

(2016) 10 OHC CK 0014
In the Orissa High Court
Case No : O.J.C. No. 6496 of 1994

Secy., Panposh Co-operative

APPELLANT

Vs

Khetrabasi Tripathy

RESPONDENT

Date of Decision : 17-10-2016

Acts Referred:

Industrial Disputes Act, 1947 — Section 25F

Citation : (2017) 152 FLR 387 : (2017) LabLR 438

Hon'ble Judges : Kumari. Sanju Panda and Shri. Sujit Narayan Prasad, JJ.

Bench : Division Bench

Advocate : Mr. Banoj Ku. Pattnaik, Advocate, for the Petitioner; Addl., Government Advocate, for the Opposite Partie Nos. 2 & 3

Final Decision : Disposed Off

Judgement

S.N. Prasad, J.—The award dated 21st October, 1993 passed in I.D. Case No. 70 of 1991 is under challenge whereby and where under, the award has been passed holding the termination of the workman illegal and unjustified with a direction to reinstate the workman in his former post i.e., Night Watchman forthwith and to pay full back wages with continuity of service and seniority.

2. Brief facts of the case of the workman is that the workman had been engaged as contingent Night Watchman under the management for a period of 89 days on daily wages of Rs.15/- and accordingly joined on 20.8.1986 and continued till 3.6.1988. The management issued separate appointment order for the above periods in different dates and ultimately on 23.7.1987, he was appointed on regular basis as night watchman in the scale of pay of Rs.206/- to Rs.280/- with other allowances. He was served with notice of termination dated 30.4.1988 to be terminated w.e.f. 1.5.1988 without assigning any reason and accordingly the workman was relieved from duty w.e.f. 31.5.1988. He was handed over his charges on 3.6.1988. He has not been paid retrenchment compensation as per Section 25-F of the Industrial Disputes Act, 1947 and also he has not been paid with back wages from 1.6.1988 to 3.6.1988, his security deposit of Rs.100/-,

hence he has prayed for reinstatement with full back wages and service benefits, for that a dispute has been raised before the adjudicating authority.

3. While on the other hand, case of the management is that the second party-workman was appointed as contingent night watchman for 89 days vide order No.79 dated 20.8.1986 as per the order of the President of the bank. The appointment was renewed vide order dated 26.11.1988, 11.4.1987 and 10.7.1987 and then the President of the Bank appointed him without following due procedure. The Registrar Co-operative Societies, Orissa vide order No.5278 dated 26.2.1988 advised the Bank to recruit with prior approval and to terminate all temporary/contingent appointment and in view of such instruction, the management served one month notice to the workman and on completion of the notice period, the workman was offered with retrenchment compensation but however he refused to receive the same.

The workman had not also discharged duty from 1.6.1988 to 3.6.1988, as such he was not entitled to get wages for the said period.

4. After the dispute having been raised by the workman and on contest an award has been passed holding the termination of the workman as illegal and unjustified with direction upon the management to reinstate him on the post along with back wages with continuity of service and seniority which is under challenge in this writ petition.

5. We have gone through the finding given by the Labour Court and after going through the same, we find that two following issues have been framed:-

i. Whether the action of the management in terminating the services of the workman in their order No.1142 dated 30.04.1988 is legal and/or justified?

II. If not to what relief the workman is entitled?

While answering the issue no.1, which pertains to action of the management in terminating the service of the workman is legal or justified?

6. The Tribunal after going through the ocular as well as documentary evidence has given finding while answering the issue in favour of the workman. We find that the Labour Court has taken into consideration the Ext.5 which is the order of regularization of service w.e.f. 23.7.1987 in the scale of pay of Rs.206/- to Rs.280/- with all other allowances as applicable to the employees. The Ext.1 is the letter issued by the Registrar, Co-operative Societies on 26.2.1988, in pursuance of the same, service of the workman was terminated w.e.f. 1.6.1988. Ext.G is the termination order which suggests the fact that the total service period of the workman from 20.8.1986 to 11.5.1988 comes to one year and 10 months continuously.

7. We also find that the management witness no.1 has stated that the retrenchment compensation has not been received by the workman but refusal to receive compensation has nowhere been explained by the management rather

the management has given a letter to the workman under Certificate of Posting to receive compensation but no document has been produced by the management as to why the letter has not been dispatched by registered post with A.D. which can only be said to be a valid source of communication.

8. It has also come on record that the workman has handed over the charge on 3.6.1988 which has been taken over, at that time also the back wages and the amount of compensation should have been paid by the management but no such steps has been taken and subsequently plea has been taken that the amount of compensation has been refused to be accepted by the workman, hence the Labour Court had discarded this evidence of the management and thereafter came to conscious finding with the observation of violation of Section 25F of the I.D. Act, 1947 which contains a condition of retrenchment which is sine qua non for the purpose of retrenching an employee.

