

(1998) 04 J&K CK 0014
In the Jammu And Kashmir High Court
Case No : S.W.P. No. 1624 of 1995

Sohanlal	Vs	APPELLANT
Union of India (UOI) and Others		RESPONDENT

Date of Decision : 30-04-1998

Acts Referred:

Industrial Disputes Act, 1947 — Section 25F

Citation : (2000) 1 LLJ 201

Hon'ble Judges : T.S. Doabia, J

Bench : Single Bench

Advocate : J.P. Singh, for the Respondent

Final Decision : Allowed

Judgement

T.S. Doabia, J.—Parties heard. Petition admitted. With the consent of the parties, it is taken up for final disposal.

2. An order terminating the service tenure of the petitioner came to be passed on the ground that the petitioner was absent and had abandoned his

duties with effect from October 17, 1990. It is this order which is the] subject-matter of challenge in the present petition. This order was passed on

August 22, 1991. Copy of this is Annexure-P-1. This reads as under:

Where as Shri Sohan Lal, Helper S/o Shri Jagan Nath Bhat previously resident of Tikker Kuwara Kashmir (J. and K.), an employee of Uri H.E.

Project redeployed to Chamera Transmission System, Chandigarh, has abandoned employment since October 17, 1990 (FN).

And whereas he has not resumed duty despite repeated notices, his name is hereby struck off from the rolls of Uri H.E. Project with effect from

October 17, 1990 (FN).

He may collect his dues from Uri H.E. Project after getting No dues Certificate from all concerned.

3; The farther fact is that the petitioner gave explanation for his absence. He submits that he was working at Hydro Electric Project, Uri. He was

transferred to Naptha Jakri Power Transmission Line. An order to this effect was passed on September 11, 1990. Copy of this is Annexure P-2.

The petitioner was further transferred to Chandigarh. An order to this effect was passed on September 18, 1990. The petitioner submitted his

joining report at Chandigarh. He later proceeded on leave on medical grounds. For this reliance is being placed on Annexure P- 4. The petitioner's

grievance is that in the meanwhile the respondent- authorities took a decision to terminate his services on the ground of absence. It is in these

circumstances the order of termination has been challenged.

4. The respondents have filed objections.

5. It is stated that under the Standing Orders if an employee remains absent for eight days then it is to be presumed that he has abandoned his

services. The respondent-authorities however admit that they did receive a letter dated September 18, 1990. This was authorised by the petitioner.

It is, however, submitted that the petitioner was advised to join service. As he did not report for duties at Hdyro Electric Project Uri his service

tenure was brought to an end. The order of termination is being supported on the following grounds: -

(i) That the petitioner had abandoned his job.

(ii) that he was absent without any reason.

(iii) That under the Standing Orders, if any employee remains absent for eight days then his services can be brought to an end.

6. I am of the opinion that the stand taken by the respondent- authorities cannot be sustained.

7. One way of looking at the matter is the manner in which the case has been projected by the petitioner in the writ petition. The other angle from

which the petitioner's case can be considered is vis-a-vis the rights which are available to the petitioner under the Industrial Disputes Act of 1947.

The respondent-Corporation is an industry under the Industrial Disputes'Act of 1947 (hereinafter referred to as the Act). This is not disputed.

8. What happens when a workman completes 240 days pf service in one calendar

year. This aspect of the matter be examined.

9. Under the Industrial Law it is well settled that a workman who completes more than 240 days of service in one calendar year is entitled to

reinstatement, if his services are brought to an end without complying with Section 25F of the Act. As to how this period is completed is totally

irrelevant. As a matter of fact where by arithmetical count a workman is able to demonstrate that he had completed this period the relief of

reinstatement has to be granted. It would be apt to notice the decision given by the Supreme Court of India in the case reported as Santosh Gupta

Vs. State Bank of Patiala, wherein the earlier view expressed in the The State Bank of India Vs. Shri N. Sundara Money, and Hindustan Steel

Ltd. Vs. The Presiding Officer, Labour Court, Orissa and Others, was approved.

