
(2002) 07 JH CK 0027
In the Jharkhand High Court
Case No : L.P.A. No. 121 of 1998 (R)

Krishna Chandra Yadav

APPELLANT

Vs

Presiding Officer, Labour Court and Another

RESPONDENT

Date of Decision : 30-07-2002

Acts Referred:

Bihar Shops and Establishments Act, 1953 — Section 26

Citation : (2003) 1 LLJ 462

Hon'ble Judges : M.Y. Eqbal, J; Hari Shankar Prasad, J

Bench : Division Bench

Advocate : T.K. Das, for the Appellant; A.K. Sinha and R.S. Mazumdar, for the Respondent

Final Decision : Allowed

Judgement

M.Y. Eqbal, J.—In this appeal under Clause 10 of the Letters Patent directed against the Judgment dated March 2, 1998 passed in CWJC No. 1847 of 1989 (R) whereby the learned single Judge allowed the writ petition and set aside the order dated July 24, 1989 passed by the Labour Court in B. S. E. Case No. 9/86 directing the workman to be reinstated in service with full back wages.

2. The facts of the case lie in a narrow compass.

3. The appellant who is the concerned workman filed a complaint u/s 26 of the Bihar Shops and Establishments Act, 1953 (in short the said Act) against the respondent-Management, namely, Asiatic Oxygen Limited, Dhanbad against his illegal removal from service and seeking an order of reinstatement with full back wages. The case of the appellant is that he was employed by the respondent on May 4, 1982 and he had worked for a period of about four years till April 12, 1986. It is alleged that during this period of four years, he was forcibly made idle from time to time prior to April 23, 1984 without any reason just with a view to give break in his service in order to escape the liability of regularisation of his service and other benefits. Appellant's further case is that he has worked from

April 23, 1984 to April 12, 1986 continuously for a period of one year eleven months and nineteen days besides seven months in the year 1982 and seven months in the year 1983.

4. On the other hand, the case of the respondent management is that the appellant was employed on consolidated payment of Rs. 12/- per day. He was a temporary casual employee and used to do different types of works depending on urgency or vacancy. Whenever the company's regular workmen used to remain on leave, the complainant was employed as a badli worker but he never worked continuously. Since no work was available after April 12, 1986 at Dhanbad Depot, the appellant was not provided with any further work.

5. The Labour Court, after considering the evidences both oral and documentary adduced by the parties, recorded a finding that the appellant continuously worked for more than six months and, therefore, termination of his service was illegal and in violation of the provisions of the said Act. Accordingly, the complaint case was allowed and the respondent-management was directed to reinstate the appellant in service with full back wages.

6. Aggrieved by the said order the Management filed CWJC No. 1847/1989-R. The learned single Judge took a view that in order to claim benefit u/s 26 of the said Act the requirement is that an employee should remain in continuous employment for six months and for counting this continuous employment for six months, the last employment for which the complaint was filed, is to be taken into consideration. Relying upon a decision of a Bench of Patna High Court in CWJC No. 1094/1981-R, the learned single Judge held that since the appellant did not work continuously for a period of six months in his last employment, he was not entitled to the benefit of Section 26 of the said Act. Accordingly, the learned single Judge allowed the writ application and set aside the order passed by the learned Labour Court.

7. Mr. T.K. Das, learned counsel appearing on behalf of the appellant assailed the impugned order of the learned single Judge as being contrary to law, facts and evidences on record. Learned counsel submitted that the learned single Judge failed to appreciate that the ratio decided in CWJC No. 1094/ 1981R has got no application in this case for the reason that in that case the Labour Court recorded a conclusive finding that the complainant did not work for continuous period of six months. Learned counsel further submitted that admittedly, the appellant was engaged in 1982 and worked continuously till April, 1986 and during that period the Management forcibly made the appellant idle for a few days in order to circumvent the provisions of Section 26 of the said Act.

8. Mr. A.K. Sinha, learned senior counsel appearing for the Management, on the other hand, put heavy reliance on the decision rendered in CWJC No. 1094/1981R affirmed by the Supreme Court.

9. Before appreciating the rival contentions of the parties, I would first like to refer Section 26 of the said Act which reads as under:

"Notice of the dismissal or discharge (1) No Employer shall dismiss or discharge or otherwise terminate the employment of any employee who has been in his employment continuously for a period of not less than six months, except for a reasonable cause and after giving such employee at least one month's notice or one month's wages in lieu of such notice.

Provided that such notice shall not be necessary where the services of such employee are dispensed with on a charge of such misconduct as may be prescribed by the State Government, supported by satisfactory evidence recorded at an inquiry held for the purpose.

