

(2008) 01 PAT CK 0086

In the Patna High Court

Case No : Letters Patent Appeal No. 1525 of 1999

Sanjay Kumar Tiwary and Others

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 25-01-2008

Acts Referred:

Citation : (2008) 01 PAT CK 0086

Judgement

S.K. Katriar, J.—Seven appellants have preferred this appeal under Clause 10 of the Letters Patent of the Patna High Court, and are aggrieved by the order dated 2.11.1999, passed in C.W.J.C. No. 10265 of 1998 (Sanjay Kumar Tiwary and Ors. v. The State of Bihar and Ors.), whereby the writ petition has been allowed in part. We shall go by the description of the parties occurring in the writ petition.

2. The facts essential for disposal of this appeal are not in dispute and may be indicated. The writ petitioners (appellants herein) were appointed as a Basic Health Worker or Peon on daily-wage basis in 1991, and continued for about one year or so. Their services were terminated by order dated 10.10.1992, leading to C.W.J.C. No. 11289 of 1992. By order dated 6.1.1993, the petitioners had withdrawn the same to seek remedy before the appropriate court under the Industrial Disputes Act 1947 (hereinafter referred to as "the Act"), which was followed by Reference Case No. 8 of 1994 in terms of Section 10(1)(c) of the Act, before Labour Court, Chapra. The same was answered in favour of the workmen (the writ petitioners), the order of termination was held to be unreasonable and illegal, and they were entitled to reinstatement with arrears of salary. It was further held that they were entitled to regularization of service. The respondent authorities issued order dated 30.12.1995 (Annexure-5), whereby they were reinstated in service and were regularised as Basic Health Workers or Peons, and were given appropriate pay-scales.

3. This was followed by C.W.J.C. No. 9981 of 1996, at the instance of the workmen for payment of their salary due since 10th of January 1996. The same was disposed of on 27.6.1997 (Annexure-10) with a direction to the respondent

authorities to reinstate the petitioners at least on daily-wage basis, to give effect to the order of regularization if the order of the Labour Court was still subsisting, and for further direction for payment of the salary, all after verification. In the meantime, complaint petition was filed against the concerned authorities for non-implementation of the Award and cognizance was taken. The accused persons preferred Cr. Revision No. 36/3 of 1997, wherein the learned Sessions Judge had at the initial stage stayed the order of cognizance, but ultimately rejected the revision application by his judgment dated 20.5.1998.

4. The respondent authorities had thereafter issued order dated 16.10.1998, followed by the consequential order dated 17.10.1998 (Annexure-1), whereby the services of the petitioners were dispensed with and has been challenged in the present C.W.J.C. No. 10265 of 1998. It is relevant to state that the petitioners did not challenge the primary order of termination of 16.10.1998, but had instead challenged the consequential order dated 17.10.1998, whereby they were relieved from their duties. The writ petition has been disposed of by the impugned order, whereby the petitioners have been directed to be reinstated on daily wage basis within a period of two weeks from the date of receipt of a copy of the order and pay them the wages accordingly from the date of issuance of the order. It is further stated in the order that it did not confer on the petitioners the status of regular employees and their services as daily-wage will be liable to be terminated for good reasons and in accordance with law.

5. While assailing the validity of the impugned order, learned Counsel for the petitioners submits that an order which had attained finality cannot be set aside or modified in a collateral proceeding. He submitted that it is also barred by principles of constructive Res Judicata. He relies on the following reported judgments:

- (i) Daryao and Others Vs. The State of U.P. and Others, ;
- (ii) AIR 1962 S.C. 1621, paragraph 180 and 181 (Smt. Ujjam Bai v. State of Uttar Pradesh and Anr.).
- (iii) Baijnath Prasad Sah Vs. Ramphal Sahni and Another, ;
- (iv) State of West Bengal Vs. Hemant Kumar Bhattacharjee and Others, ;

6. He further submitted that the learned Single Judge cannot modify the order of a coordinate Bench. He also submitted that the learned Labour Court has recorded the requisite findings in terms of Section 2(oo) (bb) read with Section-25F of the Act. He next submitted that the High Court can quash the award and remit the matter back to the learned labour court but cannot substitute its own order. He relies on the judgment of the Supreme Court, reported in Jitendra Singh Rathor Vs. Shri Baidyanath Ayurved Bhawan Ltd. and Another, .

7. Counsel further submitted that the court cannot make out a third case and that too in a collateral proceeding. He lastly submitted that the award was

implemented, the workmen were regularised and given appropriate pay-scales, whereafter the order of termination has been passed which can be done only after observing the requirements of Section 25F of the Act and Article 311 of the Constitution of India.

