
(1978) 07 PAT CK 0017
In the Patna High Court

Mahabir

APPELLANT

Vs

D.K. Mittal, Dy. Chief Mechanical Engineer, N.E. Rly. and
Others

RESPONDENT

Date of Decision : 27-07-1978

Acts Referred:

Constitution of India, 1950 — Article 226
Industrial Disputes Act, 1947 — Section 2, 25F, 25J

Citation : (1979) 2 LLJ 363 : (1980) PLJR 162

Hon'ble Judges : Vishwanath Mishra, J;Nagendra Prasad Singh, J

Bench : Division Bench

Judgement

Nagendra Prasad Singh, J.—This writ application has been filed for quashing an order passed by the respondent--Deputy Chief Mechanical Engineer, compulsorily retiring the petitioner from the service of the North Eastern Railway with effect from 11.11.1976. According to the petitioner, the said order is illegal, ultra vires and without jurisdiction. A copy of that order is Annexure-1 to the writ application.

2. The order retiring the petitioner compulsorily from the service of the Railway is purported to have been passed in exercise of the power conferred on the authority concerned by Clause (h) of Rule 2046 of the Indian Railway Establishment Code (hereinafter referred to as the Code). Rule 2046, which is the same as Fundamental Rule 56, vests power in authorities concerned, to retire officers of different categories, on certain conditions being fulfilled. We are concerned only with Clause (h) of the same, which is as follows:

Notwithstanding anything contained in this rule, the appointing authority shall, if it is of the opinion that it is in the public interest to do so, have the absolute right to retire any railway servant giving him notice of not less than three months in writing or three months' pay and allowances in lieu of such notice:

(i) if he is in Class I or II service or post and had entered Government service before attaining the age of thirty-five years, after he has attained the age of fifty

years.

(ii) in any other case after he has attained the age of fifty-five years.

From a bare reference to this provision it will appear that before retiring an employee of the railway, the appointing authority must be satisfied that it was in public interest to do so. Having been satisfied about the same, a notice of not less than three months in writing or three months' pay and allowances in lieu of such notice is to be given. Sub-clause (ii), which is applicable in the case of the petitioner, prescribes that age of the person concerned at the relevant time must be 55 years. There is no dispute that the conditions mentioned in the aforesaid provisions were fulfilled, when the impugned order was issued.

3. The main point, which has been urged on behalf of the petitioner by the learned counsel, is that the petitioner being a workman within the meaning of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act), his services cannot be terminated unless the provisions of Section 25F of the Act is also followed, as he is governed by the provisions of the Code as well as the provisions of the Act. Section 25F of the Act is as follows:

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 the 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 the service;

(b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to 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.

Learned Counsel admitted that so far as the requirement of Clause (a) of Section 25F is concerned, it had been fulfilled in the instant case by service of the notice in advance, but according to him there has been infraction of the requirement of Clause (b) inasmuch as the petitioner was not paid at the time, when he was compulsorily retired, compensation which should have been "equivalent to fifteen days' average pay for every completed year of continuous service". It is said that the petitioner was in service of the Railways for more than 20 years. There is no dispute about the non-payment of compensation to the petitioner, but, according to the respondents, as compulsory retirement does not amount to retrenchment within the meaning of the Act the provision of Section 25F of the

Act shall not be applicable. This takes us to the question as to whether compulsory retirement will amount to retrenchment within the meaning of the Act.

4. "Retrenchment" has been defined by Section 2(oo) of the Act as follows:

"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

(5) termination of the service of a workman on the ground of continued ill-health.

In view of the definition given above, barring the exceptions mentioned therein any termination by the employer of the service of a workman, for any reason whatsoever shall amount to retrenchment. In such a situation, once it is established that the petitioner was a workman within the meaning of the Act and order of the compulsory retirement amounts to termination by the employer of the services of the petitioner, then it will amount to retrenchment within the meaning of the Act.

5. According to the petitioner, he was employed as Machine Man (Design) by the Railway; as such he will be deemed to be a workman within the meaning of the Act. In the counter-affidavit during submissions it was not asserted on behalf of the respondents that the petitioner was not a workman within the meaning of the Act. The Railway being an industry within the meaning of the Act and petitioner working as machineman will be deemed to be a workman.

