

(2014) 07 AHC CK 0062

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 33829 of 2014

Pramod Kumar Dubey

APPELLANT

Vs

Presiding Officer

RESPONDENT

Date of Decision : 03-07-2014

Acts Referred:

Industrial Disputes Act, 1947 — Section 25F

Citation : (2014) 7 ADJ 157 : (2014) 6 ALJ 50 : (2014) 106 ALR 342 : (2014) 6 AWC 5493 : (2014) 143 FLR 806 : (2014) 143 FLR 317 : (2014) 4 LLN 588 : (2014) LLR 1157

Hon'ble Judges : Suneet Kumar, J

Bench : Single Bench

Advocate : V. Singh and Vinod Pandey, Advocate for the Appellant; Satish Chaturvedi, Advocate for the Respondent

Final Decision : Dismissed

Judgement

Suneet Kumar, J.—The present writ petition has been preferred by the workman against the award dated 30.7.2013 passed by the Tribunal cum Labour Court, Kanpur in I.D. No. 38 of 2008 (Shri Pramod Kumar Dubey v. The Regional Manager, State Bank of India, Kanpur). Central Government on 2.6.2008 referred the following dispute for adjudication to the tribunal:

"Whether the action of the management of State Bank of India, Kanpur in terminating the services of Shri Pramod Kumar Dubey (Guard) with effect from 12.6.2004 is just fair and legal. To what relief is the workman concerned is entitled?"

2. The petitioner-workman was engaged as a guard by the State Bank of India, Kanpur on 16.9.2003 and worked till 11.6.2004 and was removed by oral order on 12.6.2004 in violation of Section 25F, without reason, notice or retrenchment compensation; had completed 270 days.

3. Accordingly, it was prayed that the petitioner be reinstated in service with full

back wages and consequential benefits.

4. Respondent bank refuted the entire claim stating that there never existed any relationship of master and servant between the contesting parties but it was admitted that petitioner was engaged to perform casual work and he never completed more than 240 days of continuous service.

5. The learned Tribunal after considering the rival contentions recorded a finding of fact that petitioner was able to prove his case that he was engaged as a Guard with the respondent bank since 16.9.2003 till 11.6.2004 and he was not served any notice, notice pay or retrenchment compensation at the time of termination of his services by the bank.

6. The learned Tribunal considering the overall facts including the fact that the Branch in which the petitioner was engaged is no longer in existence awarded a compensation of Rs. 40,000/- to the petitioner instead of directing reinstatement.

7. The learned counsel for the petitioner contends that the Tribunal has erred in granting lump sum compensation and once the Tribunal came to a conclusion that the petitioner had worked for more than 240 days and the procedure prescribed for retrenchment was not followed, the petitioner was entitled to reinstatement with full back wages.

8. In rebuttal, the learned counsel appearing for the respondent bank has contended that the Branch in which the petitioner was appointed has since closed and the petitioner was removed in the year 2004 and reference was made after a lapse of 4 years in 2008. The Tribunal was absolutely right in only granting compensation instead of directing reinstatement.

9. Rival submission fall for consideration:

10. Hon"ble the Apex Court in the case of State of Maharashtra and Others Vs. Reshma Ramesh Meher and Another, in paragraph No. 24 held as under:

"It is true that once the order of termination of service of an employee is set aside, ordinarily the relief of reinstatement is available to him. However, the entitlement of an employee to get reinstated does not necessarily result in payment of full or partial back-wages, which is independent of reinstatement. While dealing with the prayer of back-wages, factual scenario, equity and good conscious, a number of other factors, like the manner of selection; nature of appointment; the period for which the employee has worked with the employer etc.; have to be kept in view. All these factors and circumstances are illustrative and no precise or abstract formula can be laid down as to under what circumstances full or partial back-wages should be awarded. It depends upon the facts and circumstances of the each case."

11. Hon"ble the Supreme Court in the case of J.K. Synthetics Ltd. Vs. K.P. Agrawal and Another, in paragraph Nos. 15 to 18 held as under:

"15. But the manner in which "back-wages" is viewed, has undergone a

significant change in the last two decades. They are no longer considered to be an automatic or natural consequence of reinstatement. We may refer to the latest of a series of decisions on this question. In U.P. State Brassware Corpn. Ltd. and Another Vs. Udai Narain Pandey, this Court following Allahabad Jal Sansthan Vs. Daya Shankar Rai and Another, and Kendriya Vidyalaya Sangathan and Another Vs. S.C. Sharma, held as follows:"

"A person is not entitled to get something only because it would be lawful to do so. If that principle is applied, the functions of an Industrial Court shall lose much of their significance."

