
(1984) 03 PAT CK 0003

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 3858 of 1981

Kailash Paswan and Others

APPELLANT

Vs

The Union of India and Others

RESPONDENT

Date of Decision : 30-03-1984

Acts Referred:

Industrial Disputes Act, 1947 — Section 10, 2(eee), 25B, 25B(1), 25E

Citation : (1984) PLJR 597

Hon'ble Judges : U. Sinha, J; Satya Brata Sanyal, J

Bench : Division Bench

Advocate : Abhijit Sinha, for the Appellant; A.B. Ojha, for the Respondent

Judgement

Satya Brata Sanyal, J.—The petitioners are employees of North Eastern Railway. They are casual labourers. They have been shut out from work. Their grievance is that the action of the respondent Railway authority is illegal and without jurisdiction. They pray for a writ of mandamus to allow them to work. The termination of their service by oral direction be ignored. They be given all consequential benefits. The illegalities alleged are : non compliance of section 25F of the Industrial Disputes Act, breach of chapter XXV of the Indian Railways Establishment Manual as amended by the Railway Board's Circular No. PO-72/P LT-69/3 (1) dated 12.7.73. The petitioners work has been stopped from 15.8.1981. They were employed on various dates. It is said that they are in continuous service for more than 240 days. Their initial employment is as masons. On the date of the termination of their service, work of Khalasi was being taken from them. The dates during which the petitioners worked as mason and the dates from which they served as Khalasi are as follows:

As Mason

Petitioner No. 1. 16.7.80 to 15.3.81.

Petitioner No. 2. 21.7.80 to 15.3.81.

Petitioner No. 3. 24.10.80 to 15.3.81.

Petitioner No. 4. 10.10.10 to 15.3.81.

Petitioner No. 5. 21.7.80 to 15.3.81.

Petitioner No. 6. 12.8.80. to 15.3.81.

Petitioner No. 1. 1.10.80 to 15.3.81.

Petitioner No. 2. 1.10.80 to 15.3.81.

As Khalasi

16.3.81 to 15.8.81.

All the petitioners.

2. The petitioners agreed to work on lower scale from 16.3.81, due to non-sanction of the post of mason, even though they became entitled to scale rate prior to that date in view of duration of their service. They, however, prayed that efforts be made to pay them the scale rate, but in the meanwhile their service be continued as Khalasi. According to respondents, this letter (Annexure 1) is of great significance and is decisive of the dispute. The relevant extract of the letter in English reads as follows:--

To

The Assistant Engineer, Broad Gauge Line Construction, Barauni.

Through Works Inspector, Sahebpur Kamal, Camp Garhhara.

Sir,

We, the undersigned masons who were working under you for the last 4, 6, 7, 8 months and had become entitled to receive scale rate or were likely to become so, give our consent to work as Khalasis due to non-sanctioning of the post of mason so that we can maintain our family and can serve the railway.

We hope that action also will be taken to pay us the scale rate and we may be continued in service (Sabko Barkarar Rakha Jai).

Date 16.3.81.

Yours faithfully,

3. Mr. Abhijit Sinha, learned counsel appearing for the petitioners contended that all the petitioners have been in continuous service for more than 240 days. Their service was uninterrupted within the meaning of section 25B of the Industrial Disputes Act. In spite of the same their services were terminated without following the procedure laid down u/s 25E. Mr. Sinha learned counsel further contends that the petitioners have achieved the status of temporary servant by working continuously for four months in view of Railway Board's Letter No.

P.C.72/RLT 69/3(1) dated 12.7.73 (Annexure 3) "Sub employment of casual labour on Railways". They, therefore, were entitled to 14 days notice under paragraph 2302 of Railway Establishment Manual or notice pay therefor. The relevant portion of the circular which is relied upon by the counsel reads as hereunder:--

It has been decided by Railway Board that casual labour other than those employed in "Projects" should be treated as temporary after completion of four months continuous employment instead of six months as at present laid down in Board's letter No. E(NG) 60 CL 13 dated 22.8.62 (b)(1).