8. Learned Counsel for the respondents submitted that the petitioners did not challenge the original order of dismissal of 16.10.1998, and only challenged the consequential order dated 17.10.1998. He next submitted that it is evident from the order of the learned writ court that there is no order setting aside the said order dated 17.10.1998. In his submission, therefore, the entire matter may be reconsidered in the perspective in appeal. He next submitted that the order of the Award is a nullity and is without recording the requisite findings in terms of Section 2(o)(b) read with Section 25F of the Act. The petitioners were daily-wagers and, therefore, the provisions of Section-25F of the Act are not attracted. He relies on the following reported judgments:

(i) Shankariah Vs. Karnataka State Road Transport Corporation, .

(ii) 1991 (1) P.L.J.R. 567 (Krishna Murari Prasad and Anr. v. The Allahabad Bank, through its Chairman-cum-Managing Director and Ors.);

(iii) Allahabad Bank Vs. Shri Prem Singh, .

9. Learned Standing Counsel submitted that the learned Single Judge did consider the question of non-applicability of the provisions of Section-25F of the Act and went to the extent possible for him and could not proceed further because he felt fettered by the order in C.W.J.C. No. 9981 of 1996.

10 He next submitted that if the order of appointment was illegal and void, regularization is not possible. He relies on the following reported judgments:

(i) Secretary, State of Karnataka and Others Vs. Umadevi and Others, State of M.P. and Others Vs. Lalit Kumar Verma, .

(ii) State of M.P. and Others Vs. Lalit Kumar Verma, .

11. We have perused the materials on record and considered the submissions of learned Counsel for the parties. It is manifest from a plain reading of the Award that the cases of all the seven workmen uniformly were that they were daily-wagers, and the learned Labour Court concluded that they were daily-wagers. Paragraphs 30 and 31 of the Award are reproduced hereinbelow for the facility of quick reference.

30 bl izdkj dkexkj i{k }kjk izLrqr fd;s x;s IHkh izdkj ds ekSf[kd ,oa nLrkosth lk{;ks ds voyksdu ls ;g Li"V gks tkrk gS fd IHkh vkosnd dkexkjks us ,d iapkx o"kZ ds 12 ekg ds vUrZxr yxkrkj 240 fnuks ls vf/kd vof/k rd vius vius in ij nSfud etnwj ds :i esa dk;Z IEikfnr fd, gS ! ;n~;fi vkoaVu dk vHkko cryk dj muds osru dh IEiw.kZ jkf"k dk Hkqxrku mfpr le; ij ugh fd;k x;k gS !

31 ;g Li"V gks tkrk gS fd IHkh vkosnd dkexkjks ds dk;Z larks"kizn jgs gS vkSj

muds izHkkjh fpfdRlk inkf/kdkjh us eq[; fpfdRlk inkf/kdkjh lg vISfud "kY; fpfdRld dks mudh lsok fu;fer djus gsrq fyf[kr vuq"alk Hkh dh Fkh fdUrq vdkj.k voS/k ax ls IHkh vkosnd dkexkjks dks eq[; fpfdRlk inkf/kdkjh lg vISfud "kY; fpfdRld }kjk lsok ls gVk fn;k x;k! ;g Hkh Li"V gS fd IHkh vkosnd dkexkjks dks lsok ls gVkrs le; vkS|ksfxd fookn vf/kfu;e 1947 dh /kkjk 25 ,Q ds vKkikad izko/kku dk vuqiky izcU/ku }kjk ugh fd;k x;k D;ksfd fdlh Hkh vkosnd dkexkj dks u rks ,d ekg dh lwpuk nh x;h vkSj u rks lwpuk ds cnys ,d ekg dk osru iznku fd;k x;k A vkosnd dkexkj dks buds osru dh jkf"k Hkh ugh nh x;h vkSj u lsok ls gVk;s tkus dk dksbZ izfrdj jkf"k iznku dh x;h ! vr% izcU/ku }kjk vkosnd dkexkjks dks euekus ax ls lsok ls gVk;k tkuk iw.kZ :i ls voS/k gS A

(Emphasis added)

12. Section-25F of the Act provides the conditions precedent to retrenchment of workmen. The same is reproduced hereinbelow for the facility of quick reference:

25F. 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 for such authority as may be specified by the appropriate Government by notification in the Official Gazette.