No precise formula can be laid down as to under what circumstances payment of entire back wages should be allowed. Indisputably, it depends upon the facts and circumstances of each case. It would, however, not be correct to contend that it is automatic. It should not be granted mechanically only because on technical grounds or otherwise an order of termination is found to be in contravention of the provisions of Section 6N of the U.P. Industrial Disputes Act. While granting relief, application of mind on the part of the Industrial Court is imperative. Payment of full back wages cannot therefore be the natural consequence. In General Manager, Haryana Roadways Vs. Rudhan Singh, this Court observed:

"There is no rule of thumb that in every case where the Industrial Tribunal gives a finding that the termination of service was in violation of Section 25F of the Act, entire back wages should be awarded. A host of factors like the manner and method of selection and appointment i.e. whether after proper advertisement of the vacancy or inviting applications from the employment exchange, nature of appointment, namely, whether ad hoc, short term, daily wage, temporary or permanent in character, any special qualification required for the job and the like should be weighed and balanced in taking a decision regarding award of back wages. One of the important factors, which has to be taken into consideration, is the length of service, which the workman had rendered with the employer. If the workman has rendered a considerable period of service and his services are wrongfully terminated, he may be awarded full or partial back wages keeping in view the fact that at his age and the qualification possessed by him he may not be in a position to get another employment. However, where the total length of service rendered by a workman is very small, the award of back wages for the complete period i.e. from the date of termination till the date of the award, which our experience shows is often quite large, would be wholly inappropriate. Another important factor, which requires to be taken into consideration is the nature of employment. A regular service of permanent character cannot be compared to short or intermittent daily-wage employment though it may be for 240 days in a calendar year."

12. In U.P. State Brassware Corpn. Ltd. and Another Vs. Udai Narain Pandey, this Court observed:

"18. Coming back to back-wages, even if the Court finds it necessary to award

back-wages, the question will be whether back-wages should be awarded fully or only partially (and if so the percentage). The depends upon the facts and circumstances of each case. Any income received by the employee during the relevant period on account of alternative employment or business is a relevant factor to be taken note of while awarding back-wages, in addition to the several factors mentioned in Rudhan Singh (supra) and Udai Narain Pandey (supra). Therefore, it is necessary for the employee to plead that he was not gainfully employed from the date of his termination. While an employee cannot be asked to prove the negative, he has to at least assert on oath that he was neither employed nor engaged in any gainful business or venture and that he did not have any income. Then the burden will shift to the employer. But there is, however, no obligation on the terminated employee to search for or secure alternative employment. Be that as it may.

(emphasis supplied)

In the case of A.P.S.R.T.C. and Another Vs. S. Narsagoud, Hon"ble the Supreme Court while considering the matter in respect of the grant of back wages held that it is found that when an employee remains unauthorizedly absent from duty, he cannot claim the relief though he has been reinstated in service.

13. In the case of Ghaziabad Development Authority and Another Vs. Ashok Kumar and Another, Hon"ble Supreme Court considered the case of a daily wager who worked for a bit more than two years without a sanctioned post and held that the interest of justice would be served if the Ghaziabad Development Authority is directed to pay a sum of Rs. 50,000/- as compensation instead of relief of reinstatement with full back wages granted by the labour Court in favour of the workman.

14. In the case of Bharat Sanchar Nigam Ltd. Vs. Man Singh, Hon"ble Supreme Court held in para. 4 and 5 as under:

"4. This Court in a catena of decisions has clearly laid down that although an order of retrenchment passed in violation of Section 25F of the Industrial Disputes Act may be set aside but an award of reinstatement should not be passed. This Court has distinguished between a daily wager who does not hold a post and a permanent employee.

5. In view of the aforementioned legal position and the fact that the respondents - workmen were engaged as "daily wagers" and they had merely worked for more than 240 days, in our considered view, relief of reinstatement cannot be said to be justified and instead, monetary compensation would meet the ends of justice."

