

(1985) 11 KAR CK 0014
In the Karnataka High Court
Case No : Writ Petition No. 20064 of 1982

Management of Motor Industries Co., Ltd.	APPELLANT
Vs	
Presiding Officer	RESPONDENT

Date of Decision : 20-11-1985

Acts Referred:

Employees State Insurance Act, 1948 — Section 73
Employees State Insurance Regulations, 1950 — Regulation 98, 98 (2), 98 (3)
Industrial Disputes Act, 1947 — Section 2 (oo), 25 F, 25 J

Citation : (1987) ILR (Kar) 507 : (1987) 2 KarLJ 110

Hon'ble Judges : Bopanna, J

Bench : Single Bench

Advocate : K. Kasthuri, for King and Patridge, for the Appellant; K. Subba Rao, for the Respondent

Judgement

Bopanna, J.—The petitioner-Management has challenged the correctness of the award made by the Labour Court", Bangalore in Ref. No. 35/79 holding that the order of termination passed against the 2nd respondent-workman ("the workman" for short) is violative of Section 25F of the Industrial Disputes Act ("the Act" for short) and the provisions of Section 73 of the Employees' State Insurance Act and therefore, he was entitled to be reinstated with continuity of service and back wages.

The facts are not in serious controversy. The workman was employed as an Operator under the petitioner-Management since about 1963 and his services were terminated by an order dated 19-5-1973 while he was receiving sickness benefit from the ESI Hospital under the Employees' State Insurance Regulations. The workman on his own showing was suffering from kidney and gastric ailments and therefore, he was taking treatment in the Chamarajpet ESI Dispensary from 12-11-1972 to 19-5-1973 for the said ailments. It is not in dispute that he was periodically sending certificates in proof of his illness to the management during that period. Having found that the workman had absented himself continuously for a period of 6 months and 15 days the petitioner issued the order of

termination as per Annexure-A filed in the Writ Petition (marked as Ex. M. I before the Labour Court). There is some dispute about the Standing Order under which the order of termination was issued to the petitioner.

2. The learned Counsel for the petitioner Mr. Kasturi, contended that the order of termination was in pursuance of the power conferred on the management under Standing Order 17.2 which reads as under:

"The employment of any permanent daily or piece rated employee may be terminated without assigning any reason by giving him 14 day's notice of by payment of wages at the basic rate of wages for 14 days in lieu of notice. If wages are drawn on piece-rate basis the fourteen days' wages will be computed on the average daily earnings of such employee for the days actually worked during the previous wage period."

However it was sought to be made out in the course of the arguments, that granting Standing Order No. 17.2 was not applicable to the facts of this case, the management had ample power to terminate his services under Standing order No. 17.4 which reads as under :

"The services of an employee absent from work on account of sickness duly certified by the Company's Medical Officer may be terminated without notice after the worker has been absent for a continuous period of thirty days. An employee absent from work on account of sickness shall be paid such benefits as may be provided for in any Act for the time being in force providing for the sickness benefits. Each case will be considered on its own merits."

3. The workman having raised a dispute touching the validity of the order of termination, the matter was referred to the Labour Court for adjudication. The Labour Court on a consideration of the oral and documentary evidence on record came to the conclusion that the order of termination cast a stigma on the workman's character, in that, it was based on the fact that on account of his absence from duty, it was difficult for the management to keep to the work schedule and therefore, that order cannot be termed as an order of termination of his services by notice simpliciter. It also held that since the workman was under, receipt, of disablement benefit at the relevant time, u/s 73 of the ESI Act, his services could not have been terminated by recourse to Standing Order No. 17.2, and the order of termination amounted to an order of punishment for his alleged continuous absence and therefore, the termination of his services without an enquiry under Annexure-A was bad-in-law.

