

(2006) 04 DEL CK 0062

In the Delhi High Court

Case No : Writ Petition (Civil) No's. 2252 of 2003 and 2391 of 2005

Netaji Subhash Institute of Technology

APPELLANT

Vs

Shri Dilkhush Bairwa and Another
 Shri Dilkhush
Bairwa Vs Netaji Subhash Institute of Technology

RESPONDENT

Date of Decision : 25-04-2006

Acts Referred:

Constitution of India, 1950 — Article 136, 226
Industrial Disputes Act, 1947 — Section 25F

Citation : (2006) 129 DLT 806 : (2006) 90 DRJ 203 : (2006) 110 FLR 719 :
(2007) 1 SLJ 531

Hon'ble Judges : Gita Mittal, J

Bench : Single Bench

Advocate : Avnish Ahlawat and Latika Chaudhary, in Writ Petition C No. 2252/2003 and K.K. Tyagi and Itekhhar Ahmed, Writ Petition C No. 2391/200, for the Appellant; K.K. Tyagi and Iftekhhar Ahmed in Writ Petition (C) No. 2252/2003 and Avnish Ahlawat and Latika Chaudhary, in Writ Petition (C) No. 2391/2005, for the Respondent

Final Decision : Allowed

Judgement

Gita Mittal, J.—The Netaji Subhash Institute of Technology, referred to as " the petitioner" in this judgment and Shri Dilkhush Bairwa, referred to as " the respondent" herein, have filed writ petition (Civil) Nos. 2252/2003 and 2351/2005 respectively assailing the industrial award dated 6th February, 2002. As these petitions raise identical questions of law and fact, they are being taken up together for disposal. There is no material dispute to the facts which give rise to the petition and to the extent necessary, the same are noted hereafter.

2. The respondent-workman was admittedly appointed as a mason by a letter of appointment dated 25th February, 1991. In the letter of appointment, the workman was notified that he was appointed to this post in the pay scale of Rs. 975-25-1150-EB-30-1540 with a starting salary of Rs. 975/- along with allowances as were admissible under the applicable rules. The letter of

appointment contained Clause 1 wherein it was stated that post was temporary but the respondent was appointed on ad-hoc basis for a period of six months. According to the petitioner, as the work for which the respondent was appointed could not be completed within this period, by an office order dated 9th October, 1991, the ad hoc tenure of the respondent was extended for a further period of six months w.e.f. 26th August, 1991 and thereafter again by an order dated 12th March, 1992 for a period of three months w.e.f. 26th February, 1992. In terms of the clear stipulations contained in this office order, the services of the respondent were terminated by an order dated 25th May, 1992 with immediate effect.

3. The respondent made a grievance of the termination of his services before the conciliation officer. The petitioner has contended that on account of the intervention of the conciliation officer, the petitioner was persuaded to make payment of Rs. 2,456/- to the workman and the petitioner had sent a cheque for this amount to the workman which he apparently accepted without prejudice to his rights and contentions. Thereafter, as the conciliation failed, by an order dated 1st June, 1995, the following dispute was referred for adjudication to the industrial adjudicator:

Whether the services of Shri Dilkhush Bairwa have been terminated illegally and/or unjustifiably by the management and if so, to what relief is he entitled and what directions are necessary in this respect?

4. In the statement of claim filed by the respondent workman, the workman had principally contended that he was appointed since 25th February, 1991 but against a permanent post of mason and that his last drawn wages were Rs. 2,005/-. It was contended that his recruitment was made against a permanent post and new hands having been recruited against the same after the termination of the services of the petitioner, rendered the action of the petitioner illegal and also violative of the terms on which he has been appointed. It has also been submitted that termination of the services of the petitioner was in violation of the principles of natural justice and that the petitioner had not made any payment in full and final settlement of the claims of the respondent. On this basis, the workman sought reinstatement with continuity of service and full back wages.