The counsel also drew our attention to paragraph 2501 of Railway Establishment Manual. For these twin reasons, the termination of the petitioners services is said to be null and void, entitling them to continuity of service with full back wages.

4. Mr. A.B. Ojha, learned counsel for the Railways, submitted that section 25F of the Industrial Disputes Act has no application at all. According to him, the petitioners were not in continuous employment for 240 days. It is said that there is break in their service on 15.3.81 from the job of Mason. On petitioners own representation (Annexure 1), when their services were going to be terminated within 240 days, they volunteered to work in lower category of Khalasi. The petitioners did not continuously work in the same category for 240 days. Mason and Khalasi constitute two different class. There is a deemed termination of service as a mason and fresh employment as a Khalasi. In any view, learned counsel submits, petitioners waived their right to compensation by issuing the letter annexure "1". As far as the question of petitioners attending the status of temporary employee, he contends that the petitioners were working in a "Project". The Project was conversion of Broad gauge to Meter gauge from Barauni to Katihar. He relies upon Note "1" of paragraph 2501 of Railway Establishment Code. Learned counsel lastly submits that this writ petition is not maintainable as the petitioners have an alternative remedy under the Industrial Disputes Act.

5. I will take up the last contention first. Assuming redress provided u/s 10 of the Industrial Disputes Act is a proper, efficacious alternative remedy which ordinarily would be a bar to the filing of a writ petition, but even then the question remains, can this writ petition be dismissed on the said ground after its admission and pendency in this Court since 1981? I do not wish to decide in this case as to whether the redress provided under Industrial Disputes Act is equally efficacious, prompt and adequate alternative remedy even though the decision of this Court say it is not (see 1978 BBCJ 340). The said question has been referred to full Bench and pending decision in this Court.

6. One view, however, seems to be fairly established that once a writ petition is admitted and parties have filed affidavits and counter affidavits, and the matter remained pending in the High Court for some time, unless there are disputed, questions of (?) fact to be gone into, the Court should be very loath to dismiss

the writ petition on the ground of alternative remedy. It should ordinarily not do so (1971 S.C. 33, 1971 BLJR 98, 1976 BBCJ 1, 1973 M.P. 175, 1976 M.P. 98, 1974 TLR 1740, 1975 TLR 1497, 1978 BBCJ 704, M/s. Shri Madhav Mills Private Ltd. Vs. Collector of Central Excise and Others, After all it is a self imposed restriction. It is a matter of discretion and not of jurisdiction (See 1977 SC 1132, 1958 SC 86, 1957 SC 882, 1952 SC 192, 1954 SC 207). The exercise of discretion depends upon the wrong and illegality alleged and complained against.

7. In the instant case the illegality alleged is shutting out the workman from work, thus terminating their service without compliance of the mandatory requirement of section 25F of the Industrial Disputes Act. There is no disputed questions of fact involved. It is admitted on all Courts that they have worked for 240 days. The only dispute between the parties is whether for reckoning "continuous service for 240 days," the work rendered in different categories can be taken into consideration. In other words whether on proper interpretation, Ext. "1" mean disengagement from the work of Mason on 15.3.81 and re-engagement as Khalasi from 16.5.81 at the request of the workmen.

8. It is true in deciding the second sub-mission of the learned counsel as to workman's attainment of temporary status, certain disputed questions of fact have to be decided. For instance whether the work of conversion of Broad Gauge to Meter Gauge from Barauni to Katihar is a project or not. Whether it is a work for day to day running of railway or providing large scale additional facilities to improve the carrying capacity of the railways. Again it is required to be found whether the workmen were doing the same type of work for a period of 120 days as required under paragraph 2501 of the Manual as amended by Railway Board on 12.7.73. The facts for the determination of this point being in dispute, the said question cannot be decided in a writ petition.