4. The learned Counsel for the petitioner, Mr. Kasturi raised the following contentions in support of the challenge to the impugned order. According to him, (a) the Labour Court was in error in not properly consuming the provisions of Regulation 98 of the ESI Regulations which conferred on the management an enabling power to terminate the services of the workman on account of his continuous absence due to sickness for a period of 6 months and more; (b) the finding of the Labour Court that the order of termination amounted to

retrenchment is opposed to the provisions of Section 2(oo) of the Act since it is well settled that if the order of termination could be brought under any of the exceptions to Section 2(oo) of the Act, that order would not amount to retrenchment. In this case according to him there is enough evidence to come to the conclusion that the services of the workman were terminated for his continued ill-health which is one of the exceptions provided for u/s 2(oo) of the Act; (c) That Section 73 of the ESI Act would not come into play at all on the facts of this case since the action taken against the workman was in pursuance of Regulation and therefore, the order of termination cannot be termed as punitive in character ; (d) that the provisions of Section 25J of the Act will not come to the aid of the workman since Section 25J would apply only to Chapter VA of the Act and not to an order of termination which comes within the exceptions provided u/s 2(oo) of the Act.

5. Mr. Subba Rao, Learned Counsel for the workman, placing reliance on certain decisions of this Court and other High Courts, submitted that even though the workman was continuously absent for a period of 6 months, on his own showing before the Labour Court, such continuous absence would not confer a right on the management to terminate his services by recourse to the exception (c) to Section 2(oo) of the Act or Regulation 98. According to him, mere continuous absence by itself would not be a ground for termination, but it has to be proved that the workman was not in a position to resume employment after such continuous absence pa the date of termination of his services. That is to say, he was not in a position to resume employment and render satisfactory service to the management on the date of termination of his services. He also submitted that the finding of the Labour Court on the applicability of Section 73 of the ESI Act also does not call for interference since the order of termination on the face of it was punitive in character as it had cast a stigma on the workman's efficiency in his job/and utility to the management and therefore, on that ground alone, the impugned award could be sustained. On the applicability of Section 25J of the Act he submitted that Section 2(oo) of the Act is only relevant to know the definition of the word "retrenchment"; that it cannot be read in isolation and what is defined as "retrenchment" has to be applied to the facts of the particular case by recourse to Section 25F of the Act and if there is a violation of Section 25F Section 25J will be attracted.

6. I will take up the first contention of Mr. Kasturi since that contention has a bearing not only on the order of termination under the Standing Order in force, but also on the finding of the Labour Court that the order of termination amounted to retrenchment. Regulation 98 on which the Learned Counsel for the petitioner relied reads as under :

Regulation 98. Discharge, etc., of employee under certain conditions :--If the conditions of service of any employee so allow, an employer may discharge or reduce on due notice an employee -

(i) who has been in receipt of disablement benefit for temporary disablement,

after he has been in receipt of such benefit for a continuous period of six months or more.

(ii) who has been under medical treatment for sickness other than tuberculosis, leprosy, mental and malignant diseases or has been absent from work as a result of illness duly certified in accordance with these regulations to arise out of the pregnancy or confinement rendering the employee unfit for work, after the employee has been under such treatment or has been absent from work for a continuous period of six months or more;"

Regulation 98(3) is not relevant for the purpose of the case and what should be construed is only Regulation 98(2). Regulation 98(2) consists of three parts. The first part applies to workman who has been under the medical treatment for disease other than tuberculosis, leprosy and mental-illness ; The second part applies to workman who has been absent from work as a result of illness duly certified in accordance with ESI regulations to arise out of the pregnancy or confinement rendering the employee unfit for work, after the employee has been under such treatment. The third part applies to workman who has been absent from work for a continuous period of six months or more.

The first part of Regulation 98 (2) applies to cases of sickness other than tuberculosis, leprosy, mental diseases. The second part of the Regulation applies to female workers who become unfit for work on account of pregnancy or confinement. The third part of the Regulation applies to the worker who has been absent from work for a continuous period of six months or more.