5. The claim was contested by the petitioner however on the ground that the workman was appointed on an ad hoc basis on the terms which have been noticed hereinafter and the workman was put to notice with regard to the temporary nature thereof as well as the duration on which he had been engaged. It was denied that the workman has been appointed against a permanent post. Upon a detailed consideration of the matter, the industrial adjudicator rendered a finding that the appointment of the workman was for a specific period which was covered under the statutory provision of Section 2(oo)(bb) of the Act and, Therefore, it was held that the respondent has been appointed purely on ad hoc basis for a fixed period. However, after arriving at such a finding, the industrial adjudicator has gone into the issue of requirement of notice and pay while

deciding issue No. 1 and has held that the petitioner had violated the provisions of Section 25-F by non-payment in terms thereof hence rendering the termination of the service of the respondent as illegal. In these circumstances, by the award dated 6th February, 2002, the petitioner has been directed to reinstate the workman into service with 25% back wages.

6. I have heard learned Counsel for the parties at length. It is noteworthy that the industrial adjudicator has also noticed that the workman had failed to establish that the management had appointed any other person on the post of mason after termination of the services of the workman and also that there was no post of mason since the year 1992 till it was created in 1998. This award has been assailed before this Court on the ground that in view of the findings returned by the industrial adjudicator that the termination of services of the workman was covered under the provisions of Section 2(oo)(bb) of the Act, the petitioner was not required to comply with the provisions of Section 25-F of the Industrial Disputes Act, 1947 and that the award cannot be sustained in the light of the authoritative pronouncement of the Apex Court on the subject.

7. The respondent workman has challenged the non-grant of full wages by way of the WP (C) No. 2391/2005 without, in any manner, impugning the other findings returned in the award. It is contended that the respondent was appointed after a due selection process and consequently, his appointment did not remain contractual. It is also submitted that in view of the selection process, it has to be held that the appointment of the workman was against a permanent post. According to the respondent in as much as the respondent was granted substantial relief by the directions in the Award there was no need for it to assail the findings in the industrial award.

8. In order to appreciate the effect of the order of termination, it becomes necessary to examine the necessary statutory provisions in this behalf. The same are to be found in Section 2(oo) of the Industrial Disputes Act, 1947, the relevant extracts whereof reads as under:

2(oo) retrenchment" means the termination by the employer of the service of a workman for any reason whatsoever, otherwise that as a punishment inflicted by way of disciplinary action but does not include:

xxx xxx xxx xxx (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

xxx xxx xxx xxx

9. Certain exceptions have been carried out in the enactment. In the instant case, a finding of fact has been returned by the Industrial adjudicator that the appointment of the workman was for a specific period and that the termination of his service was covered under the exception provided u/s 2(oo)(bb) of the Industrial Disputes Act, 1947 which has become final. As a consequence thereof,

the question which would require to be answered is the effect of such a termination and as to whether the provisions of Section 25-F of the Act would be applicable to the same. This issue has fallen for consideration before the Supreme Court in a large number of cases. The Court has also been called upon to consider the termination of the service of the workman who has been employed for the purpose of work on projects, tenure specific contracts; muster roll employment; casual labour and of workmen who are appointed from time to time against regular posts which actually exist in the establishment.

10. In a case entitled *M.P. Electricity Board v. Hariram*, the Supreme Court had occasion to examine a claim of a casual employee who was appointed on specific project work, i.e. of laying electric lines at a particular place. There was no permanent post to which they could be reinstated. The court held that such a workman could not claim entitlement to the same job which come into existence in other places or for other parts of the same project as for digging holes for installing the electric poles for the lines. It was further held that the workman could, Therefore, neither claim reinstatement nor regularisation. The judgment of the Apex Court has been reported at *M.P. Electricity Board Vs. Hariram etc.*, .