9. After considering the finding given by the Labour Court in this regard which according to us based upon cogent evidence, hence we decline to interfere with the same on the principle laid down by the Hon''ble Supreme Court by its Full Bench in the cases of Syed Yakoob v. K. S. Radhakrishnan and others reported in AIR 1964 SC 477, Swaran Singh and another v. State of Punjab and others reported in (1976) 2 SCC 868, Heinz India Private Limited and another v. State of Uttar Pradesh and others reported in (2012) 5 SCC 443, M/s. Pepsico India Holding Pvt. Ltd. v. Krishna Kant Pandey, (2015) 4 SCC 270.

From perusal of the propositions laid down by the Hon''ble Apex Court as stated herein above, it is evident that the writ court sitting under Article 226 of the Constitution of India can interfere with the fact finding if there is perversity in the finding or error apparent on the face of record but no such ground has been shown to have interfered in this case, hence following the ratio laid down by the Hon''ble Apex Court, we have declined to interfere with the award.

10. So far as the second issue which pertains to relief part to which the workman is entitled, the Labour Court has passed the order of reinstatement with back wages and continuity of service with seniority.

11. Learned senior counsel representing the petitioner-management, Mr. B.K. Pattnaik has submitted that even if there is violation of Section 25F of the I.D. Act, 1947 the order of reinstatement ought not to have been passed by the Labour Court instead the order of compensation ought to have been passed and also there should not have been direction to make payment of full back wages, since no evidence has been led by the workman as to whether he was working during the relevant period elsewhere or not.

12. We have appreciated the arguments advanced on behalf of learned senior counsel for the petitioner-management in this regard but he has failed to apprise this Court as to whether the order passed by the Labour Court with respect to reinstatement has been implemented or not since this Court vide order dated 21.09.1998 has passed an interim order staying the direction for payment of

back wages until further orders without passing any interim order with respect to reinstatement part.

13. Hence, taking into consideration the provision of Section 17 of the I.D. Act, which stipulates that after publication of the award in the Gazette Notification it is to be implemented within one month from the date of notification but no such instruction has been made available to us in this regard, even otherwise also the contention raised by the learned senior counsel appearing for the management that the order of reinstatement could not have been passed in routine manner, there is no dispute about the fact that if there is exceptional situation in which case the order of reinstatement can be passed in case of violation of provision of Section 25-F of the I.D. Act, 1947 as has been dealt with by the Hon'ble Apex Court in the case of Hari Nandan Prasad v. Employer I/R to Management of F.C.I., reported in AIR 2014 SC 1848 has been pleased to hold at paragraph 17 as follows:-

"17.xxxxxxx

Taking note of the judgments referred to in the aforesaid paragraphs and also few more cases in other portion of the said judgment, the legal position was summed up in the following manner:

"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 practise 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 25-F 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.

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 under Section 25-F 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. 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.

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 practise 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".

In another judgment rendered in the case of BSNL v. Bhurumal reported in AIR 2014 SC 1188 needs to be made to the paragraph-25, which is being reproduced herein below:-

"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 practise 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."

14. From perusal of the observation made by the Hon"ble Supreme Court and the guideline given therein, it is evident that in this situation the order of reinstatement can be passed and we have examined this case in that context and find that the petitioner has taken into regular establishment by virtue of an order of competent authority vide Ext.5 in a scale of pay of Rs.206/- to Rs.280/-, however according to the management without following the procedure laid down under Article 16 of the Constitution of India. But even assuming that it can only be said to be irregular appointment and not illegal as per the clarification made regarding illegal and irregular appointment by the constitution Bench of the Hon"ble Apex Court in the case of in the State of Karnataka v. Umadevi(3) reported in (2006) 4 SCC 1 and as such we have no hesitation to hold that the case of the workman is coming under the exception as per the decision laid down by the Hon"ble Apex Court in the case of Hari Nandan (supra).

15. Hence, we decline to interfere the part of order by which direction of reinstatement was passed but so far as the direction to pay full back wages is concerned, we find that no evidence have been recorded in this regard as to

whether the workman during the relevant period had gainfully employed or not and as such for that limited purpose the matter needs to be referred before the Labour Court for fresh adjudication of that part.

16. Accordingly, the matter is remitted before the Labour Court, Sambalpur to conduct an enquiry as to whether the workman was gainfully employed during the relevant period or not.

17. It is directed that the Labour Court will adjudicate the same after conducting proper enquiry without unnecessary delay. It goes without saying that the parties shall be heard.

18. With these observations and direction, the writ petition is disposed of.