6. So far as the question as to whether the order compulsorily retiring the petitioner will amount to retrenchment, it has to be examined in some greater detail. In general parlance, retrenchment means the discharge of surplus labour of staff by the employer, otherwise than as a punishment. But while defining the word "retrenchment" the Act says that it will include termination by the employer "for any reason whatsoever". This has been interpreted to mean that the word retrenchment used in the Act includes within its campus all types of termination by the employer and the reasons leading to such terminations are irrelevant for all practical purposes. This aspect of the matter has been considered by the supreme Court in the case of *The State Bank of India Vs. Shri N. Sundara Money*, , where it was observed:

As break down of Section 2(oo) unmistakably expands the semantics of retrenchment. Termination...for any reason whatsoever, are the key words. Whatever the reasons, every termination spells retrenchment. So the sole question is, has the employee's service been terminated? Verbal apparel apart"

the substance is decisive. A termination takes place where a term expires either by the active step of the master or the running out of the stipulated term. To protect the weak against the strong this policy of comprehensive definition has been effectuated. Termination embraces not merely the act of termination by the employer, but the fact of termination however produced.

The word "termination" in context with the "retrenchment" was interpreted to mean that the service of the employee concerned should have come to end by any means whatsoever. This must be in contradiction to coming to an end in the natural course of events like superannuation. Again, the same question arose for consideration in the case of *Hindustan Steel Ltd. v. The Presiding Officer, Labour Court, Orissa and Ors.* AIR 1977 S.C. 31. In this case, an attempt was made to question the correctness of the ratio of the aforesaid judgment of the Supreme Court in the case of *State Bank of India (supra)* by counsel concerned saying that the interpretation given to the word "retrenchment" was in conflict to the interpretation given by the Supreme Court in its earlier judgments, specially in the case of *Hariprasad Shivashanker Shukla and Anr. v. A.D. Dewalker and Ors.* AIR 1957 S.C. 121. Their Lordships, after referring to the earlier judgment, expressed the view that there was no conflict and it was observed that in the case of the *State Bank of India (supra)* the scope of the word "retrenchment" has been rightly interpreted. It may be mentioned that in the case of *Hariprasad Shivashanker Shukla (supra)* it had been pointed out that the words for any reasons whatsoever, used while defining "retrenchment" would not include a bona fide closure of the whole business because it would be against the entire scheme of the Act. We are not concerned with any other case of termination due to closure of whole business. Again, in the case of *Delhi Cloth and General Mills Ltd. Vs. Shambhu Nath Mukherji and Others*, , it was held that striking off the names of the workman from the rolls, will amount to retrenchment within the meaning of Section 2(oo) of the Act. In all these cases it was also held that whenever the employer purports to terminate the service of an employee, which amount to retrenchment within the meaning of the Act, it has to be in conformity with the requirements of Section 25F, and once there is a non-compliance, order of termination shall be vitiated.

7. Learned Counsel appearing for the respondents urged that compulsory retirement will not amount to termination of the service of the petitioner because it is the result of exercise of statutory power. In that connection, learned Counsel has drawn our attention to the aforesaid Rule 2046 of the Code and has submitted that it prescribes different stages at which an employee of the Railway can superannuate, and when after attaining the age of 55 years, an employee of Railway is asked to retire, for all practical purposes it amounts to superannuation. It is difficult to accept this contention. It is an admitted position that, but for the impugned order passed against the petitioner, he would have continued in the service of the Railway. In such a situation, perhaps, it cannot be urged that the result of any such order will not be to end the period of service which otherwise would have continued for a longer period. In any opinion,

whenever a person is compulsorily retired, the period of his service is concluded as a result of any such order. In the case of the State Bank of India (supra) it was observed:

Without speculating on possibilities, we may agree that "retrenchment" is no longer terra incognita but are covered by an expansive definition. It means to end, conclude, cease. In the present case the employment ceased, concluded, ended on the expiration of nine days--automatically may be, but cessation all the same.

In this connection, it may be relevant to consider the definition of "retrenchment" in Section 2(oo). It excludes from its ambit only voluntary retirement, and retirement of the workman on reaching the age of superannuation. By necessary implication, it shall include compulsory retirement of the workman.

8. Learned Counsel appearing for the respondents urged that the rules and the Act both operate in their separate field and it should not be held that an action taken in accordance with Rule 2046 of the Code has to be consistent with the requirements of Section 25F of the Act. It is true that the impugned order is consistent with the requirement of Rule 2046. But, if the Act gives benefit to certain categories of employees of Railway of Section 25F as well, then the authorities concerned have to pass orders which are consistent with the provisions of the rule as well as the Act. Section 25J of the Act has a non-obstante clause. The relevant portion of Section 25J is as follows:

(1) The provisions of this Chapter shall have effect notwithstanding anything inconsistent therewith contained in any other law including standing orders made, under the Industrial Employment (Standing Orders) Act, 1946.

(2) For the removal of doubts, it is hereby declared that nothing contained in this chapter shall be deemed to affect the provisions of any other law for the time being in force in any State in so far as that law provides for the settlement of industrial disputes, but the rights and liabilities of employers and workmen in so far as they relate to lay-off and retrenchment shall be determined in accordance with the provisions of this Chapter.