In this pronouncement, the Supreme Court cited with approval its earlier decision reported at *M. Venugopal Vs. The Divisional Manager, Life Insurance Corporation of India, Machilipatnam, Andhra Pradesh* and another,

11. In the instant case, the industrial adjudicator has specifically held that the appointment of the workman was for a specific period as was covered under Sub-clause (b) of Section 2(oo) of the Industrial Disputes Act, 1947. Therefore, it has rightly been held by the impugned award that such a termination of service could not be covered under the definition of the expression "retrenchment" as has been defined u/s 2(oo) of the Statute.

12. In this behalf, reference can appropriately be made to the pronouncement of the apex court reported at *Harmohinder Singh Vs. Kharga Canteen, Ambala Cantt.*, In this case it was held that contracts of service which are for a fixed term, are excluded from the definition of retrenchment in the Industrial Disputes Act, 1947. It was held that where termination takes place on the expiry of the contract period or in terms of the contract, the principles of natural justice are not attracted. In this behalf, reliance was placed on the earlier pronouncement of the Supreme Court in *Uptron India Limited Vs. Shammi Bhan and Another*,

13. In a pronouncement of the Supreme Court reported at *Escorts Limited v. Presiding Officer*, (1997) 11 SCC 521 an argument was laid that even though a workman had been appointed on temporary basis for period of two months, it was urged that because the workman had worked for 240 days, the termination of his services amounted to retrenchment u/s 2(oo) of the Industrial Disputes Act, 1947 and the same being in violation of Section 25F of the Industrial Disputes Act, 1947 was illegal. The Apex Court held that it was unnecessary to go into the question whether a workman had worked for 240 days in a year

inasmuch termination of services of the workman did not constitute retrenchment in view of Clause (bb) in Section 2(oo) of the Act. The termination of the services of the workman was in accordance with the stipulation contained in his contract which is to be found in his letter of appointment. Therefore, even though termination of the services of the workman was before the expiry of the period of probation, however, since the termination of the service was in accordance with the terms of the contract, it fell within the ambit of Section 2(oo) (bb) of the statute and did not constitute retrenchment. In this regard, the Supreme Court cited with approval its earlier decision reported at M. Venugopal Vs. The Divisional Manager, Life Insurance Corporation of India, Machilipatnam, Andhra Pradesh and another,

14. Therefore, there can be no manner of doubt that this Court is bound by the authoritative judicial pronouncement of law to the effect that so long as the termination of service of the workman is in accordance with the terms of the contract on or expiry of the contract, the same does not amount to retrenchment within the meaning of the expression as it is excepted u/s 2(oo) of the Industrial Disputes Act, 1947. In these circumstances, the employer would not be required to comply with the provisions of Section 25F of the Industrial Disputes Act, 1947.

15. Learned counsel for the petitioner has also placed reliance on the authoritative and binding pronouncement of the Apex Court in State of Rajasthan and others Vs. Rameshwar Lal Gahlot, it was held by the Supreme Court that termination on account of expiry of the specified period mentioned in the appointment letter would be valid, unless the same is found to be mala fide or in colourable exercise of power. In its absence, the employer could terminate the services in terms of letter of appointment. The court held that such a termination would be covered by Clause (bb) of Section 2(oo) of the Act and, Therefore, Section 25F would have no application. In 2002 (5) SCC 646 entitled Haryana State F.C.C.W. Store Ltd. v. Anr. v. Ram Niwas and Anr., the engagement of the workman was for a specific purpose and for a particular period and disengagement was effected when the period of their appointment had expired. It was held that such disengagement was in terms of the contract of service and, Therefore, not "retrenchment" within the meaning of Section 2(oo) of the Act. In these circumstances, the workman was held not entitled to any relief. In these circumstances, in the light of the principles laid down by the Apex Court in the afore-noticed judgment, Section 25F would have no application to the facts and circumstances of the case.

