

(2005) 11 AHC CK 0029
In the Allahabad High Court
Case No : Special Appeal No. 110 of 1996

Kripa Shankar Dwivedi and Others

APPELLANT

Vs

U.P. State Electricity Board and, Electricity Distribution
Division

RESPONDENT

Date of Decision : 22-11-2005

Acts Referred:

Citation : (2006) 5 AWC 4579 : (2006) 2 LLJ 687

Hon'ble Judges : Vikram Nath, J;S. Rafat Alam, J

Bench : Division Bench

Advocate : K.P. Agrawal, Suman Sirohi and Sumati Rani Gupta, for the Appellant; S.C. Srivastava, for the Respondent

Final Decision : Allowed

Judgement

Vikram Nath, J.—This intra Court appeal has been filed against the judgment of learned single Judge dated 8.12.1995 passed in Writ Petition No. 33969 of 1992 dismissing the writ petition.

2. The appellants were the erst while employees of the Mirzapur Electric Supply Company (in short the Company) which was taken over by U.P. State Electricity Board (in short the Board) on 01.09.1975 i.e. the date when the licence of the Company was revoked. Before the taking over by the Board the appellants and several other employees were retrenched on 15.11.1974 by the company. In this respect the appellants raised an industrial dispute, which was pending before the Industrial Tribunal on the date of taking over by the Board, However, for the aforesaid reason the appellants were not taken in employment by the Board even though all other employees of the Mirzapur Electric Supply Company were taken in employment by the Board. The appellants industrial dispute in respect of their retrenchment which was referred by the State Government for adjudication to the Industrial Tribunal was finally decided vide award dated 25.1.77 partly against the appellant and partly in their favour. The relief of reinstatement was denied even though the retrenchment was found to be illegal, for the reason that

on the date of the award the licence of the Company stood already revoked and reinstatement would saddle the Board with liability of salary/ wages w.e.f. 01.09.1975 and also that such reinstatement would be beyond the scope of reference. The Tribunal however allowed back wages till 31.08.1975 from the date of retrenchment i.e. 15.11.1974 and were held to be in employment of the Company till the taking over. Aggrieved by the same the appellants filed Writ Petition No. 3351 of 1977 and 3209 of 1977.

3. Both these petitions were heard together and decided by a common judgment dated 10.2.1982 whereby this Court allowed the writ petition and set aside the award of Tribunal in so far it refused full back wages to the work men and further had denied the relief of reinstatement. This Court however remanded the matter to the Tribunal to reconsider only the question of payment of back wages and further directed the U.P. State Electricity Board to consider the question whether it would like to absorb the five work men keeping in mind the fact that workmen had already given up their claim for back wages w.e.f 01.09.1975 the date of taking over by the Board thereby not incurring any financial liability on the Board. The said judgment of this Court dated 10.2.1982 became final.

4. The appellants pursuant to the judgment dated 10.2.1982 did not pursue the matter with the Tribunal for back wages. They however approached the Board but could not find favour with the Board as no orders for absorption were passed, whereupon they filed Writ Petition No. 6887 of 1986 before this Court. This Court vide judgment dated 1.5.1992 allowed the writ petition holding that the reason given by the Board in the counter affidavit for not absorbing the appellants on account of some restriction imposed was not tenable and further directed the Board to reconsider the case of the petitioners for absorption in accordance with law. This judgment dated 1.5.1992 of this Court also became final.

5. The appellants again approached the Board whereby the Executive Engineer of the Board vide letter dated 21.6.92 communicated that the appellants could not be absorbed for the reason that on the date of the taking over of Mirzapur Electric Supply Company, they were not working in the company. This order of Executive Engineer was assailed in Writ Petition No. 33969 of 1992. The said writ petition has been dismissed vide judgment dated 8.12.1995 which is impugned in the present appeal.

6. We have heard Sri K.P. Agarwal learned Senior Counsel assisted by Kn. Sumati Rani Gupta for the appellant and Sri S.C. Srivastava learned counsel for the respondent Board.

7. Sri K.P. Agarwal learned counsel for the appellants has submitted that the appellants having been held entitled to reinstatement by the judgment of this Court dated 10.2.1982 and in any case in view of the award of Tribunal holding that appellants were in service of the Company on 01.09.1975 it would be deemed that they were in service of the Company on the date of its taking over. It is submitted that even though they were retrenched prior to the date of taking

over but as the effect of the reinstatement would be that the retrenchment of the appellant was held to be illegal and as if it was never in existence, the appellants would be deemed to have continued in service of the Company without break. It is further submitted that this aspect of the matter was not taken into consideration by the learned single Judge and further that the learned single Judge felt that it was the sole discretion of the Board whether or not to take the appellants in service and the Board having exercised that discretion could not be compelled to take appellants into service. It is submitted that the view taken by the learned single Judge was contrary to the record and the writ petition of the appellants has not been correctly decided.

