
(2016) 07 RAJ CK 0006

In the Rajasthan High Court

Case No : Civil Writ Petition No. 5551 of 2016

Manager Muslim Musafir Khana Moti Doongri Jaipur

APPELLANT

Vs

Zahir Khan

RESPONDENT

Date of Decision : 05-07-2016

Acts Referred:

Industrial Disputes Act, 1947 — Section 25F

Citation : (2016) 3 CLR 437 : (2016) 151 FLR 995 : (2016) LabLR 1257 :
(2016) 3 LLN 508

Hon'ble Judges : Mr. M.N. Bhandari, J.

Bench : Single Bench

Advocate : Mr. Manoj Goyal, Advocate, for the Appellant

Final Decision : Dismissed

Judgement

Mr. M.N. Bhandari, J.—By this writ petition, a challenge is made to the award of Labour Court dated 08.06.2015, whereby, termination of service of the workman is held to be illegal thus a direction to reinstate with all consequential benefits has been given.

2. Learned counsel for petitioner submits that present case has chequered history. Initially when the Labour Court decided the reference, it was adverse to the workman. A writ petition was filed by the workman to challenge the award of the Labour Court. It was dismissed however on an appeal before the Division Bench, award of the Labour Court so as judgment of the learned Single Judge were set aside. The case was remanded back to the Labour Court for afresh adjudication. It is after noticing the order passed by the Payment of Wages Authority where a direction for payment of salary for two months was given but the period was not added to determine the total working days. The Division Bench recorded admission 2 of the management regarding engagement of the workman since 10.07.1997 till 31.07.1999. The judgment of the Division Bench for it was not challenged by the petitioner herein though counsel has raised many questions about the correctness of the judgment of the Division Bench. It

cannot be considered by this court but could have been on an appeal before the Apex Court. After remand of the case, the Labour Court has decided the reference in favour of the workman. It is after holding that workman has worked for two years from the year 1997 till 1999. It was also found that name of the workman was struck-off from the register thus it amounts to retrenchment and Section 25F of the Industrial Disputes Act, 1947 (in short "the Act of 1947") has not been followed.

3. Learned counsel submits that workman was required to prove his working for 240 days in a year to allege termination to be in violation of Section 25F of the Act of 1947. In absence of proof of working for 240 days, award of the Labour Court would not be tenable.

4. It is further contended that even if it is taken to be a case of illegal termination, employee was not entitled to get full back wages for the intervening period. It should have been denied on the principle of "no work no wages". A reference of judgment of the Apex Court in the case of Reserve Bank of India v. Gopinath Sharma & Anr., reported in (2006) 6 SCC 221, has been given.

5. I have considered the submission made by learned counsel for petitioner and perused the record.

6. The main issue raised by learned counsel for petitioner to challenge the award is about working days of the respondent-workman. According to him, the workman has not worked for 240 days thus Section 25F of the Act of 1947 is not attracted. The argument aforesaid is without taking note of the finding recorded by the Division Bench holding engagement of the workman for more than two years. The finding aforesaid has been referred by the Labour Court in its award. For ready reference, it is quoted hereunder:

"The working of the appellant-workman at least from 10.07.1997 to 31.07.1999 is not denied even by the respondent-employer."

7. Taking aforesaid admission of the petitioner-employer, the engagement of the workman for the said period gets established. The documents were also produced before the Labour Court and have been taken into consideration where working in the month of August and September in the year 1999 gets established. The case of self-abandonment of service was not accepted. The workman is not required to show his working for 240 days, if he has worked continuously for a year or more than a year. It would be clear from the perusal of Section 25F and 25B of the Act of 1947. Both the provisions are quoted for ready reference:

"25F. Conditions precedent to retrenchment of workmen.- 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 that 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:

(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."

"25B. Definition of continuous service.- For the purposes of this Chapter :

(1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;

(2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer :

(a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-

(i) one hundred and ninety days in the case of a workman employed below ground in a mine; and

(ii) two hundred and forty days, in any other case;

(b) for a period of six months, if the workman, during a period of six calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than--

(i) ninety-five days, in the case of a workman employed below ground in a mine; and

(ii) one hundred and twenty days, in any other case.

Explanation.- For the purposes of clause (2), the number of days on which a workman has actually worked under an employer shall include the days on which-

(i) he has been laid-off under an agreement or as permitted by standing orders made under the Industrial Employment (Standing Orders) Act, 1946 (20 of 1946), or under this Act or under any other law applicable to the industrial establishment;

(ii) he has been on leave with full wages, earned in the previous years;

(iii) he has been absent due to temporary disablement caused by accident arising out of and in the course of his employment; and

(iv) in the case of a female, she has been on maternity leave; so, however, that the total period of such maternity leave does not exceed twelve weeks."

8. Section 25B would be applicable when an employee has not worked continuously for a year but has worked for more than 240 days in a year. In case an employee has worked continuously for more than a year, Section 25B would not be applicable. The termination cannot be made without complying the provision of Section 25F as it falls under the definition of retrenchment. In view of above, argument of the learned counsel for petitioner cannot be accepted that workman has not worked for 240 days when his working is continuously of more than a year.

9. So far as award of back wages for the intervening period is concerned, it is in the light of petitioner's failure to lead evidence to prove gainful employment of the workman. In absence of evidence to prove gainful employment, the benefit of back wages becomes admissible to the workman. Thus I do not find any illegality in the award for back wages of the intervening period. The judgment of the Apex Court in the case of Reserve Bank of India v. Gopinath Sharma & Anr. (supra) has no application to the present case. Therein, taking note of nature of appointment, back wages were denied.

10. The burden to prove gainful employment lies on the employer. In the present case, the petitioner herein has failed to prove gainful employment of the workman thus as a consequence of which, the grant of back wages cannot be said to be illegal. The Apex Court has also allowed the benefit of back wages where order of termination is held to be illegal. The award of the back wages is a consequence of holding termination to be illegal unless gainful employment is proved by the employer. The view aforesaid has been taken by the Apex Court in the case of Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya (D.ED.) & Ors., reported in (2013) 10 SCC 324. The relevant para of the said judgment is quoted for ready reference:

"22. The very idea of restoring an employee to the position which he held before dismissal or removal or termination of service implies that the employee will be put in the same position in which he would have been but for the illegal action taken by the employer. The injury suffered by a person, who is dismissed or removed or is otherwise terminated from service cannot easily be measured in terms of money. With the passing of an order which has the effect of severing the employer employee relationship, the latter's source of income gets dried up. Not only the concerned employee, but his entire family suffers grave adversities. They are deprived of the source of sustenance. The children are deprived of nutritious food and all opportunities of education and advancement in life. At times, the family has to borrow from the relatives and other acquaintance to avoid starvation. These sufferings continue till the competent adjudicatory forum decides on the legality of the action taken by the employer. The reinstatement of such an employee, which is preceded by a finding of the competent judicial/quasi judicial body or Court that the action taken by the employer is ultra vires the

relevant statutory provisions or the principles of natural justice, entitles the employee to claim full back wages. If the employer wants to deny back wages to the employee or contest his entitlement to get consequential benefits, then it is for him/her to specifically plead and prove that during the intervening period the employee was gainfully employed and was getting the same emoluments. Denial of back wages to an employee, who has suffered due to an illegal act of the employer would amount to indirectly punishing the concerned employee and rewarding the employer by relieving him of the obligation to pay back wages including the emoluments."

11. In the light of discussion aforesaid, I do not find any ground to cause interference in the award of the Labour Court.

12. The writ petition is accordingly dismissed.