15. In the case of Asst. Engineer, Rajasthan Dev. Corporation and Another Vs. Gitam Singh, Hon"ble Supreme Court considered its several earlier decisions holding compensation to be justifiable relating to a daily wager instead of reinstatement with full back wages and held in para. 22 and 27 as under:

"22. From the long line of cases indicated above, it can be said without any fear of contradiction that this Court has not held as an absolute proposition that in cases of wrongful dismissal, the dismissed employee is entitled to reinstatement in all situations. It has always been the view of this Court that there could be circumstance(s) in a case which may make it inexpedient to order reinstatement. Therefore, the normal rule that dismissed employee is entitled to reinstatement in cases of wrongful dismissal has been held to be not without exception. Insofar as wrongful termination of daily-rated workers is concerned, this Court has laid down that consequential relief would depend on host of factors, namely, manner and method of appointment, nature of employment and length of service. Where the length of engagement as daily wager has not been long, award of reinstatement should not follow and rather compensation should be directed to be paid. A distinction has been drawn between a daily wager and an employee holding the regular post for the purposes of consequential relief.

27. In our view, Harjinder Singh-2 and Devinder Singh-3 do not lay down the proposition that in all cases of wrongful termination, reinstatement must follow. This Court found in those cases that judicial discretion exercised by the Labour Court was disturbed by the High Court on wrong assumption that the initial employment of the employee was illegal. As noted above, with regard to the wrongful termination of a daily wager, who had worked for a short period, this Court in long line of cases has held that the award of reinstatement cannot be said to be proper relief and rather award of compensation in such cases would be in consonance with the demand of justice. Before exercising its judicial discretion, the Labour Court has to keep in view all relevant factors, including the mode and manner of appointment, nature of employment, length of service, the ground on which the termination has been set aside and the delay in raising the industrial dispute before grant of relief in an industrial dispute."

16. In a recent judgment of Hon"ble Supreme Court in the case of BSNL v. Bhurumal, Civil Appeal No. 10957 of 2013 decided on 11th December, 2013, considered the case of a daily wager and held in para. 9, 23, 24 and 25 while granting compensation instead of reinstatement with full back wages:

"9. Even the intra Court appeal filed by the appellant i.e. Letters Patent Appeal (LPA) has been dismissed by the Division Bench of the High Court vide judgment dated November 2, 2011 holding that the concurrent finding of facts recorded by the CGIT as well as learned Single Judge did not warrant any interference.

23. It is clear from the reading of the aforesaid judgments that the ordinary principle of grant of reinstatement with full back wages, when the termination is found to be illegal is not applied mechanically in all cases. While that may be a position where services of a regular/permanent workman are terminated illegally and/or mala fide and/or by way of victimization, unfair labour practice etc. However, when it comes to the case of termination of a daily wage worker and where the termination is found illegal because of procedural defect, namely in violation of Section 25F of the Industrial Disputes Act, this Court is consistent in

taking the view in such cases reinstatement with back wages is not automatic and instead the workman should be given monetary compensation which will meet the ends of justice. Rationale for shifting in this direction is obvious.

24. Reasons for denying the relief of reinstatement in such cases are obvious. It is trite law that when the termination is found to be illegal because of non-payment of retrenchment compensation and notice pay as mandatorily required u/s 25F of the Industrial Disputes Act, even after reinstatement, it is always open to the management to terminate the services of that employee by paying him the retrenchment compensation. Since such a workman was working on daily wage basis and even after he is reinstated, he has no right to seek regularization (See: Secretary, State of Karnataka and Others Vs. Umadevi and Others, Thus when he cannot claim regularization and he has no right to continue even as a daily wage worker, no useful purpose is going to be served in reinstating such a workman and he can be given monetary compensation by the Court itself inasmuch as if he is terminated again after reinstatement, he would receive monetary compensation only in the form of retrenchment compensation and notice pay. In such a situation, giving the relief of reinstatement, that too after a long gap, would not serve any purpose.

25. We would, however, like to add a caveat here. There may be cases where termination of a daily wage worker is found to be illegal on the ground it was resorted to as unfair labour practice or in violation of the principle of last come first go viz. while retrenching such a worker daily wage juniors to him were retained. There may also be a situation that persons junior to him were regularized under some policy but the concerned workman terminated. In such circumstances, the terminated worker should not be denied reinstatement unless there are some other weighty reasons for adopting the course of grant of compensation instead of reinstatement. In such cases, reinstatement should be the rule and only in exceptional cases for the reasons stated to be in writing, such a relief can be denied."

17. Applying the law on the facts of the case at hand, I am of the view that the tribunal committed no illegality or jurisdictional error in granting compensation and not directing reinstatement.

18. Petitioner was engaged on 16.9.2003 and worked till 11.6.2004. Reference was made after a lapse of four years on 2.6.2008 and in the meantime, the Branch in which the petitioner was engaged had closed. Thus the petitioner barely worked for a year.

19. Under such circumstances, the reinstatement of the petitioner could not have been awarded. The petition is devoid of merits and is accordingly dismissed.