

(2001) 02 AHC CK 0033
In the Allahabad High Court
Case No : C.M.W.P. No. 17750 of 1992

Micro Abrasives (India) Ltd.

APPELLANT

Vs

Dhanvir Singh and another

RESPONDENT

Date of Decision : 27-02-2001

Acts Referred:

Constitution of India, 1950 — Article 254, 254(2)
Government of India Act, 1935 — Section 76
Uttar Pradesh Industrial Disputes Act, 1947 — Section 2, 4

Citation : (2001) AWC 1511 : (2001) 89 FLR 895 : (2001) 1 UPLBEC 669

Hon'ble Judges : V.M. Sahai, J

Bench : Single Bench

Advocate : R.K. Shukla and S.K. Gupta, for the Appellant; Ashok Khare, S.D. Shukla and Atul Mehra, for the Respondent

Judgement

V.M. Sahai, J.—The questions that arise for consideration in this petition are whether an appointment of a probationer contrary to model standing orders is invalid appointment, if so. its effect ; whether clause (bb) of Section 2(oo) of the Industrial Disputes Act, 1947. (Central Act) is applicable in State of Uttar Pradesh; whether a probationer can be terminated or discharged from the service without complying the provisions of the Section 6N of the U.P. Industrial Disputes Act, 1947 (U. P. Act): whether termination or discharge of a probationer after expiry of maximum probationary period amounts to retrenchment; whether the workman is entitled for reinstatement and back wages ?

2. The petitioner appointed Dhanvir Singh the respondent No. 1 on 1.1.1987 as an Office Assistant on probation for a period of six months. The appointment letter mentioned that if the work of the respondent is found satisfactory, he would be absorbed in the factory and if it is not found satisfactory, then his service could be terminated even earlier than six months. It further provided that the probationary period could be extended by another six months. The probationary period of the petitioner was extended by another six months w.e.f. 1.7.1987 by order passed on 26.6.1987. The workers of the petitioner"s concern

went on strike from 10.12.1987 till 16.2.1988. The respondent Joined the strike and did not attend his duties during this period. The Works Manager of the petitioner's company passed an order on 15.3.1988 that as the work of the respondent was not satisfactory during the probationary period, he was discharged from the service w.e.f. 16.3.1988. The respondent raised industrial dispute. The State Government exercising powers u/s 4-K of the U.P. Industrial Disputes Act, 1947 [in brief the U.P. Act) made a reference to the Labour Court, U.P., Rampur, the respondent No. 2. It was registered as Adjudication Case No. 50 of 1991. The respondent No. 2 by its award dated 31.10.1991. published on 24.3.1992 accepted the claim of respondent and 31.10.1991, published on 24.3.1992 accepted the claim of respondent and held that the termination of respondent from the service was illegal, the respondent was entitled for reinstatement with all benefits of service which he would have received had he been on work. The petitioner challenged the award dated 31.10.1991 by means of this writ petition. This Court on 19.5.1992 passed an interim order and stayed the operation of the award to the extent that it granted back wages to the respondent. It directed that the respondent would be paid future wages from the month of June ,1992 and It shall be open to the petitioner to take or not to take work from the respondent.

3. I have heard Sri Shashi Kant Gupta the learned counsel for the petitioner and Sri Ashok Khare the learned senior counsel assisted by Sri S. D. Shukla for the respondent No. 1 and Sri Atul Mehra brief holder State of U.P. appearing for the respondent No. 2.

4. Sri Shashi Kant Gupta, the learned counsel for the petitioner has urged that clause (bb) has been added in Section 2(oo) of the Industrial Disputes Act, 1947 (in-brief Central Act) by Amending Act No. 49 of 1984, w.e.f 18.8.1994. Under Clause (bb) a probationer can be discharged from the service. He placed reliance on the decisions of the Apex Court in M. Venugopal Vs. The Divisional Manager, Life Insurance Corporation of India, Machilipatnam, Andhra Pradesh and another, and State of Rqjasthan v. Rameshwar Lal Gahlot 1999 (77) FLR 38 . He also relied on Division Bench decision of this Court in Smt. Pushpa Agarwal Vs. Regional Inspectress of Girls Schools and Another, and the decision of Karnataka High Court in C.M.Jitendra Kumar v. The Management Bharat Earth Movers Ltd. and another . He further urged that respondent was appointed on probation and his probationary period was extended and he had been discharged from the service by order dated 15.3.1988 w.e.f 16.3.1988. The termination of service for unsatisfactory work could constitute motive and not foundation, therefore, no right accrued to the respondent to continue in service of the petitioner. He placed reliance on the decisions of the Apex Court in Krishnadevaraya Education Trust and Another Vs. L.A. Balakrishna, . AIR 2000 1706 (SC) . M/s. Oswal Pressure Die Casting Industry, Faridabad Vs. Presiding Officer and Another, 1998 (1) PLJR 77 (SC) . Kunwar Arun Kumar Vs. U.P. Hill Electronics Corporation Ltd. and Others, , K.V. Krishnamani Vs. Lalit Kala Academy, Municipal Corporation, Raipur Vs. Ashok Kumar Misra, . State of U.P. and another v. K.K. Shukla (1991) SCC

