

(2017) 04 AHC CK 0124
In the Allahabad High Court
Case No : 774 of 2016

Senior Post Master And Another

APPELLANT

Vs

Sri Ganga Ram And Another

RESPONDENT

Date of Decision : 11-04-2017

Acts Referred:

Industrial Disputes Act, 1947, Section 25F, Section 25G, Section 2(OO), Section 2(j), Section 25H, Section 2(BB) - Conditions precedent to retrenchment of workmen - Procedure for retrenchment - Definitions - Definitions - Re-employment of retrenched workmen - Definitions

Citation : (2017) 04 AHC CK 0124

Hon'ble Judges : Saumitra Dayal Singh

Bench : Single Bench

Advocate : Sanjay Kumar Om, Ajay Kumar Singh

Judgement

1. This writ petition has been filed by the employer seeking a writ of certiorari to quash the award of the Industrial Tribunal-cum-Labour Court, Kanpur dated 05.02.2015, in Industrial Dispute No. 69 of 2010 between Ganga Ram and Senior Superintendent of Post Offices, Agra.

2. By that award the Industrial Tribunal has answered the reference made to it, in favour of the workman declaring the termination of his services with effect from 18.09.2008, neither legal nor justified. Further, the Industrial Tribunal has granted the relief of reinstatement with full back-wages and all consequential benefits.

3. The proceedings before the Industrial Tribunal had arisen upon the reference made by the Central Government vide order dated 30.03.2010, to the following effect: "Whether the action of the management of Sr. Post Master, Agra in terminating the services of their workman Sri Ganga Ram w.e.f. 18.9.2008 is legal and justified? If not, what relief the workman is entitled to?"

4. Upon such reference being made, the parties appeared and filed their written statements and also led evidence, both oral as also documentary in support of their respective claims. The facts as they emerge from the record before the Industrial Tribunal are that the workman Ganga Ram claimed to have been engaged on daily wage basis with effect from 05.05.2007 as a Tempo/Mail motor driver. He relied on the alleged appointment letter dated 04.05.2007. Further, he claimed to have worked till 17.09.2008 and that his services were illegally terminated on 18.09.2008 by an oral order without issuing any show cause notice etc. The workman further claimed to have worked for two hundred forty days during twelve calendar months preceding the date of his alleged illegal termination. Accordingly, he alleged violation of Section 25 F of the Industrial Disputes Act, 1947 (hereinafter referred to as the "Act"). The workman further claimed violation of Section 25 H and 25 G of the Act and according to him the rule of first come last go had been violated i.e. he claimed persons junior to him had been retained in service while his services had been terminated.

5. The employer in its written statement raised a preliminary objection of the establishment of Post Office not being an industry within the meaning of Section 2 (j) of the Act. Further, the employer disputed the claim of the workman having worked for two hundred forty days in twelve calendar months immediately preceding the alleged termination of the work. The employer further submitted that in view of Section 2(oo) and 2 (bb) of the Act the case of the workman was not of retrenchment and that the employer had not violated the provisions of Section 25 H and 25 G of the Act. The employer also submitted that the workman had never undergone any selection process and had in fact, never been appointed on any post and as such the workman had neither been terminated nor disengaged on 18.09.2008. It was further stated that the workman was engaged highly intermittently on casual nature of work on daily wage basis as "Safai Karmi" and some times, upon exigency of work, he had been engaged as Tempo/mail motor driver. For that purpose the employer also relied on an application made by the workman dated 13.06.2008 describing himself as a "Safai Karmi". It also denied engagement of fresh hands.

6. In support of their case, the parties led evidence. The employer relied on an application dated 13.06.2008 made by four persons, claiming payment of revised wages. In that application the respondent workman had described himself as a "Safai Karmi". The document was relied by the employer to prove that the employee was never appointed as a Tempo/mail motor driver. The employer further relied on another document dated 14.05.2007 by which it was alleged that the employee was asked to perform the work of a Tempo/mail motor driver on daily wage basis in view of work exigency having arisen as one Bhagwan Das who was earlier performing that duty was found to be lacking a valid driving licence. On the other hand, the workman led evidence to establish that he had worked for two hundred forty days in the twelve calendar months immediately preceding his alleged termination. This evidence was both oral as also documentary.

7. It is in this background that the Industrial Tribunal has made its award directing the reinstatement of the workman Ganga Ram with full back wages with all consequential benefits.

8. In this writ petition, affidavits have been exchanged between the parties. However, upon the matter being called out, both in the first call and in the revised list, none appeared for the respondent workman Ganga Ram, though his counter affidavit is on record having been filed by Sri Ajay Kumar Singh, Advocate. Thus, the matter was taken up for final hearing.