7. Mr. Kasturi contended that the action taken by the Management under Standing Order was in consonance with Regulation 98 R/w the third part of Sub-clause (2) of that Regulation. As noticed earlier, there is no dispute about the absence of the workman for a continuous period of 6 months or more and therefore, the point for consideration is whether Regulation 98 would confer a right on the management to terminate the services of the workman on the ground that he was absent - from work for a continuous period of 6 months or more. The second part of the requirement under Regulation 98 has been proved. But the first part of the Regulation that is "if the conditions of service of any employee so allow an employer may discharge or reduce on due notice to any employee" contemplates two things-firstly the conditions of service of the employee should permit the termination on the ground of absence over a period of six months; secondly, the employer should give the employee "due notice" of the action proposed to be taken against him.

8. Mr. Kasturi contended that Regulation 98 should be read with Standing Order 17 (4) of the Company's Standing Orders and thus read the power of the Management to invoke Regulation 98 as not open to any doubt. In my view, this contention appears to be well founded. Though there is no specific mention of Regulation 98 in Standing Order No. 17 the wording of Standing Order No. 17.4 does disclose that the management has the power to terminate the services of

an employee without notice if the worker had been absent from work for a continuous period of 30 days. If the management had exercised its power when the workman was absent from work for a period of 30 days, that power would have been in violation of Regulation 98, but in this case, the management exercised its power when the workman had been absent from work for a continuous period of 6 months. Therefore, it cannot be said that Standing Order No. 17.4 would conflict with Regulation 98, on the facts of this case. Therefore, the first requirement of Regulation 98 (1) is satisfied by the petitioner. But the second requirement whether there was "due notice" to the workman requires consideration. It was contended by Mr. Kasturi that the words "due notice" would only mean that the workman in terms of the contract of employment must be given due notice of termination of his services or wages in lieu of notice. I am unable to agree with this contention. The words "due notice" in the context of Regulation 98 only mean that before the workman's services are terminated on the ground that he had been absent from work for a continuous period of 6 months or more and for any other reasons mentioned in Regulation 98, he must be put on notice about the intention of the management so that he would have an opportunity, to explain why he could not attend to his work for a period of 6 months and also to plead that though he was continuously absent he was in a position to resume work and perform his duties or to do some other work if not the work which he was doing by reason of the fact that on account of his prolonged sickness he is not in a position to do the same work as he was doing before his continuous absence to the satisfaction of the management. That is the reason, the Legislature has used the words "due notice" in order to give an opportunity to the workman to explain his absence for a period of 6 months so that his plea for continuity of employment could be considered by the management favourably.

9. Though no decisions on the application of Regulation 98 is brought to my notice I am satisfied on the plain language of this Regulation that the workman should be given proper notice before the management exercises the power conferred on it by Regulation 98 and Standing Order 17(4) to terminate his services on account of continuous absence. A similar case where the contract of employment was terminated by reason of the fact the workman was absent from work for a continuous period of 18 months came up for consideration before the National Industrial Regulation Court in U.K. (See: 1972(2) All England Reports 715) *Marshall v. Harland & Kloff Ltd.*, In that case, the workman became ill in October 1969 and was thereafter absent from work because of his illness. There was no evidence as to how long he might be incapacitated from doing any work. During the period of his absence from work he received no wages. The Management did nothing to terminate the workman's contract of employment until 1st April 1971. By a letter of that date the management informed the workman that their London works were to close down at the end of June 1971; that although he had been sick and absent for a considerable time he would be given four weeks' notice (together with four weeks' pay) to terminate his

contract of employment, and (c) that although he did not qualify for a redundancy payment he would be given an ex-gratis payment of 50 pounds in appreciation of his years of service. Workman gave notice u/s 6(1) of the Redundancy Payments Act, 1965 of his intention to claim Redundancy Payment. The Industrial Tribunal found (i) that the workman's contract of employment had been terminated by frustration prior to 1st April 1971 owing to the length of his illness; alternatively (ii) that due to his ill-health, workman's contract of employment, or the relationship had become that of ex-employer and ex-employee coupled with an understanding that, should he recover, he would be re-employed; in the further alternative (ii) that the workmen's dismissal had not been attributable to redundancy but to sickness. Accordingly, the Tribunal held that the workman was not entitled to redundancy payment. The workman's appeal before the National Industrial Relations Court was allowed. Sir J. Donaldson (the present Master of Rolls) as he then was speaking for the Court held:

"In the context of incapacity due to sickness, the question of whether or not the relationship has come to an end by frustration sounds more difficult than it is. The tribunal must ask itself : was the employee's incapacity, looked at before the purported dismissal, of such a nature, or did it appear likely to continue for such a period, that further performance of his obligations in the future would either be impossible or would be a thing radically different from that undertaken by him and agreed to be accepted by the employer under the agreed terms of his employment ? In considering the answer to this question, the tribunal should take account of :

(a) The terms of the contract, including the provisions as to sickness pay - The basis of weekly employment may be destroyed more quickly than that of monthly employment and that in turn more quickly than annual employment. When the contract provides for sick pay, it is plain that the contract cannot be frustrated so long as the employee returns to work, or appears likely to return to work, within the period during which such sick pay is payable. But the converse is not necessarily true, for the right to sick pay may expire before the incapacity has gone on, or appears likely to go on, or so long as to make a return to work impossible or radically different from the obligations undertaken under the contract of employment.

(b) How long the employment was likely to last in the absence of sickness - The relationship is less likely to survive if the employment was inherently temporary in its nature or for the duration of a particular job, than if it was expected to be long term or even lifelong.

(c) The nature of the employment - Where the employee is one of many in the same category, the relationship is more likely to survive the period of incapacity than if he occupies a key post which must be filled and filled on a permanent basis if his absence is prolonged.

(d) The nature of the illness or injury and how long it has already continued and the prospects of recovery - the greater the degree; of incapacity and the longer the period over which it has persisted and is likely to persist, the more likely it is that the relationship has been destroyed.

(e) The period of past employment - A relationship which is of long standing is not so easily destroyed as one which has but a short history. This is good sense and, we think, no less good law, even if it involves some implied and scarcely detectable change in the contract of employment year by year as the duration of the relationship lengthens. The legal basis is that over a long period of service the parties must be assumed to have contemplated a longer period of sickness than over a shorter period.

These factors are interrelated and cumulative, but are not necessarily exhaustive of those which have to be taken into account. The question is and remains : was the employee's incapacity, looked at before the purported dismissal, of such a nature, or did it appear likely to continue for such a period, that further performance of his obligations in the future would either be impossible or would be a thing radically different from that undertaken by him and accepted by the employer under the agreed terms of his employment ? Any other factors which bear on this issue must also be considered.

This reasoning of the National Industrial Relations Court would go to show, in this case, that had the workman been given notice as required under Regulation 98 he would have been in a position to satisfy the management the reasons for his continuous absence. Therefore, though it could be held that the management was well within its power to take action under Standing Order No. 17.4 R/w Regulation 98, that order is violative of the principles of natural justice since the workman was not given an opportunity to explain against the proposed action. In this view of the matter, it is not necessary to go into the other questions.

10. But the Learned Counsel for the petitioner has submitted that a large number of cases have frequently come up before the management where the workman by abusing their entitlements under the ESI Act go on medical leave for indefinite periods and therefore, it has become a problem for the management from the point of industrial relations to take suitable action against these workman. He insisted a ruling from this Court on the facts of this case to enable the management to adopt a definite procedure which will be eventually upheld by the Labour Courts and Tribunals constituted under the Act.