760 , State of Gujarat Vs. Sharadchandra Manohar Neve, and Shri Dhanjibhai Ramjibhai v. State of Gujarat (1985) 1 SCJ 86. The learned counsel further urged that no finding has been recorded by the Labour Court that the respondent had worked for the period 240 days nor any violation of standing orders has been alleged before the Labour Court, therefore, the award of the Labour Court is liable to be set aside. The respondent is not entitled for reinstatement and back wages.

5. On the other hand Sri Ashok Khare, the learned counsel for the respondent has urged that clause (bb) of Section 2(oo) of the Central Act is not applicable to the State of Uttar Pradesh. The workmen working In the State of U.P. and their terms of employment are governed by the U.P. Act and the provisions of Clause (bb) of the Central Act cannot be read in U.P. Act. He placed reliance on a Division Bench decision of this Court in Jai Kishun and others v. U.P. Cooperative Bank Ltd., Lucknow and others, (1989) 2 UPLBEC 144 and a single Judge decision of this Court in Mohamad Husain v. Labour Court at Varanasi and another 1994 L/C 2403 . He urged that since Clause (bb) of Section 2(oo) of the Central Act is not applicable and the terms of employment would be governed by U.P. Act and since there is no provision in U.P. Act similar to Clause (bb) of the Central Act, therefore, the law laid down by the Constitution Bench of the Apex Court in Punjab Land Development and Reclamation Corporation Ltd., Chandigarh Vs. Presiding Officer, Labour Court, Chandigarh and Others, , would be applicable to the facts of this case and termination of respondent without complying the mandatory provision of Section 6N of U.P. Act would render the termination or discharge illegal. The learned counsel further urged that Model Standing Orders was applicable to the petitioner's concern. It provides that a workman could be appointed on probation for a period of three months. The petitioner had appointed the respondent on a probation period of six months which was contrary to the model standing orders, therefore, the appointment of the respondent cannot be treated to be on probation. An invalid appointment is not covered in the exceptions provided u/s 6N of the U.P. Act or clause (bb) of Section 2(oo) of the Central Act. Since respondent had worked for 240 days continuously in a calendar year, he became regular employee of petitioner and his service could not be terminated without payment of retrenchment compensation. He placed reliance on the two Division Bench decisions of Madhya Pradesh High Court in Rajesh Kumar and Others Vs. State of M.P. and Others, and Suresh Chandra Mathe Vs. Jiwaji University and Others, He further relied on the single Judge decision of the Punjab and Haryana High Court in Ctdderbaha Co-operative Marketing - cum-Processing Society Ltd. v. Presiding Officer Labour Court and another. and another decision of Bombay High Court in Alexandar Yesudas Maikel Vs. Perfect Oil Seals and Irp and Others, He further urged that the respondent did not join the strike nor he was absent from 10.12.1987 to 16.2.1988. He urged that from the award, it is clear that the respondent continuously worked from 1.1.1987 to 16.3.1988 and completed more than 240 days. therefore, the petitioner could not discharge or terminate the respondent

from service without complying with the provisions of Section 6N of the U.P. Act. The learned counsel for the State of U.P. appearing for respondent No. 2 supported the award.

