
(1994) 07 MP CK 0064
In the Madhya Pradesh High Court
Case No : M.P. No. 699 on 1991 (G)

Ram Krishan Sharma

APPELLANT

Vs

Samrat Ashok Technical Institute (Degree) Vidisha

RESPONDENT

Date of Decision : 06-07-1994

Acts Referred:

Industrial Disputes Act, 1947 — Section 25F

Citation : (1994) 2 MPJR 39

Hon'ble Judges : Shacheendra Dwivedi, J

Bench : Single Bench

Advocate : Arun Mishra, for the Appellant; R.D. Jain, for the Respondent

Judgement

Shacheendra Dwivedi, J.

The petitioner in this petition preferred under Article 226 and 227 of the Constitution seeks a direction for the quashing of the order contained in Annex. P-7, of his removal from the post of the L. D. C. by respondent, the employer, after he had served the respondent for about 5 years.

The facts may be shortly described: The petitioner was initially appointed as a Time Keeper on ad hoc basis by the respondent vide order Annexure P-1 dated 21.6.1985. The petitioner under different orders passed from time to time, was allowed to work in different capacities such as Telephone Operator of PBX and was also posted for some time in Library Section, as clerk.

On 4.4.88, the petitioner was posted as L. D. C. on salary of Rs. 785/- per month vide Annexure P-3. The services of the petitioner were extended from time to time under different orders. But, the petitioner's service was ordered to be terminated by order dated 5.7.90 Annexure P-7. The petitioner earlier to his termination had represented to the respondent under Annexure P-8, on 18.5.90 for Ins regularisation in service as L.D.C.

The petitioner's counsel. Shri Arun Mishra, contended forcefully that the

representation made by the petitioner for his regularisation resulted in the termination of his service. For the regularisation the reliance was placed on a Government circular Annexure P-9 issued in the matter of regularisation of temporary and contingency employees of class III and IV. It was contended that the petitioner's performance in service was very good and he was entitled to be regularised, but instead his service was terminated. It was contended that the petitioner having completed more than 240 days in a calendar year, could not be removed from service by the respondent without complying with the provisions of Section 25-F of Industrial Disputes Act for short the "Act" hereinafter).

A further ground was raised by the petitioner's counsel that an employee. L.D.C. much junior to the petitioner named Vinod Swaroop Chaurasiya was retained, whereas the service of the petitioner was terminated. It was as such alleged that in the matter of the petitioner the respondent had applied the double standard and the petitioner was discriminated against and the action of the respondent tantamount of Article 14 of the Constitution.

The respondent's counsel. Shri R. D. Jain, repelled the contentions of the petitioner with equal force. It was submitted by him that the petitioner was not validly appointed on the post. The other incumbent V. S. Chaurasiya was appointed on a different post and that there was neither any violation of Articles 14 and 21 or of Section 25-F of the Act as the Industrial Disputes Act itself was not applicable to the respondent, being educational institution.

Examining the contentions raised by both the parties and on the perusal of Annexure P-12, one fact is amply borne out that the other retained incumbent V. S. Chaurasiya is holding the post of the L. D. C. and was posted in the Consultancy Centre of the respondent. The reply submitted by respondent in this regard is conspicuously vague. V. S. Chaurasiya is admittedly, junior to the petitioner and respondent had discriminated the petitioner by terminating his service and by retaining a junior employee as clerk of lower division. The argument advanced by the respondent that the principle last come first go was not applicable to the instant case, but such contention is without any support of law or the documents and, therefore, does not appear to have any substance. The very fact that the petitioner served the respondent as L. D. C. for more than 4 years, is indicative of the fact that there was the requirement of L.D.C. and there appears much force in the petitioner's contention that he was discriminated against, and that his representation for regularisation came as a main cause for his removal from service. The petitioner had made representation Annex. P-8 on 18.5.90 and his services were terminated by order dated 5.7.90

With regard to the applicability of Section 25-F of the Act, the respondent has urged that the Act was not applicable as the respondent was not an "industry". But the argument is wholly misconceived. The contention that the petitioner did not state in his petition that the respondent was an industry and as such, the petitioner cannot claim benefit of the provisions of Section 25-F of the Act is also untenable. It can well be gathered that the petitioner had stated in the petition

that the action of the of the respondent was violative of the provisions of the Act meaning thereby that the relevant provisions of the Act were understood to be applicable to the respondent and even if there was no averment that the respondent was an industry, it could safely be gathered through implication that the petitioner by so stating his right had meant that the respondent was an industry, as the provisions of the Industrial Disputes Act could only apply when the respondent was an industry, under its definition.