The relevant observations are as under (Paras 11 and 12):

In State Bank of India v. N. Sundara Money, (supra). Bench of three Judges of this Court consisting of CHANDRACHUD, J. (as he then was)

KRISHNA IYER, J. and GUPTA, J., considered the question whether Section 25F of the Industrial Disputes Act was attracted to a case where

the order of appointment carried an automatic cessation of service, the period of employment working itself out by efflux of time and not by an act

of employer, KRISHNA IYER, J. who spoke for the Court observed:

Termination for any reason whatsoever are the key words. Whatever the reason, every termination spells retrenchment. So the sole question

is has the employee's service been terminated? Verbal apparel apart, the substance is decisive. 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 True, the section speaks of retrenchment by the employer and it is urged that some act of volition by the employer to bring about the

termination is essential to attract Section 25F and automatic extinguishment of service by efflux ion of time cannot be sufficient 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 pre-emptive provision to terminate is struck by the same voice as the post-appointment termination.

Dexterity of diction cannot defeat the articulated conscience of the provisions.

In *Hindustan Steel Ltd. v. Presiding Officer Labour Court, Orissa*, (supra), the question again arose whether termination of service by efflux of time was termination of service within the definition of retrenchment in Section 2(oo) of the Industrial Disputes Act. Both the earlier decisions of the Court in *Hariprasad Shivshankar Shukla v. A.D, Divikar* AIR 1957 SC 121 and *State Bank of India v. S. Sundara Money*, (supra) were considered. There was also a request that *N. Sundara Money's* case conflicted with the decision in *Hariprasad Shivshankar Shukla v. A.D.*

Divikar and therefore, required reconsideration. Bench of three Judges of this Court consisting of CHANDRACHUD J. (as he then was), GOSWAMI J. and GUPTA J. held that there was nothing in *Hariprasad Shivshankar Shukla v. A.D. Divikar* which was inconsistent with the decision in *N. Sundara Money's* case (supra). They held that the decision in *Hariprasad Shivshankar's* case (supra) was that the words 'for any reason whatsoever' used in the definition of retrenchment would not include a bona fide closure of the whole business because it would be against the entire scheme of the Act. The learned Judges then observed that on the facts before them to give full effect to the words 'for any reason whatsoever' would be consistent with the scope and purpose of Section 25 of the Industrial Disputes Act are not contrary to the scheme of the Act. In *Delhi Cloth and General Mills Ltd. Vs. Shambhu Nath Mukherji and Others*, GOSWAMI SHINGHAL and JASWANT SINGH, JJ held that striking off the name of a workman from the rolls by the management was termination of the service which was retrenchment within the meaning of Section 2(oo) of the Industrial Disputes Act.

9-A. The above view stands reiterated in later decisions in *Management of Karnataka State Road Transport Corporation, Bangalore Vs. M. Boraiah and Another*, ; *Punjab Land Development and Reclamation Corporation Ltd., Chandigarh Vs. Presiding Officer, Labour Court*,

Chandigarh and Others, Thus once an employee completes more than 240 days of service and there is failure to comply with the provisions of

Section 25F of the Act, then he is entitled to reinstatement and this relief can be granted even in a writ petition.

10. If above be the situation then the petitioner who had completed more than 240 days of service in one calendar year had some rights under the

Industrial Disputes Act.

11. In this regard it would again be pertinent to refer to another decision of the Supreme Court of India reported as Workmen of American

Express International Banking Corporation Vs. Management of American Express International Banking Corporation, wherein it has been

observed that the paid holidays and Sundays are also to be counted for determining as to whether a person has completed 240 days of service in a

calendar year. The relevant observations made are as under (para 5):

What is continuous service has been defined and explained in Section 25F of the Industrial Disputes Act. In the present case the provision which

is of relevance is Section 25B(2)(a)(ii) which to the extent that it concerns us, provides that a workman who is not in continuous service for a

period of one year if the workman during a period of twelve calendar months, preceding the date with reference to which the calculation is to be

made has actually worked under the employer for not less than 240 days. The expression which we are required to construe is actually worked

under the employer. This expression according to us, cannot mean those days only sickle or pen but must necessarily comprehend all those days

which he was in the employment of the employer and for which he had been paid wages either under express or implied contract of service or by

compulsion of statute Standing Order etc.