6. The question is whether an appointment of a probationer contrary to model standing orders is invalid appointment, if so, its effect? In its award the Labour Court has recorded a finding that the respondent was appointed for a period of six months as office assistant on probation. The model standing orders provided in U.P. Industrial Employment (Standing Orders) Rules, 1946 (as applicable in 1988) are applicable to petitioner's factory. Standing order 3 (b) lays down that, "A permanent workman is a workman who has been engaged on a permanent basis and includes any person who has satisfactorily completed a probationary period of three months in the same or another occupation in the industrial establishment". Standing order 3 (c) lays down that, "A probationer is a workman who is provisionally employed to fill a permanent vacancy and has not completed three months in that occupation". Under the model standing orders, the petitioner could not appoint the respondent on probation for more than three months. The appointment of respondent on probation for six months was contrary to the provisions of model standing orders. The appointment of respondent on probation could be for three months only. Even if the appointment was on probation of six months it was an invalid appointment, its effect in law would be that the respondent could be treated on probation for a period of three months only because period of six months mentioned in the appointment letter was invalid and inconsistent with the standing order. therefore, the discharge of respondent would be invalid. (See, *Indian Tobacco Co. Ltd., Nagpur Vs. Industrial Court, Nagpur* and *Another*, The model standing orders do not provide for any extension of probationary period. The respondent after three months became permanent or regular workman as provided by standing order 3 (b). In any case, the petitioner cannot be permitted to take advantage of his own mistake and claim that since respondent's appointment was for six months, it was contrary to the model standing orders and invalid. The longer period of probation mentioned in the appointment order did not make the appointment invalid but rendered the period beyond three months surplusage. That has to be ignored. The right of the respondent has to be decided treating him as a valid appointee on probation for three months. The termination of service of a workman for any reason whatsoever except excluded by Section 6N amounts to retrenchment. The High Courts of Madhya Pradesh, Punjab and Haryana and Bombay in *Rajesh Kumar (supra)*, *Suresh Chandra Mathe (supra)* and *Cidderbaha Cooperative Marketing-cum-Processing Society Ltd. (supra)*, and *A.Y. Maikel (supra)*, have held that services of the probationer cannot be terminated without complying the mandatory provisions of retrenchment; therefore, since the petitioner had terminated the services of the respondent without complying with the provisions of Section 6N of the U.P. Act, the termination or discharge was illegal and the award of the Labour Court does not suffer from any infirmity.

7. The next question in this case is whether Clause (bb) of Section 2(o) of the

Industrial Disputes Act, 1947 (Central Act) is applicable in State of Uttar Pradesh ? The condition of the service of workmen in Uttar Pradesh is governed by the provisions contained in U.P. Act. The question whether definition of the word "retrenchment" as defined in Section 2 (s) of the U.P. Act or amended definition under Clause (bb) of Section 2(oo) of Central Act would apply in State of U.P. came up for consideration before the Division Bench of this Court in *Jal Kishun* (supra). The Division Bench examined both the definitions of retrenchment contained in U.P. Act and Central Act and held that the provisions of U.P. Act would prevail over the Central Act in the matters relating to rights and liabilities of employer and workmen in a case of retrenchment and in matters of retrenchment Section 6N of the U.P. Act would be applicable. The observation of the Division Bench in paragraphs 25 and 26 is extracted below :

"25. From a perusal of the two provisions quoted above, it is clear that an inconsistency exists in regard to the applicability of the provisions contained in Chapter V-A of the Central Act and the provisions contained under Sections 6J to 6Q of the U.P. Industrial Disputes Act. In this connection, we find that the Industrial Disputes Act, 1947, came into force on April 1, 1947. The U.P. Industrial Disputes Act came into force on February 1, 1948 after receiving the assent of the Governor General of India u/s 76 of the Government of India Act, 1935. Section 6R has been added to the U.P. Industrial Disputes Act in the year 1957 by U.P. Act No. 1 of 1957. The President had accorded assent to U.P. Act No. 1 of 1957 on December 29, 1956. It was published in the Gazette of Uttar Pradesh dated January 2, 1957. So far Section 25J of the Central Act is concerned, it was existing since prior to passing of U.P. Act No. 1 of 1957. Section 25J of the Central Act was also amended by Act No. 36 of 1964 with effect from 19.12.1964 but by this amendment only proviso to subsection (1) of Section 25J was added. The other provisions which are material namely, subsection (1) and sub-section (2) of Section 25J remained the same as existing from before. From the above facts. It is clear that addition of Section 6R to the U.P. Act was made by an amendment in the year 1957, i.e., subsequent to the existing provision contained u/s 25J of the Central Act. Article 254 of the Constitution is attracted in cases where there exists conflict between the two provisions of the Statutes, one passed by the Parliament and the other, by the State Legislature. In such cases, it is the State law which is to prevail provided it has received the assent of the President and has been passed subsequent to the Act made by the Parliament. This position is clear from Clause (2) of Article 254 of the Constitution. As observed earlier, inconsistency exists between the two provisions namely. Section 25J of the Central Act and Section 6R of the U.P. Act. Both cannot operate simultaneously and one will have to give way to the other. Provisions contained u/s 6R of the U.P. Act being a subsequent law, having been passed after receiving assent of the President shall override and provisions contained u/s 25J of the Central Act as it was already existing since prior to 1957. The subject-matter of legislation is undoubtedly in the concurrent list. Therefore, we hold that in view of Article 254(2) of the Constitution, provisions of