11. In my view, it is not necessary for the purpose of this case to express any opinion on the validity of the Standing Order No. 17.2. But if the management were to have recourse to Regulation 98, the proper order that could be passed by the management would be under Standing Order No. 17.4 and not under Standing Order No. 17.2. Since Standing Order 17.4 specifically provides for the termination of the service of the workman, if he has absented himself for a continuous period of 30 days. To make this power in conformity with the enabling

power under Regulation 98 the Management can take action only in cases where the workman had been absent for a continuous period of 6 months and that power could be exercised by the management only after due notice to the workman. That raises a further question whether the management will have to get over the provisions of Section 25J of the Act. The provisions of Section 25J read as under :

"25J: (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].

The proviso to Section 25J and Sub-section (2) of Section 25J are not relevant for the purpose of this case. Retrenchment as defined u/s 2(oo) of the Act reads as under :

"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

(c) termination of the service of a workman on the ground of continued ill-health ;

12. It was contended by Mr. Kasturi that Regulation 98 would also cover the exception to the provisions of Section 2(oo) in that the workman who is absent for a continuous period of 6 months due to illness for which he was treated by the ESI authorities could be treated as a workman suffering from continued ill-health. According to him absence for a continuous period of 6 months would mean "continued ill health" under Exception (c) of Section 2(oo). He submitted when a worker is continuously absent for a period of 6 months it may not be possible for the management to find out that he is not fit for future work or that he had lost his physical or mental faculties on account of continuous ill-health to resume work and perform his part of the contract till it is properly terminated ; that it will be difficult for the management to apply Regulation 98 as that might put the management into difficulties when that order of termination under that Regulation is challenged as being violative of Section 2(oo). But those difficulties by themselves would not be a proper answer to interpret the words "continued ill-health" as synonymous with "continuous absence". The ESI Act is an Act to provide for certain benefits to the workman in case of sickness in the course of employment or death during the period of employment and to make provisions for certain other matters in relation thereto. Incidentally, an enabling provision is made under Regulation 98 enabling the management to terminate the service of the workman if his conditions of services so prescribed in cases coming under

Regulation 98. But the right of management under Regulation 98 cannot conflict with the rights of the workman u/s 2(oo) R/w Section 25F of the Act. As between the Industrial Disputes Act and ESI Act, the former Act would be a Special Act in relation to the conditions of service of the workman. This view admits of no doubt in the light of the decision of the Supreme Court in Life Insurance Corporation of India Vs. D.J. Bahadur and Others, In the circumstances, the meaning of words "continued ill-health" must be ascertained from the language of Section 2(oo), and the object of Industrial Disputes Act and the protection sought to be conferred by that Act on the workman. It therefore follows that the management while exercising the power under Regulation 98 should also keep in view the provisions of Section 2(oo) and only if the management could establish that the workman was unable to perform his part of the contract of employment by reason of continued ill-health it could terminate his services without violating Section 25F. What is continued ill-health would depend on the facts and circumstances of each case since the Legislature has not prescribed any duration of the period of ill-health under the exception to Section 2(oo) As observed by, the Patna High Court:

""Ill-health obviously means disease, physical defect or infirmity or unsoundness. A person, who is not free from infirmity of disease or, in other words, is not possessing a sound health for active duties, and if this State of health continues for a long period, he may be said to be suffering from continued ill-health. In this case, according to the medical report, Azimuddin was permanently incapacitated from work due to old age infirmity, and therefore, it was a case of continued ill-health, as envisaged in Clause (c) of Section 2(oo). If the expression "continued ill-health" is susceptible of a narrower interpretation and means continued illness due to same organic disease, and if retrenchment means nothing but discharge of a portion of labour force as surplusage, then a person not suffering from any disease, but wholly disabled for active duties due to physical infirmity or otherwise, will not come within the purview of this Act. The acceptance of the argument of the learned Government Advocate will, therefore, introduce in the Act an anomaly not obviously in the contemplation of the legislature. In my considered judgment, "continued ill-health" includes any physical defect or infirmity incapacitating a workman for future or an indefinite period".