The respondent was not unaware of the situation and had therefore denied the fact that provisions of the Act were applicable. It was meant thereby that the respondent was not industry. Even accepting the contention that respondent was not stated to be an industry, and that the petitioner was not stated to be a worker, the respondent can still have no escape from the law on the point. For resolving the controversy the definition of "industry", as provided in Section 2 (j) of Industrial Disputes Act and as interpreted and applied by the Apex Court, may be resorted to.

At first the definition as given in Section 2 (j) which reads thus-

2 (j)" industry means any business, trade, undertaking, manufacture or calling of employers and includes any calling, service, employment, handicraft, or industrial occupation or avocation of workmen.

The word "service" used in the definition is of wide import and includes the "educational institutions" in its ambit. "Education" has been found to be a sublime service. For more than a decade, the theory of triple test has been applied for ascertaining if the certain activity is an "industry" or not. If there has been firstly any systematic activity, secondly organised by co-operation of employer and employees and thirdly, if the activity is for the production and/ or distribution of goods and services, calculated to satisfy the human wants and wishes (not spiritual or religious) and if the three conditions are satisfied, the activity has been taken to be an industry. See *Bengalore Water Supply Vs. A Rajjappa* (1978 SC 548).

In the earlier view of the Supreme Court, the Education was a mission and a vocation, rather than a profession, trade or business. But the view expressed by the Supreme Court in *University of Delhi vs. Ram Nath* (AIR 1963 SC 1973) was overruled in *Bangalore Water Supply and Sewerage Board Vs. A. Rajappa and Others*, by a larger bench. consisting of seven Judges of Supreme Court and speaking for the Court, it was observed by Hon"ble Shri Krishna Iyer. J. that:-

81. So long as services are part of the wealth of a nation and it is obscurantist to object to it- educational services are wealth, are "industrial".

Further, dealing in details with the point whether the "education" could be regarded as an industry", it was observed :-

112. Undoubtedly, education is a sublime cultural service, technological training and personality builder. A man without education is brute and nobody can quarrel

with the proposition that education, in its spectrum, is significant service to the community.

and lastly it was held that-

(a) The consequences are (i) professions, (ii) clubs (iii) educational institutions (iv) co-operatives (v) research institutes (vi) charitable projects and (vii) other kindred adventures, if they fulfil the triple tests listed in I (supra). cannot be exempted from the scope of Section 2(j).

Although the definition of "industry" as appearing in Section 2 (j). underwent a change in the year 1982 and under the amended definition, educational institutions, have been exempted from the definition of industry. that definition has not yet been put to its effect, as it was to be substituted for the present definition only from a notified date. But that date has not so far been notified and the provision remains in its old form.

Considering the provisions of law as they stand today, the educational service is not only an industry but is the mother of industries and the respondent is, therefore, held to be an industry.

Now, it is to be seen whether the petitioner is a workman" so as to attract the benefit of Section 25-F of the Act.

"Workman" have been defined in Section 2 (s) which may be reproduced with profit-

2 (s) "workman" means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward. whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person.

The petitioner was posted as L.D.C. and has been discharging the clerical work and, therefore, falls within the definition of workman.

The last limb of the petitioner's contention still remains to be examined, whether the termination of the petitioner's services falls foul of retrenchment, as defined in Sections 2 (oo) and 25-F of the Act. Section 2 (oo) reads thus:

"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 or 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

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

The petitioner had admittedly served the respondent for more than 240 days in the 12 calendar months, preceding his termination. The respondent's last order of terminating the service of the petitioner amounts to retrenchment as defined in Section 2 (oo) of the Act and the petitioner would not fall within the excepted category, just for the wordings or the nature of last employment order.

