

(2000) 04 RAJ CK 0037

In the Rajasthan High Court

Case No : C.W.P. No's. 2623, 2988, 2989, 3092, 3465 and 3598 of 1998

Mansoori Bros and Others

APPELLANT

Vs

Chhotu Khan and Others

RESPONDENT

Date of Decision : 03-04-2000

Acts Referred:

Industrial Disputes Act, 1947 — Section 25F

Citation : (2002) 4 LLJ 746

Hon'ble Judges : B.S. Chauhan, J

Bench : Single Bench

Judgement

B.S. Chauhan, J.—All these writ petitions have been filed against the impugned Award of the Labour Court dated May 14, 1998, by which the claim of the workmen had been accepted holding that the services of the workmen had been terminated without following the procedure prescribed u/s 25-F of the Industrial Disputes Act, 1947 (for short, "the Act"), but in lieu of reinstatement, certain amount of compensation has been granted to the workmen.

2. Cross writ petitions have been filed by the employer being aggrieved of the Award of compensation and by the workmen for not awarding reinstatement. As the employer is the same, facts are also identical and the Awards have also been made on similar line, all these petitions are disposed of by the common Judgment and for the same, the facts of Writ Petition No. 2623/1998 are being considered.

3. In the said case, the workman was employed in July, 1979 and he worked up to November, 1991 and it was alleged that his services were terminated orally on November 30, 1991. The workman raised an industrial dispute and the Appropriate Government made a reference, vide order dated November 25, 1994: whether the services of the workman had been terminated illegally on November 30, 1991, and if yes, to what relief he was entitled to? In reply to the claim petition, the employer submitted that the services of the workman were never terminated but he had abandoned the services voluntarily and he had also

indulged in illegal activities of stealing petrol and diesel but the employer had condoned the said misconduct. Even before the Labour Court, the representative of the employer made a statement on February 26, 1998 that the employer was ready to give employment to the workman and he was given employment during the pendency of the dispute before the Labour Court, but he did not work regularly and again abandoned the job. Workman was given information by a letter Under Postal Certificate but he did not join. That dispute is not relevant for determining the present controversy. As the workman had worked for a long period, it is not necessary to see whether he had worked for 240 days in a calendar year counting backwards from the date of retrenchment. The only issue remains to be determined is: whether his services were terminated or he had abandoned the service voluntarily?

4. The specific stand of the employer before the Labour Court had been that the workman remained absent from November 30, 1991 onwards voluntarily. He was sent several messages orally through persons but he did not turn up and ultimately he was sent a letter Under Postal Certificate dated June 2, 1992 and the proof of which was produced before the Labour Court. The workman did not deny the acceptance of the letter under postal certificate, nor has it been anybody's case that the proof of postal certificate was a forged or fabricated document, nor the learned Labour Court has tried to examine the case from that angle.

5. u/s 27 of the General Clauses Act, there is a presumption of service by registered post, as held by the Hon'ble Supreme Court in Gujarat Electricity Board and Another Vs. Atmaram Sungomal Poshani, Chief Commissioner of Income Tax (Administration), Bangalore Vs. V.K. Gururaj and Others, 1996 VII AD 821 (SC) Adavala Sathaiah and Others Vs. Special Dy. Collector, Land Acquisition Unit I and Others, and Shimla Development Authority and others Vs. Smt. Santosh Sharma and another,

6. In Madanlal Kadia Vs. Union of India (UOI) and Others, the Orissa High Court placed reliance upon the Judgment of Privy Council in Harihar Banerji v. Ramshashi Roy AIR 1918 PC 102 and held that there can also be presumption of receiving the letter sent under postal certificate in view of the provisions of Section 114(f) of the Evidence Act

7. In Kanak Lata Ghose Vs. Amal Kumar Ghose, a similar view has been reiterated by the Calcutta High Court by observing that if a person makes a claim that the letter was sent under postal certificate, the other side may cross-examine it on the said issue and try to find out further information as to who had posted it, at what time it was posted etc.

8. In Mst. L.M.S. Ummu Saleema Vs. Shri B.B. Gujaral and Anr, the Apex Court, dealt with the issue of presumption of service of letter sent under postal cover, and observed as under:

"6. The certificate of posting might lead to a presumption that a letter addressed

to the Assistant Collector of Customs was posted on August 14, 1980 and in due course reached the addressee. But it is only a permissible and not an inevitable presumption. Neither Section 16 nor Section 114 of the Evidence Act compel the Court to draw a presumption. The presumption may or may not be drawn. On the facts and circumstances of a case, the Court may refuse to draw the presumption. On the other hand, the presumption may be drawn initially but on a consideration of the evidence, the Court may hold the presumption rebutted."