13. It is evident that a workman in continuous service for not less than one year under an employer shall not be retrenched unless he has been given one month's notice in writing indicating the reasons for retrenchment or has been paid in lieu of the notice period. He shall also be given compensation as per the formula prescribed therein and notice thereof has been served on the appropriate Government.

14. Section-2 of the Act provides the definitions. Section 2 (oo) defines "retrenchment", and Clause (bb) was inserted therein by Act 49 of 1984 with effect from 18.8.1984. Section 2(oo) of the Act is reproduced hereinbelow for the facility of quick reference:

2(oo)- "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 therein; or

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

15. Clause (bb) has been the subject-matter of various judgments. One of the earliest judgment was handed down by the Karnataka High Court in Shankariah v. K.S.R.T.C. (supra), wherein it was held that a Badli worker who is employed on a day-to-day basis in any vacancy caused by the absence of any employee and who is paid for the number of days he works as such, either daily or once in a month, was held to be covered by Clause (bb) of the Act. The Karnataka High Court held as follows:

...In my opinion the contention is untenable for the order of termination does amount to retrenchment within the meaning of that expression as defined u/s 2(oo) of the Industrial Disputes Act, in view of the introduction of Sub-clause (bb) into the said clause.

In view of Sub-clause (bb) which was introduced into the Act by Act 49/84 which came into force from 19th August, 1984, the termination of services of a workman in terms of the stipulation contained in the order of appointment does not amount to retrenchment.

The view taken in law supports the contention of the respondents.

16. Then came to the judgment of a learned Single Judge of this Court in Krishna Murari Prasad and Anr. v. The Allahabad Bank (supra), which entirely supports the respondents' case. It has been held that a casual worker working on daily wages is covered by Clause (bb) and, therefore, the provisions of Section-25F are not attracted.

17. The judgment of the Supreme Court in Allahabad bank v. Prem Singh (supra) finally concludes the matter. Paragraphs 9 and 10 of the judgment are reproduced hereinbelow for the facility of quick reference:

9. This is not a case where by passing any order the existing services of a workman were terminated. The respondent was given employment for one day at a time with the issuance of successive letters. The relationship between the parties being contractual, the term of the contract was that the services stood terminated at the end of the day. The Tribunal has not given any reason whatsoever as to what was the obligation on the appellant to employ the respondent. The status of the respondent was, at best, that of a daily wager. By virtue of his letters of employment he ceased to be employed at the end of each

day. His day's service stood automatically terminated. This being so the decision of the Tribunal in holding that the respondent shall be deemed to have continued in service from 16.6.1977 and would also be entitled to usual pay and allowances is clearly untenable. The respondent could not insist on his being continued to be employed and the appellant was under no legal obligation to employ him.

10. For the aforesaid reasons the award of the tribunal dated 29.5.1980 is set aside as the respondent is neither entitled to demand employment nor is he entitled to any other relief. The appeal is accordingly allowed. There will, however, be no order as to costs.

18. In view of the authoritative pronouncement of the Supreme Court, as well as the judgments of the High Courts, there is now no doubt that a casual worker on a daily-wage basis is covered by Clause (bb) of Section-2(oo) of the Act and termination of employment of such a person does not attract the provisions of Section 25F of the Act. In other words, termination of employment of a daily-wage employee cannot give rise to an industrial dispute, an employer terminating the employment of daily-wager is not required to follow the provisions of Section 25F of the Act and is, therefore, not required to serve notice, pay compensation etc. Indeed such a person is not within the sweep of the Act. Reference Case No. 8 of 1994 was not maintainable and, in view of the findings recorded by the learned Labour Court, it was not open to him to grant any relief to the workmen.

19. The next question which arises for consideration is whether or not, in the facts and circumstances of the case, it is open to this Court, or would it be a sound exercise of jurisdiction, to set aside or ignore the award. I am mindful of the position that none of the parties filed appeal, if available, or a writ petition in this Court. Is the Court in exercise of its powers under Articles 226 and 227 of the Constitution powerless to deal with such a situation and allow a patent illegality in the teeth of statutory provisions to be perpetuated.

20. The Supreme Court held in Hari Vishnu Kamath Vs. Syed Ahmad Ishaque and Others, , that Article 226 confers on High Courts power to issue appropriate writs to any person or authority within their territorial jurisdiction in terms absolute and unqualified. Election Tribunals functioning within the territorial jurisdiction of the High Courts fall within the sweep of that power. If the High Courts are to recognise or admit any limitation on this power, that must be founded on some provision in the Constitution itself.