The Act lays down the pre-requisite conditions, to be followed by the employer before a "workman" can be retrenched and if those conditions were not satisfied and the due procedure was not followed, the termination of service would be void ab initio. These conditions have been provided in Section 25-F of the Act. which reads thus:

25-F. Conditions precedent to retrenchment of workmen. - No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until--

(a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;

(b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay (for every completed year of continuous service) or any part thereof in excess of six months; and

(c) notice in the prescribed manner is served on the appropriate government or such authority as may be specified by the appropriate Government by notification in the Official Gazette.

In the instant case admittedly the prescribed procedure was not followed before retrenching the petitioner. There has been a statutory violation of Section 25-F of the Act and, therefore, the order of termination is vitiated in law and cannot be sustained.

It was also argued by respondent's counsel, Shri R. D. Jain, that the umbrella of Section 25-F of the Act was not available to the petitioner as his service was only for the fixed period and could not be held to be retrenchment as it has terminated automatically with the lapse of time. It was contended therefore that the petitioner's service fell within the excepted category provided in clause (bb) of Section 2 (oo) which defines retrenchment. I am unable to accept the contention. It is the settled rule of interpretation that exception is intended to restrain the principal clause and has to be interpreted narrowly. It cannot be

given a meaning which may nullify or curtail the ambit of the principal clause. In enacting the clause (bb), the Parliament intended to exclude certain categories of workers from the definition of term "retrenchment". But there is no indication in this clause of allowing an outlet to the employer to shunt out the workers in the garb of non-renewal of their service contract when the period specified in the contract comes to an end. though the work subsists. When an employee in dire need, in order to save his employment, enters into the contract by signing on dotted lines, having no choice in a position to "do it or leave it and when such situation comes to the Court of law. the Court would not shirk to avoid the contract by appropriate declaration. The Court would relieve the weaker parties from unconstitutional contractual obligations, unjust, unfair, oppressive and unconscionable rules or conditions when an employer is really unable to meet on equal terms. The Courts though have no power to amend the law by process of interpretation but do have power to amend the law so as to be in conformity with the Intendment of the Legislature.

Admittedly, the petitioner had served the respondent for over 5 years. A feeble and vague statement with no reasons about the validity of petitioner's appointment is of no avail to the respondent after the lapse of 5 years, period. The long period is itself indicative of the subsisting work. Further more. the other clerk, junior to the petitioner was retained in service for the availability of work. The exception occurring in Clause (bb) of Section 2 (oo) of the Act is limited to those cases where the work itself is of temporary character and was over. Only in those circumstances the employer could employ the "workman" with the bona fide and genuine intentions for satisfying the temporary need and those cases could only fall within the excepted category. Section 2 (oo) has to be read as a whole and construed to carry forward the spirit of I. D. Act meant for avoiding the exploitation of workman in the garb of contractual obligations as appearing in the exception clause. It is only the restricted interpretation of the exception clause, which can yield the intended result and provide the scope for principal clause appearing in Section 2 (oo) of the Act, to operate in the intended field.

Earlier to the year 1984, when in the definition of retrenchment in Section 2 tool a sub-clause (bb) was added. Section 25-F (a) had a proviso that--

Provided that no such notice shall be necessary if the retrenchment is under an agreement which specifies a date for the termination of service.

The above proviso has the similar effect. In 1984. both Sections 2 (oo) and 25-F (a) underwent a change. The proviso to clause (a) of Section 25-F was deleted and instead the clause (bb) was added to Section 2 (oo) of the Act. Dealing with the unlamented Sections, the Supreme Court in the case of The State Bank of India Vs. Shri N. Sundara Money, where the nine days employment had terminated due to automatic cessation of service by efflux of time, it was held that the words used in Section 2 (oo) :-

Termination... for any reason whatsoever" are the key words. Whatever the

reason, every termination spells retrenchment.....

