
(2004) 08 AHC CK 0209
In the Allahabad High Court
Case No : Writ Petition No. 32558 of 1999

Mohd. Arshad

APPELLANT

Vs

Industrial Tribunal and Others

RESPONDENT

Date of Decision : 19-08-2004

Acts Referred:

Uttar Pradesh Industrial Disputes Act, 1947 — Section 6N

Citation : (2005) 5 AWC 4211 : (2004) 3 UPLBEC 2371

Hon'ble Judges : Tarun Agarwala, J

Bench : Single Bench

Advocate : Devendra Pratap Singh, for the Appellant; Q.H. Siddiqui, for the Respondent

Final Decision : Allowed

Judgement

Tarun Agarwala, J.—The petitioner has filed this writ petition challenging the award of the Industrial Tribunal which has rejected the claim of the petitioner. The State Government referred the matter to the Industrial Tribunal for adjudication of the dispute. The terms of the reference order was whether employers were justified in terminating the services of the workmen, Mohd. Arshad, w.e.f. 1.11.1986? If not, to what relief is the workman entitled to.

2. The petitioner in his written statement contended that he was engaged as a driver in the Nagar Nigam, Allahabad in the Octroi Department on 1.9.1984. It is alleged that he worked continuously without any break in service till 31.10.1986 and on 1.11.1986 his services were dispensed with. The petitioner alleged that the termination of his services was in violation of the provisions of Section 6-N of the U.P. Industrial Disputes Act (hereinafter referred to as the Act) and that he had worked for more than 240 days in a year and, therefore, he was entitled to be reinstated with continuity of service and with full back wages.

3. The Nagar Nigam contested the matter before the Tribunal and submitted that the petitioner was engaged w.e.f. 2.9.1984 as a temporary, casual daily wage

driver in the Octroi Department and that the casual nature of employment came to an end on 30.6.1986. The employers further contended that the services of the petitioner were never terminated on 1.11.1986 and, therefore, the reference order was invalid, inasmuch as no cause of action arise on 1.11.1986. Subsequently, the employers filed an amendment application for amendment of the written statement, which was allowed in which it was stated that the petitioner was appointed as a daily wager on a fixed term and that his services on fixed term came to an end on 31.10.1986.

4. In support of his case, the petitioner filed a letter dated 18.4.1990 of the Assistant Engineer, which certified that the petitioner had worked as a daily rated driver from 1.9.1984 to 31.10.1986. The petitioner also moved an application for summoning of various documents, which were in the possession of the employers, namely, the Attendance and Payment Registers for the relevant period. In spite of granting several opportunities to the employer to produce the registers, the employers failed to produce the registers and eventually the Tribunal by an order dated 15.10.1997 directed the workman to file secondary evidence and further held that adverse inference would be drawn against the employers for non-production of the record at the time of the hearing of the case.

5. On behalf of the employer the statement of Mangal Singh was recorded, who admitted that the petitioner worked as a driver on daily wage basis and worked continuously from 2.9.1984 to 31.10.1986 even though his appointment was for a fixed term of three months each. The witness further stated that his services came to an end on 31.10.1980.

6. The Tribunal by its award rejected the claim of the petitioner holding that the petitioner had not worked for 240 days and that he could not establish that his services were terminated on 1.11.1986. The Tribunal also held that the evidence given by the petitioner was contradictory and, therefore, his statement was unreliable. The Tribunal also came to the conclusion that the reference was made after a period of 8-1/2 years and, therefore, no relief could be granted to the petitioner. The Tribunal, accordingly, declined to answer the reference.

7. The petitioner has assailed the findings of the Tribunal and submitted that the evidence led before the Tribunal clearly proved that petitioner had worked for more than 240 days in a year and that his services were dispensed without complying with the provisions of Section 6-N of the U.P. Industrial Disputes Act and, therefore, the termination of his services was wholly illegal. The learned Counsel submitted that the findings recorded by the Tribunal were perverse and based on surmises and conjectures and were not based on the evidence on record. The learned Counsel submitted that the evidence placed before the Tribunal had been ignored completely by the Tribunal.

8. Heard Sri P.P. Singh, the learned Counsel for the petitioner and Sri Q.H. Siddiqui, the learned Counsel appearing for the Nagar Nigam, respondent No. 2.

