

(2013) 02 KL CK 0098
In the High Court Of Kerala
Case No : OP (LC) No. 946 of 2010

K.N. Rajappan

APPELLANT

Vs

The Presiding Officer and Others

RESPONDENT

Date of Decision : 11-02-2013

Acts Referred:

Industrial Disputes Act, 1947 — Section 25B, 25F

Citation : (2013) 3 ILR (Ker) 270 : (2013) LabIC 2564 : (2013) 4 LLN 284 :
(2013) LLR 993 : (2013) LLR 1208

Hon'ble Judges : S.S. Satheesachandran, J

Bench : Single Bench

Advocate : Sandhya Raju, for the Appellant; K.P. Sree-Kumar, P.M. Satheesh by Govt. Pleader, Smt. Sunitha Vinod, SC and Karfeed, for the Respondent

Judgement

S.S. Satheesachandran, J.—Ext. P1 award passed by the Labour Court, Kannur deciding the reference whether termination of the petitioner by the management was justifiable against him, is challenged in this Original Petition invoking the visitorial jurisdiction of this Court under Article 227 of the Constitution of India. Petitioner raised an industrial dispute over the termination of his service by the management-respondent contending that he was denied employment since he was tested HIV positive. He was employed as a worker in Kannur Regional Tourist Hotel Management and Restaurant Co-operative Society Ltd. and, later, that society was renamed in 2005 as Kerala Food House and Catering Co-operative Ltd., respondent, and he had a continuous service from 1998 till 4-4-2006 when he was terminated from service without justifiable reason, was his case. Employer had deducted subscription from his wages for payment to the Employees Provident Fund Scheme was banked upon to press his case for reinstatement with back wages and compensation. Respondent management resisting the claim contended that he was employed in the establishment only from 3-9-2005 to 28-2-2006 on daily wages of Rs. 120/-. He left his employment due to ill-health, he was not a workman and dispute raised by him was not entertainable, was the defence of the respondent.

2. On the materials placed by both sides Labour Court accepted the contentions raised by the management and held that there was no evidence to establish that management had denied employment to the "worker" for the reason of his ill health. He was not in continuous service for a period of 240 days contemplated u/s 25B of the Industrial Disputes Act and, so there was no retrenchment of petitioner u/s 25F of that Act and, therefore, he was not entitled to any relief, was the view taken by the Labour Court to decide the reference against him.

3. I heard the counsel on both sides. The dispute referred for adjudication by the Labour Court was whether termination of Sri. Rajappan, worker, Pariyaram Medical College Canteen, Pariyaram by the management is justifiable? If not what relief he is entitled to? On materials placed, true, the workman has not established his case of continuous service as claimed by him and also that the respondent was an entity renamed in continuation of a Co-operative Society in which he claimed of previously employed from 1998 onwards. Award would show that Labour Court Negatived the case of the workman for the reason that he has not completed service of 240 days in a year under the respondent, and, as such he was not employed as a permanent workman under the employment. As if petitioner has canvassed a case of retrenchment without justifiable reason by the respondent Labour Court has proceeded to consider his case and came to the conclusion that he is not entitled to any relief.

4. According to respondent he was working in the establishment from 3-9-2005 to 28-2-2006. He was employed in the establishment for 179 days only on daily wages is the case of the respondent. Contribution was collected from his wages towards the Employment Provident Fund Scheme is admitted by the respondent, but it is contended that he is not a workman. The question that emerges for consideration is whether to claim the benefits under the Industrial Disputes Act, for short the Act, the workman should be a permanent workman. If we go by the definition of workman it does not indicate that he should be in permanent service of the employer. True to claim compensation for retrenchment his continuous service in the establishment has to be taken into account and in fact that is the basis also. The definition of workman in section 2(s) of the Act reads thus:--

2(s)" workman" means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical 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 (ten thousand 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.

The above definition of workman consists of three parts. The first part gives the statutory meaning of workman, the second part gives an extended connotation to include those workmen who have been dismissed, discharged or retrenched in connection with an industrial dispute; or whose dismissal, discharge or retrenchment has led to an industrial dispute, and the third part, specifically excluding certain categories of persons who would otherwise come under first and second part. In the present case we are concerned of the first part of the definition to examine whether petitioner should have established continuous service of 240 days with the respondent to claim relief's under the Act. A contract of employment, relationship of employer and employee, is the basis to satisfy the first part of definition of workman. Once the relationship of employer is made out, then, the period of service is not material to show the status of workman. Even a temporary or casual employee would fall within the ambit of the first part of the definition of workman. Every person employed in an industry irrespective of his status-temporary, permanent or probationer-if he is not under excluded category, would be a workman.

Where any question over the relationship of employer and employee is raised that has to be considered as a preliminary issue since determination of that issue will decide validity of the reference. Without considering that issue preliminarily Labour Court has proceeded to consider on the evidence let in status of the petitioner whether he was workman or not. In the written statement filed by the respondent, it appears, no serious challenge was raised over the status of the workman other than contending that he was employed for a short period only, not satisfying the minimum period to claim compensation towards the retrenchment. Case of the petitioner is that he was denied employment and terminated from service since he was detected as HIV positive. Employer has contended that he absented himself on the ground of ill health. So this was a case where Tribunal ought to have gone into the question whether there was "unfair labour practice." but, it has proceeded to consider whether the case of the petitioner workman was one falling u/s 25F of the I.D. Act, retrenchment of a workman. "Unfair labour practice" defined u/s 2(ra) of the Act means any of the practices specified in the Fifth Schedule of the Act. A discharge or dismissal of a workman not in good faith, but in the colourable exercise of the employer's right falls within an unfair labour practice. If petitioner was a workman even if he is detected as HIV positive, that cannot be a ground for his discharge or dismissal. His service of course can be terminated on the ground of continued ill health, if he is incapable of discharging his duties and that would not also amount to

retrenchment. Employer has contended that he has absented from duty and that there was no termination at all. Another contention raised was that he was only a daily worker. In such circumstances Labour Court should have first gone into the question whether the petitioner was a workman, to determine the validity of the reference, and, then, if he is found to be a workman whether it was a case of retrenchment or unfair labour practice. But it has gone into the case of the petitioner as if the reference has to be answered considering whether retrenchment of petitioner whose status as a workman was challenged by the respondent. Ext. P1 award passed by the Labour Court in such circumstances cannot be sustained, and it is liable to be set aside.

Setting aside Ext. P1 award Labour Court is directed to examine as a preliminary issue whether petitioner is a workman, and if he is found to be so, then, consider whether he absented from duties on the ground of ill health or was discharged/retrenched by employer since he was detected HIV positive and, thus, by unfair labour practice, to consider the grant of reliefs in accordance with law.