In view of Section 25J of the Act, if two provisions are governing the terms and conditions of an employee and if they are inconsistent with each other, the provisions of the Act as contained in Chapter VA shall have the overriding effect except the cases covered by the proviso to Sub-section (1) of Section 25J with which we are not concerned. Sub-section (2) of Section 25J also says in clear and unmistakable terms that the rights and liabilities of the employers and workmen in so far as they relate to lay-off and retrenchment, shall be determined in accordance with the provisions of that Chapter, which contains Section 25F as well. In view of this mandate of the Parliament, it is difficult to hold that although the petitioner was a workman and he has been retrenched within the meaning of the Act, the requirement of Section 25F of the Act, should not have been fulfilled.

9. It is not the case of the respondents that the petitioner was paid at the time of retrenchment, compensation as required by Clause (b) of Section 25F. Even in the counter-affidavit filed on behalf of the respondents it has not been stated that they were going to offer to the petitioner on the stipulated date the amount of compensation as required by Clause (b) of Section 25F of the Act. There is nothing in the impugned order as well, to show that the compensation was to be paid. However, learned Counsel appearing for them, simply stated that they might have paid that compensation at the time of retrenchment, i.e., the appointed day being 11.11.1976. This argument, on the face of it, cannot be accepted, because there is no mention of any compensation in accordance with Clause (b) of Section 25F of the Act, in the impugned order. If the respondents wanted to pay the compensation to the petitioner, they would have certainly mentioned it in that order. The requirement of Section 25F is imperative and mandatory. The Supreme Court in the case of State Bank of India (supra), observed:

Without further ado, we reach the conclusion that if the workman swims into the harbour of Section 25F, he cannot be retrenched without payment, at the time of retrenchment, compensation computed as prescribed therein read with Section 25F(2).

In the cases of Hindustan Steel Ltd. v. The Presiding Officer, Labour Court, Orissa and Ors. (supra) and Delhi Cloth and General Mills Co. Ltd. v. Shambhu Nath Mukherji and Ors. (supra), the orders being in violation of Section 25F were held to be illegal.

10. Learned counsel appearing for the respondents then submitted that in view of Clause (3) of Article 226 of the Constitution of India this Court should not exercise its writ jurisdiction because an alternative remedy was available to the petitioner. According to the learned counsel, the petitioner having been held to be a workman within the meaning of the Act, can raise an industrial dispute for redress of his grievance, and, as such, he should be directed to pursue his remedy against the so-called illegal termination of his service before the appropriate Government, and then before the Industrial Court. In support of this contention, reliance was placed on a judgment of the Supreme Court in the case of The Premier Automobiles Ltd. Vs. Kamlekar Shantaram Wadke of Bombay and Others, . In that case, a question had arisen as to whether in cases of disputes which can be adjudicated by the Industrial Courts, the jurisdiction of the civil Court is ousted. After considering different aspects of the matter, only certain categories of disputes were pointed out, which could be agitated before the civil Court. It was observed that if the industrial dispute relates to enforcement of a right or an obligation created under the Act, then the only remedy available to the suitor to get an adjudication under the Act. Learned Counsel for the respondents urged that the same principle be applied" while dealing with an application under Article 226 of the Constitution because this is an industrial dispute which can be adjudicated under the provisions of the Act.

This aspect of the matter has been considered by this Court and reference in this connection may be made to the judgment in the case of Hart Rai v. Union of India and Ors. (1978) B B C J 350. In that case also reliance had been placed on behalf of the respondents, in the aforesaid Supreme Court decision The Premier Automobiles Ltd. Vs. Kamlekar Shantaram Wadke of Bombay and Others, , but it was held that adjudication before the industrial Court will not amount to an alternative remedy so as to bar the maintainability of the writ application of the petitioner before this Court. It need not be emphasised that an alternative remedy, on its plain reading, means a remedy which is available to the petitioner concerned and which is not dependent on the opinion of any other authority. It is well-known that it is upto the appropriate Government to refer or not to refer a dispute for adjudication to an industrial Court. In such a situation, after having admitted this writ application, it will not be a proper exercise of discretion to dismiss the same and to ask the petitioner to take a chance before the appropriate Government. Accordingly, I hold that the writ application of the petitioner is maintainable and he is entitled to the relief claimed for. As the impugned order compulsorily retiring the petitioner amounts to retrenchment within the meaning of the Act and the procedure prescribed by Section 25F of the Act has not been complied with, it has to be held that the termination of the petitioner from the service of the Railway was against the mandatory provisions of the Act, and, as such, liable to be quashed by this Court.

11. In the result, the writ application is allowed and the order impugned (Annexure 1) is quashed. In the circumstances of the case, there will be no order as to costs.

Vishwanath Mishra, J.

12. I agree.