9. Normally, findings of fact given by the Tribunal should not be reappraised in a

writ jurisdiction. However, where the findings given by the Tribunal are not based on the evidence brought on record and the findings have been given either on some misapprehension or was based on surmises and conjectures, in that event, this Court has the power and jurisdiction to reappraise the evidence. From the record it is clear that the findings arrived at by the Tribunal was based on surmises and conjectures. The Tribunal has failed to appreciate the evidence on record.

10. In the present case, the Tribunal has given a finding holding that the petitioner had never worked continuously for 240 days, but unfortunately, the Tribunal has not considered the statement of Mangal Singh, who was a witness of he employer, who stated :--

"2.9.84 lagayat 31.10.86 tak yah driver ka kam chungi vibhag mey teen-teen mah ki niyukti ke adhar par karte rahe 31.10.86 ko inki seva samapat ho gai."

11. The Tribunal has also not considered the letter of he Assistant Engineer, dated 18.4.1990 which certified that the petitioner had worked from 1.9.1984 to 31.10.1986. The statement of Mangal Singh and the letter of the Assistant Engineer clearly proves that the petitioner had worked continuously from 2.9.1984 to 30.10.1986. The fact that the petitioner had not worked continuously could have been verified by the production of the Attendance and Payment Registers which the employer was directed to produce but the same was not produced and, therefore, an adverse inference has to be drawn against the employer for non-production of the said registers, which if produced, would have been clinched the issue. The Tribunal committed an error in holding that the petitioner never asked for the production of Muster Roll register which was wholly erroneous and based on surmises and conjectures. The petitioner had categorically asked for the Attendance and Payment Registers, which would have proved the number of days he had worked and the payment that was made to him for the number of days he had worked. The production of these registers would have established that the petitioner was either employed for a limited number of days or that he was employed continuously for more than 240 days. Since the employers did not produce the aforesaid registers, an adverse inference has to be drawn against them and an irresistible conclusion is drawn that the petitioner had worked continuously without any break in service from 1.9.1984 to 31.10.1986. Since he had worked continuously more than 240 days in a year, even though he was on daily wages, nonetheless he could not be removed from the service without the compliance of the provisions of Section 6-N of the U.P. Industrial Disputes Act.

12. The finding of the Tribunal that the evidence of the petitioner was unreliable is wholly erroneous. Merely because the petitioner at some place stated that he had worked also in the year 1981 could not be a ground to disbelieve his statement specially when there were other evidence on the record, namely, the statement of Mangal Singh and the letter of the Assistant Engineer. Even otherwise, minor discrepancies are liable to be ignored. It may be stated here

that even in criminal case, where the standard of proof is much higher, minor discrepancies in the version of the witnesses of the prosecution does not demolish the prosecution case as held in State of U.P. Vs. M.K. Anthony, . Thus, even in criminal cases, minor discrepancies does not jeopardise the prosecution case, the same principle would apply with greater force in civil cases where the burden is lighter. In my view, the findings of the Tribunal were perverse and arbitrary and the Tribunal has made too much out of a minor discrepancy, if any. The Tribunal on the other hand has not considered the statement of the employer's witness.

13. The finding of the Tribunal that the petitioner has failed to prove that his services were terminated on 1.11.1986 is wholly erroneous. The finding of the Tribunal that the employers have categorically stated that the petitioner had last worked till 30.6.1986 and had not worked till 31.10.1986 is incorrect. It seems that the Tribunal has only considered the unamended written statement of the employer. The employer had filed an application for the amendment of the written statement in which they categorically admitted that the petitioner worked till 31st October, 1986. In view of the fact that the employers admitted that he had last worked till 30.10.1986, the finding of the Tribunal that the petitioner failed to prove that his services were terminated w.e.f. 1.11.1986 is baseless and based on surmises and conjectures.

14. The learned Counsel for the respondents submitted that the petitioner was appointed on a fixed term and that his services came to an end upon the expiry of the fixed period. The services of the petitioner came to an end on the basis of a fixed term appointment which does not amount to retrenchment in view of Section 2(oo)(bb) of the Industrial Disputes Act.

