initio and inoperative. A declaration is made that he continues in service with all consequential benefits, namely full back wages. In the circumstances of the case I leave the parties to bear their own costs.

(28) At the conclusion of the hearing I announced this order on 16-8-1982. Now I have given my reasons for so doing.