12. Before parting with this aspect of the matter, it would be apt to notice the decision on which reliance has been placed by Sh. J.P. Singh who is

appearing for the respondent-authorities. This decision is reported as Hindustan Paper Corporation Vs. Purnendu Chakrobarty and Others, . In

the above case the workman was employee of Hindustan Paper Corporation. He entered in the service as Fire Fighting Officer. He was appointed

as Assistant Manager (Security and Fire Fighting). On May 27, 1988, he applied for casual leave. The corporation refused to extend the leave. On

the next day a criminal case u/s 302/201 read with Section 34 Indian Penal Code came to be registered against him. He continued to apply for extension of leave. The Corporation refused to extend the leave. The Corporation called for his explanation also. Ultimately his services were brought to an end. The Supreme Court of India reversing the decision of the High Court of Guwahati, came to the conclusion that the services of an employee could not be brought to an end.

13. It be seen that the above decision given by a two members Bench in Hindustan Paper Corporation v. Purnendu Chakrabarty, does not take notice of several other earlier decisions of the Supreme Court of India. Some of these decisions are being noticed. In West Bengal State Electricity Board and Others Vs. Desh Bandhu Ghosh and Others, it was held that any provision in the Regulation enabling the management to terminate the services of a permanent employee by giving three months notice or pay in lieu thereof, would be bad as violative of Article 14 of the Constitution.

Such a Regulation was held to be capable of causing vicious discrimination and was also held to be naked hire and fire rule. This view was reiterated in Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, Again in O.P. Bhandari Vs.

Indian Tourism Development Corpn. Ltd. and Others, the Supreme Court of India held that Rule 31 (v) of the Indian Tourism Development Corporation (Conduct Discipline and Appeal) Rules, 1978 which provided that the services of a permanent employee could be terminated by giving him 90 days' notice or pay in lieu thereof would be violative of Articles 14 and 16 of the Constitution.

14. In Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress and Others, a Constitution Bench reiterated the earlier view that the services of a confirmed employee could not be legally terminated by a simple notice.

15. In D.K. Yadav Vs. J.M.A. Industries Ltd., the Supreme Court of India has laid down that where the Rule provided that the services of an employee who overstays the leave would be treated to have been automatically terminated would be bad as violative of Articles 14, 16 and 21 of the Constitution. It was further held that if any action was taken on the basis of such rule without giving any opportunity of hearing to the employee, it would be wholly unjust, arbitrary and unfair. The Supreme Court of India

reiterated and emphasised in no uncertain terms that principles of natural justice would have to be read into the provision relating to automatic termination of services.

16. Apart from this, in a recent decision i.e. *Uptron India Ltd. v. Shammi Bhan* (1998 1 LLJ 1165), the Supreme Court of India has expressed a

view that mere sending of notice to the workman does not tantamount to terminating his services. This decision was given in an appeal having been

preferred by Uptron India Ltd. against the judgment of Allahabad High Court. The respondent Shammi Bhan was appointed as an operator

(trainee) in the petitioner's establishment on June 13, 1980. On completing her training she was absorbed on that post with effect from July 13,

1981. She was confirmed on July 13, 1982. She went on maternity leave on November 7, 1984. She remained on maternity leave up to January

29, 1985. As she allegedly remained absent with effect from January 30, 1985 to April 12, 1985, without any application for leave her services

were brought to an end in terms of Clause 17(G) of Certified Standing Orders of the Company. The employee sought reference before Industrial

Tribunal. The Industrial Tribunal came to the conclusion that termination of the services amounted to retrenchment within the meaning of Section

2(oo) of the Industrial Disputes Act. As legal requirements had not been followed, the termination was held to be bad. The relevant observations

made are as under:

In view of the above, we are of the positive opinion that any clause in the Certified Standing Orders providing for automatic termination of service

of a permanent employee not directly related to 'Production' in a Factory of Industrial Establishment would be bad if it does not purport to

provide an opportunity of hearing to the employee whose services are treated to have come to an end automatically.