15. In my view, this argument is devoid of any merit. In the first instance the provisions of Section 2(oo)(bb) of the Industrial Disputes Act has not been incorporated in the U.P. Industrial Disputes Act and, therefore, this provision will not apply to the proceedings initiated under the U.P. Industrial Disputes Act. Secondly, under the garb of a fixed term appointment, the petitioner's services had been extended continuously by giving him short-term appointment and in this way permitted the petitioner to continue for 26 months. Such short term appointments for fixed period has been made in order to overcome the provisions of retrenchment which amounts to unfair labour practice. Fixed term appointment for short period is required for exigencies of work, but when it is allowed to continue for 26 months, it indicates that there was a regular requirement of work. In such a situation, where the petitioner was allowed to continue for 26 months it became imperative and necessary for the employers to comply with the provisions of Section 6-N of the U.P. Industrial Disputes Act before dispensing his services. In my view, the petitioner having worked for more than 240 days in a calendar year, even on fixed term appointments was required to be given a notice and retrenchment compensation etc. as contemplated u/s 6-N of the U.P. Industrial Disputes Act and non-compliance of

the said Section vitiated the order of termination. Accordingly, the submission made by the learned Counsel for the petitioner is devoid of any merit.

16. The Tribunal also gave a finding that the petitioner was not entitled to any relief on the ground that he had raised the dispute belatedly after a lapse of 8-1/2 years. Admittedly, the petitioner had last worked till 31.10.1986 and his services were dispensed on 1.11.1986. The petitioner approached the Conciliation Officer only in the year 1994 and ultimately the State Government referred the matter u/s 4-K of the U.P. Industrial Disputes Act in the year 1995. Admittedly, there has been a delay of 8-1/2 years and the question which arises for consideration is whether an Industrial Dispute existed or was apprehended at the time when the matter was referred for adjudication by the State Government u/s 4-K of the U.P. Industrial Disputes Ac. A reference order can always be challenged by the employer on the ground of delay in making the reference and also on the ground that no Industrial Dispute existed or was apprehended and that there was no material before the State Government to come to a conclusion that an industrial dispute existed or was apprehended. Unless and until a reference order is challenged, the employer cannot agitate that the workman was not entitled to the relief on account of delay in making the reference.

17. In the present case, there is no whisper from the side of the employer that no industrial dispute existed or was apprehended nor there is any allegation that there is a delay of 8-1/2 years in making the reference. However, the employers did raise an argument before the Tribunal that the petitioner is not entitled to any relief on account of the fact that there has been a delay of 8-1/2 years. In my view, in the absence of any averment in the written statement that no industrial dispute existed or was apprehended, the claim, of the petitioner could not be thrown out on the ground of delay in making the reference. In my opinion, in order to deny the petitioner his relief, it is necessary for the employer to challenge the order of reference. Since the order of reference has not been challenged by the employer, it is not open for them to allege that the claim of the petitioner was liable to fail on the ground of delay.

18. However, the employer can definitely contest and persuade the Tribunal in molding its relief in so far as back wages are concerned. The employer could not be fastened with the liability of back wages where there has been a delay by the workman in raising a dispute. The employer cannot be faulted for the lapse committed by the workman.

19. In view of the aforesaid. I find that the award of the Tribunal could not be sustained and, therefore, the said award is quashed. Since the dispute relates to the period 1984 to 1986, no useful purpose would be served in remanding the matter back. Since I have held that the petitioner had worked continuously more than 240 days, he is liable to be reinstated. On the question of back wages, I find, that from the date of termination till the date of the issuance of the reference order, the petitioner is not entitled for any back wages inasmuch as the petitioner is responsible for not raising the industrial dispute earlier. In Gurmail

Singh Vs. Principal, Govt. College of Education and Others, , the Supreme Court held that notwithstanding the delay in raising the dispute, the dispute would still continue for adjudication and that the workman would be deprived of the back wages for the period in raising the dispute. In Ajaib Singh Vs. The Sirhind Co-Operative Marketing Cum-Processing Service Society Limited and Another, , it was held that where the order of dismissal is challenged belatedly, the dispute would still continue for adjudication and the workman would be deprived of the back wages for the period of delay in raising such dispute, if on merit the workman is to succeed. Accordingly, I hold that the petitioner is not liable to be given back wages for the period starting from the date of termination till the date of reference order. In view of the facts and circumstances of the case, I find it appropriate to award only 50% of back wages from the date of the reference order till the date of reinstatement.

20. In view of the aforesaid, the writ petition is allowed with cost. The award of the Tribunal is set aside and the respondent No. 2 is directed to reinstate the petitioner. Further, the petitioner is only entitled for 50% of back wages from the date of the reference order till the date of reinstatement.