21. Reference may also be made to the judgment of the Supreme Court in Nagendra Nath Bora and Another Vs. The Commissioner of Hills Division and Appeals, Assam and Others, of which is reproduced hereinbelow for the facility of quick reference:

30. A Constitution Bench of this Court examined the scope of Article 227 of the Constitution in the case of Waryam Singh and Another Vs. Amarnath and Another, . This court, in the course of its judgment, made the following

observations at p. 571 (of SCR); (at p. 217 of AIR):

"This power of superintendence conferred by Article 227 is, as pointed out by Harries, C.J., in *Dalmia Jain Airways Ltd. Vs. Sukumar Mukherjee*, , to be exercised most sparingly and only in appropriate cases in order to keep the Subordinate Courts within the bounds of their authority and not for correcting mere errors."

It is, thus, clear that the powers of judicial interference under Article 227 of the Constitution with orders of judicial or quasi-judicial nature, are not greater than the powers under Article 226 of the Constitution. Under Article 226, the power of interference may extend to quashing an impugned order on the ground of a mistake apparent on the face of the record. But under Article 227 of the Constitution, the power of interference is limited to seeing that the tribunal functions within the limits of its authority.

22. The judgment of the Supreme Court in *Nagendra Nath Bora and Anr. v. Commissioner of Hills Division and Appeal, Assam* (supra) was approved by the Supreme Court in its judgment reported in *Shri Ambica Mills Co. Ltd. Vs. S.B. Bhatt and Another*, of which is to the same effect.

23. Reference may also be made to the authoritative pronouncement of nine Judges' Bench of the Supreme Court in *Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others*, , the relevant portion of paragraph 108 (x) of which is reproduced hereinbelow for the facility of quick reference:

...So far as the jurisdiction of the High Courts under Articles 226 of the Constitution- or of this Court under Article 32- is concerned, it remains unaffected by the provisions of the Act. Even so, the Court would, while exercising the jurisdiction under the said articles, have due regard to the legislative intent manifested by the provisions of the Act. The writ petition would naturally be considered and disposed of in the light of and in accordance with the provisions of Section 11-B. This is for the reason that the power under Article 226 has to be exercised to effectuate the regime of law and not for abrogating it. Even while acting in exercise of the said constitutional power, the High Court cannot ignore the law nor can it override it. The power under Article 226 is conceived to serve the ends of law and not to transgress them.

24. The Supreme Court held in its judgment in *Municipal Board, Saharanpur Vs. Imperial Tobacco of India Ltd. and Another Etc.*, , that the High Court under Articles 226 and 227 of the Constitution of India cannot act as a court of appeal and only patent errors of law as found from the orders of the authorities below could be corrected in exercise of its jurisdiction. On the facts of that case, the jurisdiction of High Court was squarely attracted. The appellate authority had based its decision on the first part of the relevant provision ignoring the second part which applied to the case. The Supreme Court held that this resulted in glaring error of law with which the High Court was justified in interfering in exercise of its jurisdiction under Articles 226 and 227. I am mindful of the

position that the order of the appellate authority was impugned before the High Court which is not the case here. However, the width of the jurisdiction of the High Court was considered and affirmed in the aforesaid terms.

25. It is thus evident on a bare perusal of the authoritative pronouncements of the Supreme Court that the duties, functions, and powers of the High Court under Articles 226 and 227 of the Constitution is of the widest amplitude and is meant to correct errors of law. The power of interference may extend to quashing of mistakes apparent on the face of the record and also to ensure that the tribunal functions within the limits of its powers. An order of an authority or a tribunal can always be corrected if it has exceeded its jurisdiction or has acted in ignorance or violation of the statutory provisions. The High Court would be justified in interfering if wrong provision of law has been applied or that an appropriate provision has been overlooked. The Court has to effectuate the legislative intent manifested in the provisions of the Act. The power has to be exercised to effectuate the regime of law and not for abrogating it. The High Court cannot ignore the law nor can it override it and the Constitutional provisions are conceived to serve the ends of law.

26. Learned Counsel for the petitioner has contended that the Award of the Labour Court has attained finality and cannot thereafter be modified in a collateral proceeding. The contention merits serious consideration. In view of the cases of the workmen and in view of the clear finding recorded by the learned Labour Court to the effect that they were daily-wagers, it was incumbent on the Labour Court to examine the provisions of Section 2(oo) and then, if necessary, apply the law of retrenchment. He has not at all noticed the same and straightway proceeded to apply the provisions of Section 25F of this Act. The Award is manifestly after ignoring the provisions of Section 2(oo) (bb) of the Act and is, therefore, absolutely illegal, void abinitio and fit to be ignored. Any subsequent action in implementation of the Award is absolutely illegal and it is not possible for this Court to countenance the situation and allow a patent illegality to be perpetuated.