17. In the face of the above situation, the concept of automatic termination in terms of the Standing Order is no longer good. It can be said that a

right did accrue in favour of the petitioner. Again, as his services were terminated without compliance of provisions of Section 25F of the Industrial

Disputes Act, therefore his termination would be bad.

18. There are some decisions to the effect that interference can be made on writ side if a case is made out that Section 25F of the Industrial

Disputes Act, 1947 has been violated. See *Mukhtyar Singh v. Food Corporation of India* 1992 MPLJ 902, *Mukesh Barghav v. State*, 1993

MPLJ 586.

19. In this case the petitioner did complete more than 240 days of service. It is also apparent that the provision of Section 25F of the Industrial

Disputes Act, 1947 were not complied with. Retrenchment compensation was not paid. Thus in view of the decision given by the Supreme Court

of India, the order of termination would be bad.

20. As one of the allegations is that the petitioner was absent and no inquiry was held in this regard even on this ground that the order of

termination cannot be sustained. This aspect of the matter has been considered in detail in SWP No. 792 of 1994 decided on April 7, 1998.

Manohar Lal v. State of Jammu and Kashmir, After taking note of the judicial precedents following conclusions were indicated:

(i) Absence from duty is not per se misconduct.

(ii) Where an employee proceeds on leave and does not resume duties even then services cannot be brought to an end without holding enquiry.

(iii) Even if there is some service regulation visualising concept of automatic termination in case of absence even then enquiry is required to be held.

(iv) Where order of reinstatement is ordered, then preponderance of view is that back wages are not to be allowed.

(v) Again where order of termination is set aside then the competent authority should be left free to decide as to whether it wishes to leave the

matter as it is or wants to hold further enquiry.

(vi) The order of termination has to precede by hearing and the order so passed has to be reasoned one.

21. Some decisions of the Supreme Court of India and of this Court dealing with public servants arising under the Constitution of India are being

noticed:

22. In the case of *Deokinandan Prasad Vs. The State of Bihar and Others*, the Supreme Court of India held that although Rule 76 of Bihar Service

Code 1952 prescribes automatic termination of service for continuous absence for five years, an order passed to that effect without giving

opportunity to Government servant offends Article 311 of the Constitution. In the case of *The State of Assam and Others Vs. Akshaya Kumar*

Deb, , the Supreme Court of India in similar circumstances held that the Government servant should have been given an opportunity to show cause

against the termination of the service by application of Fundamental Rule 18. Supreme Court of India held that the same was a requirement of

natural justice. In the absence of such opportunity the termination was illegal.

23. In this regard the view expressed by this Court may also be noticed:

A Division Bench in *Khair Din v. State of Jammu and Kashmir* 1995 (1) SCT 566: found the order of termination bad as enquiry was not held.

The employee had sought extension of leave by sending telegrams. These were not taken note of Employee was held entitled to reinstatement.

24. R.C. GANDHI, J. In *Mohd. Aslam v. State of Jammu and Kashmir* 1996 Lab IC 889 has observed that the termination without affording

reasonable opportunity to show cause is not apt. What was observed in para 6 is to be reproduced below:

The next contention of the petitioner is that he has been discharged from service without affording an opportunity of being heard. The petitioner

has not even been issued show cause notice for explaining the reasons of his absence. The order has been passed without holding any inquiry as

contemplated in terms of Rule 359 of the Police Rules 1960. No Government servant can be removed or discharged from service except in the

manner provided by law. The respondents were under legal obligation to afford an opportunity of being heard to the petitioner and after having

considered the explanation of the petitioner resort should have been taken after holding enquiry. The order of the respondents on the face of it

appears to be arbitrary and not sustainable in law as the action of the respondents has resulted in depriving the petitioner of his services without

adhering and observing the mandate of Rule 359 of the Police Rules and the principles of natural justice. The petitioner was holding a civil post and

termination of service without affording him reasonable opportunity of show cause as to why he be not discharged from service is not justifiable.