Burra Kur Coal Co. Ltd. Vs. Azimuddin Ashraff and Another, The law in England is also not different on this point as could be seen from the observation of Sir Donaldson in Marshall's case. The principles which he had laid down in his Judgment may not be strictly applicable to the facts of this case, in view of the fact that the provisions of the 1965 Redundancy Act are not on pari materia with Section 2(oo) of the Act but all the same some of the relevant principles not foreign to industrial jurisprudence for testing whether the contract of employment was frustrated by the sickness of the workman would be applicable for a proper determination of the action taken by the Management based on Regulation 98 and under the exception to Section 2(oo) of the Act.

13. In the light of the foregoing, the other points raised by the learned Counsel for the petitioner do not arise for consideration. It therefore, follows that the finding of the Labour Court does not call for interference. But as regards the reliefs granted by the Labour Court it should be noticed that the Labour Court on the material on record failed to notice that the workman was not very truthful in placing his case before it. It is on record that the order of termination was issued on 19-5-1973. The termination letter was sent both by registered post and by certificate of posting. The letter sent by registered post was returned with the endorsement "left" by the Postal Authorities. It does not say that the management had mailed it to the wrong address. It was for the workman, if he had changed his residential address during the sickness period, to intimate the change in his address. It is on record that the correct address of the workman was given by him on 10-10-1973 that is nearly about 5 months after the order of termination. But by strange co-incidence, he reports for work on 22-5-1973 with a fitness certificate from the ESI Doctor. That co-incidence could be easily explained. The obvious reason is that he had received the order of termination and therefore, he wanted to get over the same by producing the fitness certificate on 22-5-1973. This fact shows that the workman was not very honest in his dealing with his employer and he was taking shelter under the rights conferred on him by the ESI Act for going on indefinite medical leave up to 6 months and more. That apart, the services of the workman were terminated about 12 years ago and it would not be possible for the management to give him the proper job regard being had to his seniority over the other workmen in similar positions. The union representing the workmen had accepted certain amounts as compensation in cases of other workmen whose services had been terminated without holding an enquiry as is evident from the recent settlement produced before me.

14. However, Mr. Subba Rao, the Learned Counsel appearing for the petitioner, brought to my notice three decisions of the Supreme Court, in which the Supreme Court in lieu of reinstatement had awarded substantial amounts ranging 1 1/2 Lakhs to 2 Lakhs as compensation. The question of compensation is left to the discretion of the Tribunals exercising jurisdiction u/s 11A of the Act and that jurisdiction will vary on the facts and circumstances of each case. On the facts of this case, I find that the workman, who on his own admission was continuously absent for a period of 6 months and only when the order of termination was issued to him/served on him, he manages to get a certificate from the E.S.I, certifying his physical fitness to report to duty. Production of such a certificate could have aroused the suspicion of the management and had the management made the necessary enquiry at that time in this regard with the E.S.I. authorities it would have been possible for the management to take proper action under Regulation 98, (the implication of which I have considered in detail in this order) coupled with its powers to terminate his services under Standing Order 17.4. The action of the management at that time could not have been challenged since the law on the question of retrenchment had not been settled.

It is, only after The State Bank of India Vs. Shri N. Sundara Money, in the year 1976 the law became clean as regards the rights of the management for taking action under the relevant Standing Orders in force.

15. It cannot also be disputed that this Court could exercise the jurisdiction u/s 11A of the Act, while dealing with the question of compensation in the light of the decision of the S C. in Gujarat Steel Tubes Ltd. and Others Vs. Gujarat Steel Tubes Mazdoor Sabha and Others, .

In the circumstances, the ends of justice will be met if the award passed by the Labour Court is modified by awarding a sum of RS. 75,030/- in full and final settlement of the claims of the workman. The management is at liberty to give deduction to the amount already paid to the workman by way of interim relief pursuant to the order of this Court. Accordingly this Petition is partly allowed and the impugned award is modified as above.