9. Sri Sanjay Kumar Om, learned counsel for the petitioner has submitted that the reference order itself was bad inasmuch the activity of running a Post Office is not an industry, it being a department of Government of India which performs sovereign function. In support of his contention, learned counsel for the petitioner has relied on a judgment of the Supreme Court in the case of Sub-Divisional Inspector of Post, Vaikam and others Vs. Theyyam Joseph and others reported in (1996) 8 SCC 489 (para-6).

10. Next, learned counsel for the petitioner submitted that the respondent workman was not employed on any permanent post and that he had not faced regular selection process. According to him, the post of the driver is a post of permanent nature and any appointment on that post could have been made only by following the procedure prescribed under the recruitment Rule, 2015 that govern the same which procedure was never followed in this case. The respondent workman had only worked on daily wage basis. As such there never could arise a claim of retrenchment.

11. Learned counsel for the petitioner has further submitted that the respondent workman had not worked for two hundred forty days in twelve calendar months immediately preceding the alleged termination and that the said workman had not discharged the burden cast on him in law, to establish the fact of having worked for two hundred days as above. It has thus been contended the finding of the Tribunal on this point, in favour of the workman is perverse.

12. Lastly, learned counsel for the petitioner has submitted that the respondent workman had worked on daily wage basis only. Even if it is assumed he had worked for two hundred forty days in twelve calendar months immediately preceding his alleged disengagement on the post of driver, even then, in view of the fact that the respondent had not been appointed against the sanctioned post and had not been selected by following due selection process, he could not claim the relief of reinstatement or of violation of Section 25 F of the Act. He could at best claim compensation. In support of his submission, he placed reliance on a judgment of the Supreme Court in the case of Jagbir Singh Vs. Haryana State Agriculture Marketing Board and another reported in (2009) 15 SCC 327 (para 14).

13. While entertaining the instant writ petition, this Court had passed the following interim order:- "As an interim measure without prejudice to the right

and contention of the parties, subject to reinstatement of the respondent no. 1 within four weeks, in the capacity in which he was initially engaged and payment of the wage, according to the wage, as on date, the remaining part of the award shall remain stayed."

14. Learned counsel for the petitioner states that in compliance of this order, the respondent workman is continuing to work as a daily wage "Safai Karmi".

15. While it is true that the Supreme Court in the case of Theyyam Joseph (supra) as held as below:- "Having regard to the contentions, the question arises whether the appellant is an industry India as a sovereign, socialist, secular, democratic republic has to establish an egalitarian social order under rule of law. The welfare measures partake the character of sovereign functions and the traditional duty to maintain law and order is no longer the concept of the State. Directive Principles of State Policy enjoin on the State diverse duties under Part IV of the Constitution and the performance of the duties are constitutional functions. One of the duties of the State is to provide telecommunication service to the general public and an amenity, and so is an essential part of the sovereign functions of the State as a welfare State. It is not, therefore, an industry."

16. However, subsequently a three-Judge Bench of the Supreme Court in the matter of General Manager, Telecom Vs. A. Srinivasa Rao and others reported in (1997) 8 SCC 767 had, upon reference made by a two-Judge Bench of that Court, specifically over ruled the judgment in Theyyam Joseph case (supra). The Supreme Court had after considering its constitution Bench judgment in the case of Bangalore Water Supply and Sewerage Board Vs. A. Rajappa reported in (1978) 2 SCC 213 held as below :- "6. It is rightly not disputed by the learned counsel for the appellant that according to this test the Telecommunication Department of the Union of India is an "industry" within that definition because it is engaged in a commercial activity and the Department is not engaged in discharging any of the sovereign functions of the State.

7. A two-Judge Bench of this Court in Theyyam Joseph case held that the functions of the Postal Department are part of the sovereign functions of the State and it is, therefore, not an "industry" within the definition of Section 2(j) of the Industrial Disputes Act, 1947. Incidentally, this decision was rendered without any reference to the seven- Judge Bench decision in Bangalore Water Supply. In a later two-Judge Bench decision in Bombay Telephone Canteen Employees" Assn. Case this decision was followed for taking the view that the Telephone Nigam is not an "industry". Reliance was placed in Theyyam Joseph case for that view. However, in Bombay Telephone Canteen Employees" Assn. Case (i.e. the latter decision), we find a reference to the Bangalore Water Supply case. After referring to the decision in Bangalore Water Supply it was observed that if the doctrine enunciated in Bangalore Water Supply is strictly applied, the consequence is "catastrophic". With respect, we are unable to subscribe to this view for the obvious reason that it is in direct conflict with the seven- Judge Bench decision in Bangalore Water Supply case by which we are bound. It is

needless to add that it is not permissible for us, or for that matter any Bench of lesser strength, to take a view contrary to that in Bangalore Water Supply or to bypass that decision so long as it holds the field. Moreover, that decision was rendered long back ? nearly two decades earlier and we find no reason to think otherwise. Judicial discipline requires us to follow the decision in Bangalore Water Supply case. We must, therefore, add that the decisions in Theyyam Joseph and Bombay Telephone Canteen Employees" Assn. cannot be treated as laying down the correct law. This being the only point for decision in this appeal, it must fail."