9. Amendment Act 36 of 1964 has drastically changed. The provision of section 25B and has repealed section 2(eee) of the Industrial Disputes Act. These changes brought about by the aforesaid amendment is designed to provide that a workmen who has actually worked under the employer for not less than 240 days during a period of twelve months shall be deemed to have been in continuous service for a period of one year whether or not he has in fact been in such continuous service for a period of one year. It is enough that he has worked for 240 days in a period of 12 months; it is not necessary that he should have been in the service of the employer for one whole year. (See Surendra Kumar Verma and Others Vs. Central Government Industrial Tribunal-Cum-Labour Court, New Delhi and Another, Section 25B of the Act introduce a deeming fiction as to in what circumstances a workman could be said to be in continuous service for the purposes of Chapter V-A. It provides (a) a deeming fiction that where a workman is in service for a certain period he shall be deemed to be in continuous service for that period even if service is interrupted on account of reasons enumerated in the said section. One of such reason is "cessation of work Which is not due to any fault on the part of the workman". "These interruptions have to

be ignored to treat the workman in uninterrupted service". (b) The other deeming fiction is for an entirely different situation. It comprehends a situation where a workman is not in continuous service within the meaning of sub-section (1) for a period of one year or six months, as the case may be, if the workman during the period of 12 calendar months just preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than 240 days. If the deeming fiction of sub-section (1) do not cover a case in such a case if the workman satisfied the condition of sub-section (2)(a) he would be deemed to be in continuous service for a period of one year. It is not necessary for the purposes of sub-section (2)(a) that the workman should be in service for a period of one year. In the case of Mohan Lal Vs. Management of Bharat Electronics Ltd., it was held "to invoke the fiction enacted in sub-section (2)(a) it is necessary to determine first the relevant date, i.e. the date of termination of service which is complained of as retrenchment. After that date is ascertained, move backward to a period of 12 months just preceding the date of retrenchment and then ascertain whether within the period of 12 months, the workman has rendered service for a period of 240 days. If these three facts are affirmatively answered in favour of the workman pursuant to the deeming fiction enacted in sub section (2)(a) it will have to be assumed that the workman is in continuous service for a period of one year and he will satisfy the eligibility qualification enacted in Section 25F.

10. Section 25F and section 25B of the Industrial Disputes Act nowhere postulate rendering same type of service or same service for a period of 240 days. The section only postulate rendering of work for 240 days in the preceding period of 12 months. This section confer certain benefits to them. I am unable to accept the submission of the learned counsel that for "continuity of service" for a period of one year, the workmen must do and continue to do the same work for which they were engaged or other work of the same type for a period of 240 days in the preceding period of 12 months. The letter (annexure "1") do not bring about any disruption of service and/or bring about their disengagement from work. It only shows that from a particular date the petitioners rendered work for another category. Even assuming the letter (annexure "1") brings about a cessation of work for a day, the said cessation was not due to any fault on the part of the workmen. Therefore, as well there would be no interruption in service in view of the provisions of section 25B(1). For the aforesaid reasons, I find force in the contention of the learned counsel for the petitioners that the petitioners having rendered 240 days of service on the date the termination of their services has been brought about there having been Inflection of the provisions of section 25F read with section 25B the said termination is void. In the eye of law they will be deemed to continue in service respective of the termination impugned in this writ petition. It is immaterial that the petitioners were a daily rated workmen. They were either doing manual or technical work. They have rendered 240 days service in a period of one year. The termination be whatever reasons, entitles them to the protection of section 25F which has admittedly been not complied

with.

11. The next question which falls for decision is to what benefit are these workmen entitled to. In the case of Surendra Kumar Verma (supra) the ordinary rule is reinstatement of the workmen along with back wages. Only in exceptional circumstances which make it impossible or wholly inequitable vis-a-vis the employer and workmen to direct reinstatement with full back wages. I do not find any exceptional circumstance for deviating from ordinary rules. I think the petitioners are entitled to the same relief as was allowed in the case of Surendra Kumar Verma (supra). In the result, the petition is allowed with cost. Hearing fee Rs. 50/-. The petitioners are directed to be reinstated with full back wages. The salary on reinstatement of the workmen will be the salary which they were drawing when they were retrenched (subject of course to any revision of scales that might have been made in the meanwhile). The period from the date of retrenchment to the date of reinstatement will not be taken into account for the purpose of reckoning seniority of the workmen among temporary employees. The respondent is free to deal with its employees, who are temporary, according to law.