9. In *Surajmal Shiwbhagwan v. Kalinga Iron Works*, AIR 1979 Orissa 126, the Orissa High Court held that the presumption u/s 114 of the Evidence Act, in case of sending the letter under postal certificate, be examined consciously.

10. In *B.L. Shrivastava Vs. M.M.L. Shridhar and Others*, the Division Bench of Madhya Pradesh High Court held that the certificate of posting may give rise to the presumption that the letters were posted but no presumption can be drawn that they were received by the other party.

11. In *Aylsabeevi v. Aboobackar* AIR 1971 Kerala 231, the Kerala High Court held that in such a case, presumption of receipt of the letter u/s 11A of the Evidence Act can be drawn.

12. In *J. Mc. Gaffin and Another Vs. Life Insurance Corporation of India*, a similar view has been reiterated by the Division Bench of Calcutta High Court.

13. Undoubtedly, presumption as for the registered letter is not there for service under postal certificate. But once a specific stand has been taken by the employer and it is not denied by the workman, nor it is his case that the proof filed by the employer was a forged and fabricated document, there was nothing on record, on the basis of which the Labour Court could have drawn an inference that the workman had not received the letter and he had not abandoned the service. According to the employer, the workman did not come on work after November 30, 1991 and the letter under postal certificate was sent to him on June 2, 1992, i.e. after waiting for a reasonable period of seven months. The Labour Court has misdirected itself on the burden of proof and held that it was the exclusive duty of the employer to prove by adducing sufficient evidence that the workman had abandoned the service. Merely because he had been in service for a long time, the presumption that he could not have abandoned the service, is not tenable.

14. Though the law of evidence etc. are not applicable in a domestic enquiry, i.e. before the Labour Court, but even then the principle enshrined therein may be considered while deciding a case of this nature. The legal maxim *Affirmanti, Non Neganti, incluubit Probatio*, which means that the burden of proof lies upon him, who affirms and not on him who denies, provide sufficient guidelines.

15. It is settled proposition of law that burden of proof always lies upon the party who makes certain allegations and seeks relief on it. The Court has to address itself, whether the party, which has made the allegations, has discharged the

burden of proving the allegations. Moreso, the party must succeed on the strength of its own case rather than on the weakness of the case of the other side. Such party is under a legal obligation to prove its case irrespective of the fact whether the opposite party has proved its case or not. "A mere destruction of the case of the defendant in absence of establishment of his own case, carries the petitioner nowhere." (Vide J.P. Ravidas and others Vs. Navyuvak Harijan Uthapan Multi Unit Industrial Co-op. Society Ltd. and others, HMM Ltd. Vs. Director General, Monopolies and Restrictive Trade Practices Commission, Kala and Another Vs. Madho Parshad Vaidya, Moran Mar Basseliou Catholicos v. Most Rev. Mar Poulouse Athanasius, AIR 1954 SC 526; and Moran Mar Basselios Catholicos v. Thukalan Paulo Avira, AIR 1959 SC 31.

16. In Addagada Raghavamma and Another Vs. Addagada Chenchamma and Another, the Apex Court has explained the distinction between "burden of proof" and "onus to prove" observing as under :

"There is an essential distinction between burden of proof and onus to prove; burden of proof lies upon the person who has to prove a fact and it never shifts. The burden of proof in the present case, no doubt, lies upon the plaintiff to establish the factum of adoption and that of partition. The said circumstances do not alter the incidence of the burden of proof, Such considerations, having regard to the circumstances of a particular case, may shift the onus of proof. Such a shifting of onus is a continuous process in the evaluation of evidence..... It is well settled that a person, who seeks to displace the natural succession to properly by alleging an adoption, must discharge the burden that lies upon him by proof of factum of adoption and its validity."

17. In Kalwa Devadattam and Others Vs. The Union of India (UOI) and Others, the Apex Court has observed as under:

"11. The question of onus probandi is certainly important in the early stages of a case. It may also assume importance where no evidence, at all, is led on the question in dispute by either side; in such a contingency, the party on whom the onus lies to prove a certain fact, must fail. Wherever, however, evidence has been led by the contesting parties on the question in issue, abstract considerations of onus are out of place, truth or otherwise of the case must always be adjudged on the evidence led by the parties."