17. While it is true that subsequently in the case of State of U.P. Vs. Jai Bir Singh reported in (2005) 5 SCC 1 another five-Judge Constitution Bench of the Supreme Court has questioned the correctness of the judgment in the case of Bangalore Water Supply and Sewerage Board (supra) by referring the matter to a still larger Bench, yet, in view of that reference being pending, the test laid down in the Bangalore Water Supply and Sewerage Board (supra) and the ratio of General Manager Telecom Vs. A. Srinivasa Rao (Supra) hold the field.

18. Accordingly, the preliminary objection and the first argument raised by the learned counsel for the petitioner has no force and is accordingly rejected. Department of Post and Telegraph, Government of India, in respect of its authority of running a Post Office, is therefore, an "industry" within the meaning of that term under Section 2(j) of the Act. The reference of the dispute to the Industrial Tribunal cum Labour Court (in respect of claim of retrenchment made by the respondent workman) against the Post Office was therefore competent and it did not suffer from any infirmity.

19. The second submission advanced by the learned counsel for the petitioner as regards the engagement of the respondent workman as a "Safai Karmi" and also as a Tempo/mail motor driver on casual/daily wage basis merits serious consideration.

20. It was the stated case of the employer that the respondent workman had been engaged intermittently on casual basis as a "Safai Karmi". This status was admitted to the said workman, having described himself as a "Safai Karmi" in his application made as late as on 13.06.2008 for payment of revised wages. Also, according to the respondent's case he had been appointed as a Tempo/mail motor driver vide letter dated 04/14.05.2007. The typed copy of that letter has been extensively relied upon by the Tribunal. A bare perusal of that letter clearly indicates that the respondent Ganga Ram had adulterated his status on that date as a "Dainik Vetan Bhogi Driver" i.e. driver on daily wage basis, in view of the fact that the person earlier performing to that duty one Bhagwan Das did not have a valid driving licence.

21. The Tribunal took note of the above facts and thereafter reasoned that it is admitted to the employer that the respondent workman had been performing the duty of a driver. The Tribunal has further found that the vehicle driven by the respondent workman and that work is also available. The Tribunal has further

reasoned that the respondent workman had regularly worked as a driver and had also completed two hundred forty days in preceding twelve calendar months from the date of his alleged termination. On this reasoning the Tribunal has concluded that there was a violation of the provision of Section 25 F of the Act as neither any notice nor wages in lieu of notice nor retrenchment compensation was offered to the respondent workman. The Tribunal has thereafter concluded - in such case the provision of Section 25 F of the Act would automatically come into play rendering the disengagement illegal. On the issue of the respondent workman having worked for two hundred forty days, the Tribunal has held that there was documentary evidence adduced by the workman as also oral evidence led by him which establish that he had worked for two hundred forty days in the twelve calendar months immediately preceding his alleged termination.

22. Taking up the last issue, first it is seen from the findings recorded by the Tribunal that the respondent workman had worked for two hundred forty days is based on the documentary evidence in the shape of paper no. 9/1 to 9/22 as also document no. 11/1 to 11/2. While, learned counsel for the petitioner has placed reliance on some of the payment vouchers annexed with the writ petition pertaining to certain some part period of twelve months relevant to the alleged termination, those do not appear to be the entire papers relied upon by the Tribunal. Also, there is no pleading to that effect in the writ petition. In fact, from the very numbering of the documents given by the Tribunal it appears that document no. 11/1 to 11/324 would be several pages.

23. Even otherwise, the respondent workman having adduced certain evidence to establish his claim of having worked for two hundred forty days, the onus had then shifted to the petitioner to disprove that case. Being the employer that too a department of the Government of India, it could easily have dis-proved the said case by adducing all payment vouchers for the disputed period and or such other evidence as may have existed. However, it did not do so.

24. Thus, the petitioner has failed to dislodge the finding of the Industrial Tribunal that the respondent workman had worked for two hundred forty days or more during the twelve calendar months immediately preceding the alleged termination as perverse. In fact, the said finding is based on appraisal of both documentary and oral evidence. No evidence having been shown to exist that may dis-prove or doubt the correctness of the finding of the Tribunal, the same is affirmed.