. A termination takes place where a term expires either by the active step of the master or the running out of the stipulated term. To protect the weak against the strong, this policy of comprehensive definition has been effectuated. Termination embraces not merely the act of termination by the employer, but the fact of termination, howsoever produced. May be the present may be a hard ease, but we can visualise abuses by employers by suitable verbal devices circumventing the amount of Section 25-F and Section 2 (oo).

it was further held

That to write into the order of appointment the date of termination confers no Moksha from Section 25-F (b) is inferable from the proviso to Sec. 25-F (a).

The Apex Court ultimately held:

"Words of multiple import have to be winnowed judicially to suit the social philosophy of the statute. So screened, we hold that the transitive and intransitive senses are covered in the current context. Moreover, an employer terminates employment not merely by passing an order as the service runs. He can do so by writing a composite order, one giving employment and the other ending or limiting" it. A separate, subsequent determination is not the sole magnetic pull of the provision. A preemptive provision to terminate is struck by the same vice as the post-appointment termination. Dexterity of diction cannot defeat the articulated conscience of the provision.

In the present amended Sections, the proviso in its spirit has been brought from Section 25-F (a) to the exception clause in Section 2 (oo) (bb), but it does not take away its effect. The two sections are to be read together and read as a whole with reference to Section 25-B, which defines the continuous service, Particularly when an employee has served for a period of 240 days in twelve calendar months preceding the date of termination, the intermittent breaks notwithstanding, his total number of days of employment, answer the test of "deemed" continuous service within Section 25-B (2).

The leading case on this facet of law is The State of Bombay and Others Vs. The Hospital Mazdoor Sabha and Others,

Even with intermittent breaks, once an employee completes 240 days of employment and if his last letter of appointment or renewal contains the automatic clause, stipulating the termination of his service, the right accrued to the employee cannot be taken away by employing the exception clause of (bb). It would still be retrenchment. To retrench is to cut down. You cannot retrench without trenching or cutting. Any other view would result in shrinkage rather in swallowing the principal clause of Section 2 (oo) itself which the Parliament would never have contemplated in view of the scheme of the Act. This cannot be the function of an exception. An employer cannot steal away the employee's umbrella provided by Section 2 (oo), 24-B read with 25-F of the Act, by serving

an employee the last letter of his appointment or the renewal with the stipulation of termination of service under the contract. So as to bring the termination within the excepted category and to snatch it out of the preview of retrenchment.

Law is a social engineering to remove the existing imbalance and to further the progress, serving the needs of the Socialist, Democratic Bharat, under the rule of law. In law the deprivation of employment must be in accordance with the procedure prescribed under the statutory, provisions, rules, regulations or the instructions. Rule of law which permeates our Constitution, warrants that it must be followed substantially and procedurally. In the instant case. The termination did not fall within the excepted category so as to take it out of preview of retrenchment and is, therefore to be held as void.

The petitioner in this petition has also contended though feebly for the relief of his regularisation as clerk. He had made a representation to respondent in Annexure P-8 also relying upon the Govt. circular Annexure P-9, but his representation could not be decided by the respondent for which an opportunity deserves to be allowed. The respondent shall consider the petitioner's representation and decide the same within a reasonable time.

Now, the last question. To what relief the petitioner is entitled. In the instant case, the petitioner did not avail the available alternative remedy under the Industrial Law and had approached this Court directly. In the circumstances, it would not be proper to order for the back wages as observed by Supreme Court in *U. F. Warehousing Corporation vs. Vijaj Narayan* (AIR 1980 SC 840). Also, there is no material on record to suggest whether the petitioner remained unemployed after his termination. No inquiry in writ jurisdiction can be made by this Court in that regard. As such, it is left open to the petitioner to seek his available remedy in law.

As sequel of above discussion, the petition is allowed. The order Annexure P-7 dated 5.7.90, terminating the service so far as it concerns the petitioner, is quashed. The petitioner would be deemed to have continued in service since the date of his illegal termination, i. e. 5.7.90. For the back wages. the petitioner would be at liberty to seek the available remedy in law. However, the petitioner would be entitled to the costs of this petition.