Provided further that an employee who has been in continuous employment for a year or more and whose services are dispensed with otherwise than on a charge of misconduct shall also be paid compensation equivalent to fifteen days' average wages for every completed year of service and any part thereof in excess of six months before his discharge in addition to the notice or pay in lieu of notice as prescribed above.

(2) Every employee, dismissed or discharged or whose employment is otherwise terminated, may make a complaint in writing in the prescribed manner, to a prescribed authority within 90 days of the receipt of the order of dismissal or termination of employment or (on) one or more of the following grounds namely:

- (i) There was no reasonable cause for dispensing with his services; or
- (ii) No notice served on him as required by Sub-section (1); or
- (iii) He had not been guilty of any misconduct as held by the employer; or
- (iv) no compensation as prescribed in Sub-section (1) was paid to him before dispensing with his service.

(3) to (5)....."

10. From bare perusal of the aforesaid provisions, it is clear that an employee who is continuously in the employment for a period of not less than six months cannot be dismissed or discharged without giving at least one month's notice or one month's wage in lieu of such notice. It further provides that no such notice would be necessary where the services of such employees are dispensed with on a charge of such misconduct as may be prescribed by the State Government, supported by satisfactory evidence recorded at an inquiry held for the purpose. Learned single Judge while dismissing the writ petition observed:

"There is no two opinion that in order to claim benefit u/s 26 the requirement is that an employee should remain in continuous employment for six months and for counting this continuous employment for six months the last employment for which the complaint was filed is to be taken into consideration. The previous employment that too intermittently from the year 1982 or so for that respondent has not raised any grievance, is not to be calculated. From perusal of the judgment of the Labour Court and also from the case of the parties it can be said

that the last employment of the petitioner was from December 16, 1985 to April 14, 1986. If that is so the employment was not for continuous six months. In that view of the matter, Section 26 of the Act is not attracted."

11. From perusal of the judgment of the Labour Court it appears that the appellant who is complainant led both oral and documentary evidence in support of his case that he has been continuously working for more than six months. The Labour Court has gone in detail of the facts of the case and analysed the entire evidence. Exts. W2 and W3 are the confidential memorandum issued by the Depot Superintendent of the respondents wherein he requested the management to regularize the employment of the appellant as his work was quite satisfactory and he had acquired sufficient knowledge to handle the work. The finding recorded by the Labour Court is quoted hereinbelow:

"The complainant has filed the following documents: Ext. W- 1 is the photostat copy of Memo sent by Depot Supdt. to Mr. Mantri (VP) Operations requesting him to consider the case of the complainant sympathetically, Ext. W-2 is the confidential memorandum dt. January 21, 1985 by the Depot Supdt. to Mr. S.K. Khosla BSM and Ext. W-3 is the confidential Memorandum dated January 12, 1985 sent by Depot Supdt. Chas Depot to Mr. S.K. Khosla BSM. In all these Memo Depot Supdt. Chas Depot has requested to regularize the employment of complainant K.C. Yadav. It will be borne out from these Exts. as well as Ext. M-2 that work of the complainant was quite satisfactory and he has acquired sufficient knowledge to handle the work to the satisfaction of the employer. From Ext. M-2 it will be clear that the complainant is connected with the Chas Depot of the Opposite Party from 1982 and he has been engaged by them for doing work during the year 1982 to 1984 on casual basis. He has worked for 69 days in 1982 and 134 days in 1983 and 31 days during January 1984 to March, 1984 and is on regular engagement from April 23, 1984 to January 12, 1985 and he has worked for 217 days i.e. 7 months. He has learnt clerical work and is regularly doing job of office clerk other than his own work as Darban-cum-Peon. The complainant in his evidence has stated that he has worked 7 months in the year 1982 and 1983 each and 31 days between January 1984 to March, 1984 and continuously since April 25, 1984 to April 12, 1986 thus he has worked for 3 years one month and 19 days. He has further stated that he was being removed from the service. He used to demand for wages for the Holidays and enhancement of his pay and make his employment regular. It is admitted that the services of the complainant has been dispensed with from April 14, 1986 orally without any notice or notice pay or compensation as required u/s 26 of the Bihar Shops and Establishments Act, 1953. The complainant has claimed that he has worked 7 months in 1982 and 7 months in 1983 and he has filed a petition calling for Attendance Register for the aforesaid period but the management have not filed the Attendance Register for the aforesaid period on the pretext that the same has been sent to Draper office of the Company. That explanation is not at all satisfactory for non-production of the Attendance Register of the aforesaid period. Therefore, there is a presumption that had those registers been