25. However, while the workman may have worked for two hundred forty days in the twelve calendar months immediately preceding his disengagement, it does not automatically lead to a conclusion that he was entitled to the relief of reinstatement. While, the Tribunal has taken note of the objection raised by the petitioner that the respondent workman was never substantively appointed as a driver and that he had never subjected himself to any selection process for appointment on that post, it has not returned any finding on that issue. On the other hand, the Tribunal has in respect of the document said to be the

appointment letter relied upon by the workman itself noted as below:- "At this place I have examined the document and find that it is specifically mentioned that one Bhagwan Das was engaged for delivery of daks but he was not having valid driving license there for he showed his inability to provide the service of the driver therefore workman Sri Ganga Ram was engaged as driver on daily rate basis to drive tempo and mail motor."

(emphasis supplied)

26. Merely because there was some certificate of the respondent having discharged the duty of a driver did not also, in any way, determine his status.

27. The Tribunal thus appears to have got swayed by the fact that the Ganga Ram had worked for two hundred forty days as a driver. There being no other evidence to suggest that the respondent workman had ever been appointed as a driver and in absence of any case of the respondent workman that he had been appointed on the post of driver after facing a regular selection process, it cannot be said that the respondent workman had ever been appointed as a driver on substantive vacancy.

28. In fact, the evidence on record clearly suggests to the contrary that he had been engaged on daily wage basis as a "Safai Karmi". Later, upon exigency of work having arisen he was engaged as a Tempo/mail motor driver again on daily wage basis only. This having been also found by the Tribunal, the finding of the Tribunal as to violation of Section 25 F of the Act is, therefore, wholly unsustainable. The respondent workman being a daily wage employee, upon his disengagement from work of a Tempo/Mail Motor Driver in that capacity/status, he could not have claimed termination or retrenchment. He continues to work as a daily wage "Safai Karmi".

29. The only issue that remains is of the relief the respondent workman would be entitled to his being a case of daily wager who had worked as a Tempo/mail motor driver on daily wage basis for a period of nearly one year and four months in an establishment that has regular work on that post.

30. The Supreme Court in the case of Jagbir Singh Vs. Haryana State Agriculture Marketing Board and another reported in (2009) 15 SCC 327 held as under "14.....It would be, thus, seen that by a catena of decisions in recent time, this Court has clearly laid down that an order of retrenchment passed in violation of Section 25-F although may be set aside but an award of reinstatement should not, however, be automatically passed. The award of reinstatement with full back wages in a case where the workman has completed 240 days of work in a year preceding the date of termination, particularly, daily wagers has not been found to be proper by this Court and instead compensation has been awarded. This Court has distinguished between a daily wager who does not hold a post and a permanent employee."

31. Also, the Supreme Court in the case of Assistant Engineer Rajasthan

Development Corporation and another Vs. Gitam Singh reported in (2013) 5 SCC 136 has held that exercise of judicial discretion by the High Court suffered from serious infirmity where the High Court upheld an award granting the relief of reinstatement to a daily wager who was found to have worked for more than two hundred forty days in the twelve calendar months immediately preceding his disengagement. Similar view has been reiterated by the Supreme Court in the case of Vice-Chancellor, Lucknow University, Lucknow Uttar Pradesh Vs. Akhilesh Kumar Khare and another reported in (2016) 1 SCC 521 wherein that Court also took note of the fact that the appointment in question had not been made on a sanctioned post and the workman in question had not been selected by following due selection procedure. In the case of Senior Superintendent Telegraph (Traffic), Bhopal Vs. Santosh Kumar Seal and others reported in (2010) 6 SCC 773, the Supreme Court again held that the relief by way of reinstatement with the back wages is not automatic even if the termination employee is found to be illegal. In each of these cases, the Supreme Court awarded compensation in lieu of reinstatement granted by the Tribunal.

32. In the present case the respondent workman was clearly a daily wager who had worked on daily wage basis as a "Safai Karmi". He had been assigned the work of a Tempo/mail motor driver again on daily wage basis. He had never been appointed on that post on substantive basis by following the due selection process. He worked as a driver for a brief period of less than one and a half year. Upon his disengagement as a driver, he has continued to perform his duty as a "Safai Karmi" in respect of which work there was never any dispute.

33. For the aforesaid reasons, the ends of justice would be met, if the writ petition is allowed with the directions to the petitioner to continue to take work from the respondent workman as a "Safai Karmi" without being prejudiced in any manner by the outcome of this writ petition and without prejudice to the workman's claim that may arise in future on account of such engagement and further, the petitioner pays to the said respondent workman a sum of rupees fifty thousand only by way of compensation for his disengagement from work as a driver with a further direction that the same be paid to him within a period of three months from today, failing which, the said amount will be paid together with interest at the rate of 9% per annum, payable for delay beyond the said period of three months.

34. Subject to the aforesaid, the writ petition is allowed and the award of the Industrial Tribunal is modified to that extent.