16. So far as the findings of the industrial adjudicator to the effect that the termination of the services of the respondent was covered u/s 2(oo)(bb) of the Act are concerned, the same has attained finality. Even before me, there is no challenge to the same by the workman.

17. In view of the finding of the industrial adjudicator, there could be no requirement of service of notice or payment of wages to the workman in accordance with Section 25-F of the Statute. Learned counsel for the respondent

has urged before me that it would be immaterial as to the terms on which the respondent was appointed in as much as he has covered a total period of more than one year in service even though under separate letters of appointment and Therefore it is incumbent upon the petitioner to comply with the provisions of Section 25-F of the Industrial Disputes Act, 1947.

18. I find that the pronouncement of the Apex Court in 2000 L.I.C. 250 entitled Management of MCD v. Prem Chand Gupta and Anr. is of no assistance to the case of the respondent in as much as in this case, the workman had been appointed in a vacant permanent post. There is no dispute that the workman was engaged to work as a mason. In the instant case, admittedly, there was no post of mason in existence either when the respondent was engaged or when his services were terminated.

19. Similarly, the principles laid down in 2000 L.I.C. 613 entitled Management of Horticulture, Department of Delhi Administration v. Trilok Chand and Anr. would have no application in the instant case in as much as in this case, the court was concerned with the termination of services of daily rated workman who had been working continuously and there was nothing on the record of the case to suggest that his appointment was for a specific tenure under written terms of appointment.

20. For the same reason, the judgment reported at 1999 L.I.C. 619 entitled MCD v. Praveen Kumar Jain would have no application as it related to termination of services of a casual worker.

21. Therefore, the finding of the industrial tribunal to the effect that the management violated the provisions of Section 25-F of the Act is erroneous in law in as much as Section 25-F would have no application to the case where the termination of the services of the workman is covered under the provisions of Section 2(o)(bb) of the Statute.

22. Shri Dilkhush Bairwa, the respondent-workman was appointed as a mason on a post which did not exist when he was appointed or when his services were terminated. It has come in the affidavit of the of the petitioner-establishment that the post of mason was created only in the year 1998 and that recruitment rules in respect thereof have still not been framed. The workman has failed to establish that any appointment has been effected by the petitioner to any regular post of mason.

23. In the light of the afore-noticed discussion, it is also noteworthy that the industrial adjudicator has found that the post of mason was created only in July, 1998. The services of the workman came to an end on 25th March, 1992 and he was relieved on this date itself. Therefore, the petitioner has stated, that no appointment has been effected as no recruitment rules have been notified. For this reason, the provisions of Section 25-H of the Industrial Disputes Act, 1947 would not be applicable to the instant case. The findings on issue No. 1 cannot be reconciled and cannot stand together with the finding on issue No. 2. The

findings of the industrial adjudicator on issue No. 1 and the direction to reinstate the workman in the post of mason and to make payment of wages are Therefore not sustainable in law.

The findings of the industrial adjudicator on issue No. 1 and the directions issued to reinstate the respondent/workman with back wages and to pay interest are contrary to law and are, Therefore, set aside and quashed.

This writ petition is, Therefore, allowed.

24. In view of the afore-stated discussion, the respondent cannot be granted any relief of back wages.

Writ Petition (C) No. 2391/2005 filed by the workman, Therefore, is hereby dismissed.

25. Learned counsel for the respondent has made a grievance that the petitioner has not made payment of the wages which were awarded to the respondent in terms of the order dated 29th March, 2004. Learned counsel for the petitioner has submitted that a period of four weeks has been granted and arrangements have been made to make the payment in terms of the order.

The amount shall be paid by the petitioner to the workman within a period of four weeks.

26. It is pointed out by learned Counsel for the respondent that the petitioner has deposited a sum of Rs. 70,000/- in terms of the order dated 17th May, 2004. The Writ Petition (Civil) No. 2252/2003 of Netaji Subhash Institute of Technology automatically having been allowed, the amount which workman.