8. Further according to the learned counsel for the appellants they having been held to be entitled to reinstatement vide judgment of this Court dated 10.2.1982 they became employees of the Company and therefore on the date of taking over their names should have been forwarded to the Board by the Company and in any case after the judgment dated 10.2.1982 their names ought to have been forwarded and the Board was under obligation to take them into employment like the other employees on the roll of the company on the date of taking over. The appellants would be similarly placed as other employees of the Company, who have been absorbed by the Board and once they were held entitled to reinstatement no difference could be drawn between the appellants and the other employees of the Board.

9. On the other hand Sri S.C. Srivastava learned counsel for the respondent Board has submitted that as the appellants have been retrenched from the service of the Company prior to the date of taking over and on the date of taking over they were not on the roll of the company, it was not at all obligatory on the Board to absorb the appellants like other employees of the Company who were on its roll on the date of taking over i.e. 01.09.1975. They could only be considered under Clause 6 of the agreement which gives exclusive discretion to the Board whether or not to absorb such employees, who were either terminated by the Company or against whom disciplinary proceedings were pending or who had resigned from the service of the Company and therefore, the appellants cannot compel the Board to take them into employment as they were terminated employees.

10. Having considered the submissions made by learned counsel for both the sides and having examined the record, we are of the view that the reason communicated to the appellants by the Executive Engineer vide letter dated 21.6.92 which is impugned in the writ petition cannot be sustained. It would be wrong to say that the appellants were not working in the company on the date of taking over. Once it has been held by the Industrial Tribunal and High Court that the appellants were wrongly retrenched and were entitled to reinstatement, it clearly means that the appellants continued to be the employees of the company. Therefore, on the date of taking over they would be deemed to be the employees of the company even though the award of the Tribunal is dated 25.01.1977 and

the judgment of this Court is dated 10.2.1982 which is subsequent to the date of taking over. Learned counsel for the respondent has not been able to show either that the judgment dated 10.2.1982 was set aside or modified by any superior Court or that the interpretation of the said judgment would be any different to our understanding of the same that the appellants would be deemed to have continued in the employment of the company ignoring the alleged retrenchment.

11. Learned counsel for the appellants have relied upon a decision of the Apex Court in the case between The Workmen Vs. The Bharat Coking Coal Ltd. and Others, page 144 wherein similar situation arose. Industrial dispute with regard to dismissal of some of the employees of the New Dharmaband Colliery was pending on the date of enforcement of Coking Coal Mines Nationalization Act, 1972. The New Dharmaband Colliery which vested in the Central Government and subsequently in the Bharat Coking Coal Company Ltd. Both were made respondents before the Tribunal. The award was delivered subsequently reinstating the employee with back wages fixing the liability jointly and severally on both the respondents. The High Court took a different view and quashed the award, aggrieved by the same the workmen approached the Apex Court, which disagreed with the High Court and restored the award of the Tribunal. The Apex Court was of the view that what matters is not the physical presence on the rolls but the continuance in service in law because the dismissal is nonest.

12. The present case is also similar in nature. The Tribunal held the retrenchment to be illegal and held the appellants to be in service up to 01.09.1975 the date of taking over but did not direct reinstatement as it would burden the Board with financial inability and secondly it would be beyond the scope of the reference. The High Court in its judgment dated 10.02.1982 had however held the appellants entitled to reinstatement and also directed the Board to consider their absorption without any financial liability of wages which they had already given up.

13. For all the reasons stated above the Board committed illegality in rejecting the claim of the appellants for absorption. Apparently the reason given by the Board is contrary to the judgment of this Court dated 10.2.1982 and therefore, the same cannot be sustained. The decision of the Board communicated vide letter dated 21.6.92 is liable to be quashed. .

14. In view of the above discussions we are unable to agree with the judgment of the learned single Judge. However, as this Court cannot issue a mandamus to the authorities for absorption of the appellants we set aside the decision of the Board as communicated vide letter dated 21.06.1992 and direct the respondent Board to consider the claim of the appellants for absorption in accordance with law treating that they were in employment in the Company on the date of taking over subject to availability of, vacancies and other essential qualification being required to be fulfilled by the appellants for such absorption. The appellants in case of being absorbed would not be entitled to any back wages which claim they had already given up before this Court in W.P. No. 3351 of 1977 and 3209 of

1977.

15. The special appeal and writ petition are accordingly allowed to the extent as indicated above.