An employee is entitled to reasonable opportunity to show cause which includes an opportunity to deny his guilt and establish his innocence which

he can do only when he knows the charge levelled against him. The learned counsel for the petitioner in support of his contention has cited at the

Bar (*Kulbin Singh v. State*) 1988 KLJ 639 (*Mafatlal Narandar Barot v. J.B. Rathod*

Divisional Controller, State Transport Mehsana and Anr.)

1988 KLJ 639 the Court was dealing With an identical case of constable of the respondent Department whose services were terminated without

prior notice and no opportunity was afforded to meet the allegations. The order of termination was held to be illegal and quashed. In *Jai Shanker*

Vs. State of Rajasthan, the Apex Court has held that while the Government employee is absent without leave, without reasonable cause,

termination of service without giving him an opportunity of show cause contravenes the principles of natural justice. The Apex Court observed as

under:

It is true that the respondent may visit the punishment of discharge or removal from service on a person who has absented himself without leave

and without reasonable cause; but this cannot entail automatic removal from service without giving such person reasonable opportunity to show

cause why he be not removed. The appellant is entitled to a reasonable opportunity to show cause which includes an opportunity to deny his guilt

and establish his innocence which he can do only when he knows that the charges levelled against him are and in our judgment the appellant was

entitled to an opportunity to show cause against the action proposed to be taken against him.

25. Thus looking from any point of view order of termination i.e. Annexure P/1 is liable to be quashed and is hereby quashed.

26. With regard to the payment of back wages it is again settled law that where an employee is reinstated on account of fact that there was some

procedural lapse in respect of the snapping the relationship of master and servant and the employee was absent then such an employee is not

entitled to back wages. See *State of Punjab v. Om Prakash* (1997) 3 SCT 186 (P & H) , *Arunachalam M. Vs. Tamil Nadu Electricity Board* and

Another, ; Government of Tamil Nadu and Another Vs. Rajaram Appasamy K., . Relief of back wages is to be granted when an employee is

reinstated on the technical ground that enquiry was not held into the alleged misconduct of unauthorised absence.

27. It would be worthwhile to indicate here that even under the Industrial law, back wages can be granted only if a finding is recorded that the

concerned workman was not gainfully employed. In case reported as *Hindustan*

Tin Works Pvt. Ltd. Vs. The Employees of Hindustan Tin Works

Pvt. Ltd. and Others, the Supreme Court of India expressed an opinion that whenever a Labour Court passes an order of reinstatement then back

wages are to be allowed. It may however, be seen that when a dispute is before the authorities constituted under the Labour Law Legislation an

opportunity is available to the parties to lead evidence. A finding of fact is recorded i.e. after evidence is led as to whether a workman was gainfully

employed or not. Such a finding cannot be recorded in writ jurisdiction and it would not be apt to grant back wages when the question as to

whether the petitioner was gainfully employed elsewhere or not cannot be gone into in the present litigation.

28. Accordingly this petition is allowed and petitioner would be entitled to reinstatement. He would not be entitled to any back wages. He would

start getting wages with effect from the date they produce the copy of this order before the respondents. The respondents, if they propose to

proceed further into the matter may serve a specific charge sheet either on that date. In the alternative the respondents would be at liberty to

indicate any other date on which the petitioner is to put in appearance. If it is proposed to hold further enquiry then not only specific charge sheet

would be served, but enquiry officer would also be named.

Petition is accordingly allowed in the manner as indicated above.