27. Three courses are, therefore, open to this Court in the alternative. This Court should either ignore the illegality, or apply the correct law on the findings of facts recorded by the learned Labour Court, or quash the same and remit it back to the learned Labour Court. Learned Counsel for the petitioners has submitted that it is not open to this Court to substitute the order of the Labour Court by an order of its own on merits. He submitted that this Court has undoubtedly powers to set aside the award and remit the matter back to the learned labour court for a fresh decision in accordance with law. He relies on paragraph No. 4 of the judgment of the Supreme Court in *Jitendra Singh Rathor v. Shri Baidyanath Ayurved Bhawan Ltd. And Anr.* (supra).

28. It appears to me that the facts and circumstances of that case were quite different, and the decision was rendered in the background of Section-11-A of the Act. The same deals with the nature and extent of relief to be granted by the

tribunal which is a statutory power exclusively vested in it. The facts and circumstances of the present case stand on a different footing. Here is a case where the Award was passed after completely ignoring the law, which renders it grossly illegal and void abinitio. The law governing the present case can most conveniently be applied on the basis of the facts found by the Labour Court, and does not need fresh evidence or reappraisal of evidence. It is a protracted matter and has been moving in and out of Court for fifteen years. I have also been reminded of the following statement in paragraph 17 (b) of the instant memorandum of appeal:

17. That in the said case, the respondents made some deliberate false statements on oath.

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(b). All the state concerned officials as well as the Labour Court acted in collusion with the petitioners/appellants.

29. There is another aspect of the matter. The learned writ court noticed the aforesaid illegality in the Award and held that "... It is true that the award of the Labour Court has not been challenged by the respondents. There is, however, a fundamental error in the order of the Labour Court which is difficult to ignore". He, therefore, proceeded to examine the provisions of Section 2(oo) (bb), and relying on the judgment of this Court in Krishna Murari Prasad and Anr. v. the Allahabad Bank (supra), proceeded to hold that "...The petitioners admittedly being daily wages employees prior to termination of their employment in 1991 could not therefore complain of any "retrenchment" within the meaning of Section 2(oo) of the Act and being so, provisions of Section 25F were clearly not applicable." He also found fault with that part of the Award whereby regularisation has been ordered for and held that the consequence of setting aside an order cannot confer on the person a status which was not enjoyed by the person at the time the impugned order had been passed. He, however, felt fettered by the order of this Court in C.W.J.C. No. 9981 of 1996, being an order of a coordinate Bench. The learned writ court, therefore, directed reinstatement of the petitioners on daily-wage basis. This Court sitting in Division Bench is not faced with any difficulty of the nature felt by the learned writ court.

30. It is stated as follows in Halsbury's Laws of England, Vol. I, 4th Edition, Para 27, page 30:

27. Validity: If an act or decision, or an order or other instrument, is invalid¹, it should, in principle, be null & void for all purposes; and it has been said that there are no degrees of nullity². Such an act can therefore be successfully impeached in collateral proceedings³, and no legally recognised rights founded on the assumption of its validity should accrue to any person even before the act is declared to be invalid or set aside in a Court of law⁴. A merely voidable act, on the other hand, should be regarded as valid until authoritatively revoked, or set aside on appeal or otherwise. In practice the legal distinction between void and

voidable acts is blurred, partly through inconsistencies in the use of terminology⁵, partly through differences in the contexts in which the terms are used⁶, and partly because of special characteristics of judicial remedies sought to impugn void or voidable acts⁷.

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31. On the strength of the judgment in *Mayes v. Mayes* (1971) 2 All.E.R. 397 : (1971)1 WLR 679 , it is further stated that the invalidity of a void act cannot be cured by waiver or acquiescence.

32. In the result, we declare the award of the learned Labour Court, Chapra, passed in Reference Case No. 8 of 1994, to be illegal and void abinitio. The petitioners were daily-wage employees, are excepted by Clause (bb) of Section 2(oo) of the Act, cannot raise the industrial dispute, and are not entitled to the benefit of Section 25F of the Act. The subsequent action of the respondent authorities in reinstating the petitioners by order dated 30.12.1995, as well as the order of this Court of 27.6.1997, in C.W.J.C. No. 9981 of 1996, and the order dated 2.11.1999, passed in C.W.J.C. No. 10265 of 1998, become non-est in law. The appeal is accordingly disposed of.