Section 6R of the U.P. Act will prevail over the provisions of Section 25J of the Central Act. i.e., to say, in the State of Uttar Pradesh, in the matters relating to rights and liabilities of employers and workmen, in a case of retrenchment, Section 6-N of the U.P. Act will be applicable.

"26. Once we have come to the conclusion that the provisions of the U.P. Act will be applicable in the State of Uttar Pradesh in the matters relating to retrenchment, there remains no difficulty in holding that the definition of the word "retrenchment" as given under the U.P. Act will be applicable. It is well-settled that the word which has been defined in a statute has to be given the same meaning whenever occasion arises while applying the provisions of the statute concerned. The definition provided in a statute is not to be applied while interpreting the provisions of a different Act. The result would, therefore, be that the petitions in hand would be covered by the decisions of the Hon"ble Supreme Court referred to in the earlier part of this judgment holding that cessation of employment brought about without complying with the provisions of Section 25J of the industrial Disputes Act. as then stood, would be illegal and void. The decisions of the Hon"ble Supreme Court are based on unamended definition of the word "retrenchment" as defined u/s 2(oo) of the Industrial Disputes Act. which was the same as it is under the U.P. Act."

8. Thus. it is clear that provision of Clause (bb) of Section 2(oo) of the Central Act is not applicable in State of U.P. Act. Therefore, the law laid down by the Apex Court in M.Venugopal (supra), and Rameshwar Lal Gahlot (supra) wherein amended sub-clause (bb) Inserted in 1984 in Section 2(oo) has been considered would not apply to the facts of this case. The decision of Karnataka High Court in C.M. Jitendra Kumar (supra), is also not applicable and it had not been accepted by the same High Court in S.N. Vasudevan and others Vs. The Management of M/s. Bharath Fritz Werner (Private) Limited, Banglore and another, A Division Bench of this Court in Smt. Pushpa Agarwal (supra), has held that if amendment in Central Act has been made after the law was enacted by the State, it will prevail over the State Act. It further held that Clause (bb) of Section 2(oo) of the Central Act will be applicable to every case wherever the question of validity of termination of service is raised on the ground of non-compliance of Section 6N of the U.P. Act. This Division Bench has not taken notice of earlier Division Bench in Jai Kishun (supra). Section 6R has been added in U.P. Act by U.P. Act No. 1 of 1957 after receiving the assent of the President on 29.12.1956. It was published in U. P. Gazette on 21.1.1957. Prior to coming into force of Section 6R in 1957, there was supremacy of the Central Act in matters of retrenchment by virtue of sub-section (2) of Section 25J of the Central Act but once the Section 6R received the assent of the President, it held the filed. Further clause (bb) applies to termination of service of a workman as a result of non-renewal of contract of employment. It would not apply to termination for unsatisfactory performance during probation. It has already been held that the respondent had completed his probationary period of three months, he became a regular workman whose service could not be terminated. Proviso to Article 254(2) carves out an

exception by providing that the Parliament can enact a law on same matter subsequently and in that case latter Central Law would prevail. But the expression "same matter" is significant. Clause (bb) added to Section 2(oo) of Central Act is not on same matter, as is covered by Section 6R of the U.P. Act, therefore, in matters of retrenchment the U.P. Act holds the field even now.

9. In *Uptron India Limited Vs. Shammi Bhan and Another*, . the Apex Court was not concerned with the question whether in view of Section 6R of the U.P. Act the amendment made in 1984 in Section 2(oo) of the Central Act by which Clause (bb) was added would apply to State of Uttar Pradesh in view of Article 254(2) of the Constitution.