18. Similar view has been reiterated the Supreme Court in Kundan Lal Ralla Ram v. Custodian, Evacuee Property, AIR 1961 SC 1316; and C. Abdul Shukoor Saheb Vs. Arji Papa Rao and Others,

19. Thus, in a case like this, where the workman had not even considered it proper to deny the receipt of the letter, presumption must have been drawn.

20. In State of Rajasthan v. Nand Lal, 1993 Suppl (1) SCC 681, the Hon''ble Supreme Court held as under:

"What we wish to emphasise is that the allegations made by each of the

petitioners has to be established by him But this allegation cannot be read to mean that the State is under an obligation to establish or make out the writ petitioner's case. The burden lies upon the petitioner, who seeks a particular relief on the basis of certain facts, to establish those facts."

21. In *Jeewanlal (1929) Ltd., Calcutta Vs. Its Workmen*, the Apex Court held as under at pp. 520 & 521 of LLJ:

"..... if an employee continues to be absent from duty without obtaining leave and in an unauthorised manner for such a long period of time that an inference may reasonably be drawn from such absence that by his absence he has abandoned service, then such long unauthorised absence may legitimately be held to cast a break in continuity of service. ... We would like to make it clear that..... there would be the class of cases where long unauthorised absence may reasonably give rise to an inference that such service is intended to be abandoned by the employee."

22. Similarly, in *Shahoodul Haque Vs. The Registrar, Co-operative Societies, Bihar and Another*, the Apex Court has observed as under:

"The undenied and undeniable fact that the appellant had actually abandoned his post or duty for an exceedingly long period, without sufficient ground for his absence, is so glaring that giving him further opportunity to disprove what he practically admits, would serve no useful purpose. It could not benefit him or make any difference to the order "which could be and has been passed against him On the view we have adopted on the facts of this case, it is not necessary to consider the further question whether any notice for termination of service was-necessary or duty given on the assumption that he was not punished. We do not think that there is any question involved in this case which could justify an interference by us"

23. As the workman himself has voluntarily abandoned the service, no fault can be found with the findings recorded by the Labour Court that his services were not terminated.

24. For the purpose of retrenchment/ termination, there has to be positive action on the part of the employer while abandonment of service is a consequence of unilateral action of the employee and the employer has no role in it.

25. Retrenchment is defined in Section 2(oo) of the Act as under:

""Retrenchment" means termination by the employer of the services of a workman for any reason whatsoever, other than as a punishment inflicted by way of disciplinary action".

26. Thus, from the aforesaid definition, it is abundantly clear that "retrenchment" means termination of service of the workman by the employer for any reason whatsoever. If the termination is by way of punishment as a consequence of a disciplinary action, it would not amount to retrenchment. In a

case where the finding of fact recorded by the Labour Court is that the workman himself has voluntarily abandoned the service, the provisions of the Act cannot be made applicable because abandonment of service, even by no stretch of imagination, can be brought within the ambit of retrenchment.

27. In State of Haryana Vs. Om Parkash and Another, Hon^{ble} Apex Court has held as under:

"Retrenchment within the meaning of Section 2(oo) means termination by the employer of the service of the workman for any reason whatsoever. Therefore, it contemplates an act on the part of the employer which puts an end to service to fall within the definition of the expression "retrenchment" in Section 2(oo) of the Act. There was nothing of the sort in the instant case. It was the workman who ceased to report for duty therefore, this is a case in which the employer has done nothing whatsoever to put an end to his employment and hence, the case does not fall within the meaning of Section 2(oo) of the Act. Therefore, the case does not attract Section 2(oo), nor does it satisfy the requirement of Section 25F."

28. Similar view has been taken by this Court in Vijay Singh Charan v. Management, Shri Swetamber Nakoda Parshwnath Tirth, Mewa Nagar, 1999 (1) RLW 314. 29. In view of the above, the Writ Petitions No. 3092/1998, 3465/1998 and 3598/1998 filed by the employee-workmen are dismissed. The Writ Petitions Nos. 2623/1998, 2988/1998 and 2989/1998 filed by the employer are allowed. The impugned awards passed in the claim petitions are set aside. There shall be no order as to costs.