
(1998) 03 KL CK 0026
In the High Court Of Kerala
Case No : W.A. No. 1210 of 1991

Narmada Building Materials (P) Ltd.

APPELLANT

Vs

Devassy and Another

RESPONDENT

Date of Decision : 19-03-1998

Acts Referred:

Industrial Disputes Act, 1947 — Section 2, 25F

Kerala Shops and Commercial Establishment Act, 1960 — Section 18(2)

Citation : (1998) 2 ILR (Ker) 759 : (1999) 1 LLJ 142

Hon'ble Judges : P.A. Mohammed, J;B.N. Patnaik, J

Bench : Division Bench

Advocate : P.F. Thomas, for the Appellant; P.V. Chandramohan, for the Respondent

Final Decision : Allowed

Judgement

Patnaik, J.—The petitioner in O.P. No. 9597 of 1987 has challenged the judgment dated September 23, 1991, of the learned single Judge by which the termination of service of respondent No. 1 herein was quashed on the ground that the appellant has not complied with the conditions of Section 25-F of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) the termination being retrenchment in the eye of law.

2. The appellant is a private limited company mainly dealing in sale of building materials. It has a godown in Trichur Town. Respondent No. 1 was employed in the godown of the petitioner as a watchman on probation for a period of six months on a monthly remuneration of Rs. 200/- with effect from May 1, 1985 as per Ex.P1 letter. It is stipulated in Ex.P1 letter that his appointment shall be for a period of six months on an Experimental basis. He was liable to be discharged from the service by giving one month's notice. By a resolution of the Board of Directors the post of watchman, was abolished with effect from February 1, 1986. On the basis of that decision the service of the first respondent was terminated by communication dated January 29, 1987. He was offered one

month's salary in lieu of notice. He refused to accept the same. It is contended by the appellant that the termination of service was necessitated on account of the fact that the godown was wholly insured and the service of a watchman was not required.

3. Being aggrieved by order of termination, the first respondent filed an appeal before the Deputy Labour Commissioner, Trichur, the second respondent herein , u/s 18(2) of the Kerala Shops and Commercial Establishments Act, 1960. By Ext. P3 order of the Appellate Authority, the second respondent held that the first respondent had completed a period of more than 240 days spreading over a period of 12 calendar months. Section 25-F occurring in Chap. VA of the Act is applicable to the facts of this case inasmuch as the termination in this case amounts to retrenchment. Section 25-F of the Act provides that the rights and liabilities of employers and workmen in so far as they relate to lay-off and retrenchment shall be determined in accordance with the provisions of Chap. V-A of the Act. Having observed that respondent No. 1 was a workman, the second respondent found that his services have been terminated in contravention of the provisions of Section 25-F of the Act and so the same is not legal and valid. Accordingly, the appellant was directed to reinstate respondent No. 1 in service with continuity of service and with backwages amounting to Rs. 3780.65 within 30 days from the date of the order. It was further directed that in case the first respondent is not reinstated in service, the appellant shall pay Rs. 4380.85 including the backwages towards compensation.

4. The appellant filed the original petition challenging the order of the Appellate Authority, Ext. P3, on various grounds. The learned single Judge while confirming the order of the appellate authority (Ext.P3) held that the petitioner had continuous service of more than 240 days. Section 25-F of the Industrial Disputes Act is applicable in this case. The learned single Judge relied on a decision rendered by the Division Bench of the Andhra Pradesh High Court in N.V. Purnachandra Rao and Others Vs. Krishna District Cooperative Marketing Society Ltd. and Others, and came to the conclusion that the appellate authority constituted u/s 18(2) of the Kerala Commercial Shops and Establishments Act is competent to invoke the provisions contained in the Act in settling the rights and liabilities of employees in so far as it relates to lay-off and retrenchment. The termination of the service of respondent No. 1 being one in the nature of retrenchment is illegal inasmuch as admittedly the provisions of Section 25-F of the Act were not complied with.

5. Learned counsel for the appellant has contended, inter alia, that the termination of the service of respondent No. 1 in this case cannot be construed as retrenchment, in view of Clause (bb) of Section 2(oo) of the Act. Hence, it is contended that, application of Section 25-F of the Act is not attracted.

6. The aforesaid decision of the Andhra Pradesh High Court in Purnachandra Rao's (supra) case has been confirmed by the Supreme Court in Krishna District Co-operative Marketing Society Limited, Vijayawada Vs. N.V. Purnachandra Rao

and Others, . While construing the rights under the provisions of Andhra Pradesh Shops and Establishments Act, 1966 it was held that the appellant, Krishna District Co- operative Marketing Society Ltd. is an industry and the employees working there are workmen. The State Act does not prevail over the provisions of Chap. V-A of the Industrial Disputes Act and Section 25-F of the Act is applicable to the case of the termination of service of an employee under the Shops and Commercial Establishments Act in view of Section 25-J of the Act. The Supreme Court after discussing various provisions of the Andhra Pradesh Act and Industrial Disputes Act as well as the earlier decisions on the subject laid down as follows:-

"10. The result of the above discussion is that if the employees are "workmen" and the management is an "industry" as defined in the Central Act and the action taken by the management amounts to retrenchment then the rights and liabilities of the parties are governed by the provisions of Chap. V-A of the Central Act (I.D. Act, 1947) and the said rights and liabilities may be adjudicated upon and enforced in proceedings before the authorities u/s 41(1) and Section 41(3) of the State Act (Andhra Pradesh Act)."