10. The next question is whether a probationer can be terminated or discharged from the service without complying the provisions of the Section 6N of the U.P. Act ? If the employer terminates the services of a workman who had been in continuous service for one year, unless it falls within one of the exceptions mentioned in Clauses (a) to (c) of Section 6N, it amounts to retrenchment. The Constitution Bench of the Apex Court in *Punjab Development and Reclamation Corporation Ltd. Chandigarh* (supra) considered unamended Section 2(oo) of the Central Act and held that "retrenchment" means the termination by the employer of the service of a workman for any reason whatsoever except those expressly excluded in the section. None of the clauses (a) to (c) apply to the discharge of respondent nor the petitioner's case is that the respondent was terminated under any clauses (a) to (c) of Section 6N. From the records of this case, it is clear that the respondent had worked for a period of 240 days. The claim made by respondent in paragraph 2 of the written statement that he had worked for 240 days had not been specifically denied before the Labour Court by the petitioner in the rejoinder statement. The Labour Court had recorded a finding of fact that no warning letter or charge-sheet with regard to strike was given by petitioner to the respondent. It further recorded the finding that the respondent had worked from 1.1.1987 to 16.3.1988 for a period of more than one year. Therefore, the claim of the respondent that he worked for a period of 240 days had not been specifically disputed by the petitioner before the Labour Court nor any evidence was led to disprove the claim therefore, it is clear that the respondent worked for more than 240 days. Even if it is assumed that the respondent was on strike from 10.12.1987 to 16.2.1988. since he worked continuously from 1.1.1987 till 9.12.1987 he completed 240 days in a calendar year. The respondent has worked for the period 240 days, therefore, he could not be retrenched from the service without complying with the mandatory provision of Section 6N of the U.P. Act.

11. The next question is whether termination or discharge of a probationer after expiry of maximum probationary period amounts to retrenchment ? The term of the appointment letter, Annexure-1 to the writ petition, clearly demonstrate that the respondent was appointed on 1.1.1987 on probation for a period of six months, which could be extended, further for another period of six months. The

petitioner claimed that they have extended the probationary period of the respondent w.e.f. 1.7.1987, for a period of six months. The extended probation period of six months came to an end on 31.12.1987. The respondent continued in service even after expiry of maximum probationary period. The petitioner terminated his service on 15.3.1988 w.e.f. 16.3.1988. after the maximum probationary period of one year, as per the terms of appointment letter had expired, which was not permissible. After expiry of maximum probation period, the respondent became regular employee of the petitioner. He could not be discharged or terminated from the service treating him to be a probationer, without complying with the provisions of Section 6N of the U.P. Act. The Apex Court in *State of Punjab Vs. Dharam Singh*, *Om Parkash Maurya Vs. U.P. Cooperative Sugar Factories Federation, Lucknow and Others*, and *M.K. Agarwal v. Gurgaon Gramin Bank* : [1987]3SCR640 . has laid down that after expiry of maximum probationary period, the employee could not be treated on probation but shall be deemed to have been confirmed. Even though these decisions were not concerned with the Industrial Disputes Act but the general principle laid down in these decisions cannot be ignored. The decisions relied upon by the learned counsel for the petitioner in *Krishnadevaraya Education Trust (supra)*, *C. P. Shahi (supra)*, *Oswal Pressure Die Casting Industry (supra)*, *Partdey Madan Mohan Prasad Sinha (supra)*, *Kunwar Arun Kumar (supra)*, *K.V. Krishnamani (supra)*, *Ashok Kumar Misra (supra)*, *K.K. Shukla (supra)*, *Shri Dhanjibhai Ramjibhai (supra)* and *Shared Chandra Manohar Neva (supra)*, are of no help to the petitioner.

12. The next question is whether the workman is entitled for reinstatement and back wages ? I have held that respondent had worked for 240 days and his termination of service without complying with mandatory provision of Section 6N rendered the discharge or termination invalid. The Apex Court in *Vikramaditya Pandey Vs. Industrial Tribunal and Another*, , has held that, "Ordinarily, once the termination of service of an employee is held to be wrongful or illegal, the normal relief of reinstatement with full back wages shall be available to the employee : it is open to the employer to specifically plead and establish that there were special circumstances which warranted either non-reinstatement or non-payment of back wages". No foundation has been laid down in this petition or before the Labour Court mentioning any special circumstances which may disentitle the respondent from being awarded back wages. Since the respondent was retrenched without payment of any retrenchment compensation, in violation of Section 6N, he was entitled for reinstatement with full back wages.

13. For the reasons aforesaid, I do not find any merit in this petition.

14. The writ petition fails and is dismissed.

15. Parties shall bear their own cost.