produced it could have adversely affected the case of the Opposite Party hence the same have been withheld. Therefore, it has been argued on behalf of the complainant that his version that he has worked 7 months regularly in 1982 and 1983 should be presumed to be correct but in view of his application dated January 12, 1985 and admission therein that he has worked for 69 days in the year 1982 in between October to December and 134 days in the year 1983. Such inference must not be drawn in spite of non-production of the Attendance Register for aforesaid period. However, it is crystal clear from the Attendance Registers Exts. M-3 to M-7 that during the year 1984 he has put in 226 days work; besides that he was entitled for 35 days as holidays and Sundays and has worked on 10 Sundays or holidays for which he has not been allowed any compensatory leave. Thus if it is taken into consideration and days of actual work and the holidays and Sundays added together then his total period of work in the year 1984 comes to 261 days besides that he has performed 10 days extra work when there were holidays or Sundays. Similarly in the year 1985 I find that he has performed 281 days actual work besides that if we add 56 days as Sundays or Holidays then the total period of work in the year 1985 is 281+ 56 days i. e. 337 days besides that he had also worked on 11 Sundays or holidays for which he has not been granted any compensatory leave. In the year 1986 he has worked throughout the month of January and has performed 13 days duty at Chas Depot during which he has worked on 4 holidays and Sundays. He has worked even on one Sunday for which he has not been provided any extra day of leave or extra pay. Therefore, it appears that he has continuously worked at Dhanbad Depot from February 10, 1986 and on one Sunday also. In the month of March he has performed duty for the entire month and in the month of April he has performed night duty from April 1 to April 14, 1986. He has even worked on one Sunday also. Thus it appears that in the year 1986 he has been in the employment of the opposite party from January 1 to April 14, the day on which he was orally terminated from the service. The management have filed Exts. M-9 series, the Debit Vouchers to show that the complainant has been paid for the period of the duties performed by him. Exts. M-9 to M-9/3 show that K. C. Yadav has been made payment for the work done from February 10, 1986 to April 12, 1986 excluding Sundays and Holidays @ Rupees 20/- per day for doing temporary work as Clerk at Dhanbad Depot. Exts. M-9/4 to M-9/7 show that he has been made payment, for the period of duty done upto the November 24, 1985 excluding Sundays and then from the month of December 1985 to February 22, 1986 @ Rs. 12/- per day excluding the Sundays and Holidays. It has been contended and submitted on behalf of the management that the period of work taken by the Company at Dhanbad Depot from February 10, 1986 to April 12, 1986 was that of a temporary clerk and is different from the work taken from him at Chas Depot prior to February 10, 1986. But according to the complainant he used to be deputed to work at different places than his actual place of work i, e. Chas Depot and for doing outside duty he used to be paid korari i.e. Daily Allowance at Rs. 20/-. This plea of the complainant is amply supported by the fact that in the Attendance Register for the months of February 1986, I find that

the complainant has been shown as at outdoor duty by mentioning the letters O.D. and for that period he was made to work at Dhanbad. Similarly in January 1986 also I find that there is at least 6 days on which he has been shown as at out door duty at Dhanbad but he actually has been made payment for the entire month of the January from Chas Depot itself vide Ext. M-9/5. Further I find that for the month of February 1986 payment has been made at Chas Depot upto February 22, 1986 although he was made to work at Dhanbad Depot from February 10, 1986 and from there also he has been made payment at Rs. 20/- per day for the actual duty done by him at Dhanbad. If the work of Dhanbad Depot was altogether a different work from that of being used at Chas Depot then the management would not have made payment for the entire month of January 1986 and also upto February 22, 1986 when admittedly the complainant was employed at Dhanbad Depot from February 10, 1986. This is only possible because for the outside duty the complainant used to get daily allowance and this supports his plea."

12. The finding of the Labour Court which is based on undisputed documentary evidence clearly shows that the appellant was taken in employment in 1982 and although there had been some break in service at the instance of the employer, the appellant continuously worked up to 1986. In our opinion, therefore, the complaint of the petitioner cannot be thrown merely on the ground that he has not continuously worked for more than six months. In the judgment relied upon by the respondents passed in CWJC No. 1094/1981-R, the facts of the case was quite different. In that case, the employee was taken in employment and before expiry of six months he was removed from the service. On the basis of that fact their Lordships held that since petitioner did not work continuously for six months the application u/s 26 of the Act was not maintainable. In the instant case, there is a detailed finding recorded by the Labour Court showing that he has been working since 1982 and in 1985 his case was strongly recommended by the Depot Superintendent of the employer for his regularisation in service but he was removed in 1986 without giving any notice or without any Inquiry. In our view, therefore, the learned single Judge has not considered this aspect of the matter and has simply proceeded on the basis that petitioner worked from December 16, 1985 to April 14, 1986 i.e. less than six months, therefore, his application was not maintainable.

13. For the reasons aforesaid, this appeals is allowed and the impugned judgment passed by the learned single Judge is set aside. Consequently, the judgment and order passed by the Labour Court is restored. However, there shall be no order as to costs.