7. The question that arises for consideration in this case is whether the termination of service of respondent No. 1 amounts to retrenchment as contemplated in Clause (bb) of Section 2(oo) of the Act.

Section 2(oo) of the Act reads as follows:-

"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

(bb) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained thereon; or

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

8. Learned counsel for the appellant submitted that the termination of service has been effected in terms of Clause (bb) of Section 2(oo) of the Act and as such it is not a case of retrenchment.

9. There is no dispute that respondent No. 1 was appointed initially for a period of six months on an experimental basis as per Ext.P1 dated April 29, 1985. Thereafter, he was allowed to be in service for a further period of about three months. But no separate letter of appointment was given for the extended period

of service and no intimation was given to him as to whether the service rendered by him during the period of six months was satisfactory or not. Another term of appointment is that he could be discharged from service on one month's notice. There is no dispute that notice period pay was offered to the respondent.

9A. In *M. Venugopal Vs. The Divisional Manager, Life Insurance Corporation of India, Machilipatnam, Andhra Pradesh* and another, the Supreme Court had the occasion to consider the scope of Clause (bb) of Section 2(oo) of the Act and held as follows:

"6. Section 2(oo) of the Act says that "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. A new Clause (bb) has been introduced apart from the three exceptions mentioned in Section 2(oo) which shall not be deemed to be retrenchment within the meaning of Section 2(oo) of the Act. Clause (bb) which has been introduced by the aforesaid Amending Act says-

"(bb) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein; or"

xxxxx xxxxxxxx xxxxxxxx

"Now with introduction of one more exception to Section 2(oo), under Clause (bb) the legislature has excluded from the purview of "retrenchment" (i) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry; (ii) such contract being terminated under a stipulation in that behalf contained in contract of employment. It need not be impressed that if in the contract of employment no such stipulation is provided or prescribed, then such contract shall not be covered by Clause (bb) of Section 2(oo)."

10. The termination of service of respondent No. 1 was effected on the ground that the go- down was insured and consequently the appellant company did not require a watchman any longer. Section 18(1) of the Kerala Shops and Commercial Establishments Act, 1960 reads as follows:

"No employer shall dispense with the service of an employee employed continuously for a period of not less than six months, except for a reasonable cause and without giving such employee at least one month's notice or wages in lieu of such notice, provided however that such notice shall not be necessary where the services of such employee are dispensed with on a charge of misconduct supported by satisfactory evidence recorded at an inquiry held for the purpose."

11. There is no bar for an employer to dispense with the service of an employee for a reasonable cause. In this case, respondent No. 1 has been employed

continuously for- a period of more than six months and wages in lieu of one month's notice was offered. There is nothing on record to show that the ground on which the service of the respondent came to be terminated was malafide or that it is a case of colourable exercise of power. On a perusal of Ext.P1 appointment letter it is crystal clear that the appointment was made for a period of six months. Extension of the period of employment thereafter, could not affect the terms and conditions of the contract. The Supreme Court in the State of Rajasthan and others Vs. Rameshwar Lal Gahlot, held under similar circumstances that the termination is not retrenchment and not illegal, if the appointment was made for a fixed period unless it is malafide. It is covered by Section 2(oo)(bb) of the Act, and provisions of Section 25-F do not apply. The facts and the decision in that case are as follows at p. 889:

"3. The undisputed facts are that respondent was appointed for a period of three months or till the regularly selected candidate assumes office. He was appointed on January 28, 1988 and his appointment came to be terminated on November 19, 1988. When the writ petition was filed, the learned single Judge held that since he had completed more than 240 days, the termination is in violation of Section 25-F of the Industrial Disputes Act, 1947 (for short, "the Act") and directed to make fresh appointment of the respondent. When appeal was filed against the latter part of the order, the Division Bench set aside the latter part of the order and directed reinstatement with back wages. As against the order altered by the Division Bench, the present appeal came to be filed.

4. The controversy now stands concluded by a judgment of this Court reported in M. Venugopal Vs. The Divisional Manager, Life Insurance Corporation of India, Machilipatnam, Andhra Pradesh and another, . Therein this Court had held that once an appointment is for a fixed period, Section 25-F does not apply as it is covered by Clause (bb) of Section 2(oo) of the Act. It is contended for the respondent that since the order of the learned single Judge was not challenged, the termination became final. Consequently, the appellant would be liable to pay back wages on reinstatement. In our considered view, the opinion expressed by learned single Judge as well as Division Bench are incorrect in law. When the appointment is for a fixed period, unless there is finding that power under Clause (bb) of Section 2(oo) was misused or vitiated by its mala fide exercise, it cannot be held that the termination is illegal. In its absence, the employer could terminate the service in terms of the letter of appointment unless it is a colourable exercise of power. It must be established in each case that the power was misused by the management or the appointment for a fixed period was a colourable exercise of power. Unfortunately, neither the learned single Judge nor the Division Bench recorded any finding in this behalf. Therefore, where the termination in terms of letter of appointment saved by Clause (bb), neither reinstatement nor fresh appointment could be made."

In view of the aforesaid dictum of the Supreme Court we hold that the termination of the service of respondent No. 1 in this case does not amount to

retrenchment. Since there is no evidence to show that it is a mala fide order or a case of colourable exercise of power, the provisions of Section 25-F of the Act would not apply. We, therefore, hold that the appellate authority u/s 18(2) of the Shops and Commercial Establishments Act has committed an error of law and as such Ext. P3 order passed by him cannot be sustained.

For the reasons stated above, we allow the appeal and set aside Ext. P3 order of respondent No. 2. No costs.