

(2002) 07 RAJ CK 0081
In the Rajasthan High Court
Case No : .C.S.A. No. 401 of 2002

State of Rajasthan and Others

APPELLANT

Vs

Mahendra Joshi and Another

RESPONDENT

Date of Decision : 05-07-2002

Acts Referred:

Industrial Disputes Act, 1947 — Section 25B, 25C, 25F, 25G, 25H

Citation : (2002) 95 FLR 595 : (2003) 1 LLJ 256 : (2003) 3 RLW 1966 : (2003) 3 RLW 1996 : (2003) 1 WLC 47

Hon'ble Judges : Rajesh Balia, J;D.N. Joshi, J

Bench : Division Bench

Advocate : R.L. Jangid, for the Appellant;

Final Decision : Dismissed

Judgement

Rajesh Balia, J.—Heard learned counsel for the appellant.

The appellant is aggrieved with the award of Labour Court as modified by the judgment of learned single Judge in S.B. Civil Writ Petition No. 1301/2000.

2. The facts of the case are that the services of respondent-workman were terminated w.e.f. October 16, 1985. The workman raised an industrial dispute alleging that he has actually worked in 12 calendar months preceding the date of termination for 229 days excluding the paid holidays and Sundays.

3. He also alleged that while terminating his services a person junior to him was allowed to continue in service and the provisions of Section 25-F of the Industrial Disputes Act have also not been followed by way of giving a notice of one month before termination of services or one months remuneration in lieu of such notice and retrenchment compensation.

4. In substance the termination was alleged to be in violation of Sections 25-F and 25-G of the Industrial Disputes Act.

5. The appellant, who is employer, contested the claim on both the counts.

6. It was contended that the workman has completed 229 days, but he was not employed for 12 calendar months. The fact that he has actually worked 229 days and which did not include the paid holidays and Sundays, was not disputed. About retaining the services of any employee junior to the workman is concerned, it was admitted, but was sought to be justified on the ground that same was done in pursuance of adjudication by the Court and therefore, the case of Ms. Manju, whose services were allowed to be continued, though junior to the respondent-workman, could not result in violation of Section 25-C of the Industrial Disputes Act, 1947.

7. The Tribunal found that by including paid holidays and weekly holidays alongwith the days for which the workman has actually discharged his duties, he has actually worked for 240 days during the 12 calendar months immediately preceding the date of termination of his services and therefore, he is a person, who is deemed to be in continuous service for a period of one year, in violation of Section 25-F of the Industrial Disputes Act and the requirement of Section 25-F were pre-conditions before retrenchment could be affected. Those conditions have not been fulfilled and there is no dispute about that.

8. He also found that taking the plea that a person junior to the workman was allowed to continue in service because of the orders of the Court, neither in the statement of the witnesses, produced by the employer this fact was stated nor the judgment in pursuance of which a person junior to the workman was allowed to continue in service was produced.

9. In these circumstances, the explanation furnished by the employer having not been proved, the Tribunal found that retrenchment was also in breach of Section 25-G of the Act of 1947. The claim that after termination of services of the workman someone else is employed in his place without giving notice to rejoin the employment was in violation of Section 25-H was not accepted by the Tribunal.

10. With these findings, the workman was ordered to be reinstated in service with 50% back wages.

11. Aggrieved with the award dated June 4, 1999, the present appellant preferred the Writ Petition No. 1301/2000.

12. The learned single Judge found that there was no material on record on the basis of which it can be held that the findings of facts recorded by the Labour Court are perverse or based on no evidence or had been contrary to the evidence on record. Therefore, those findings cannot be interfered with while exercising jurisdiction under Article 227 of the Constitution of India. The Court also found that even if it is assumed that the workman has not completed 240 days, the award of the Labour Court cannot be disturbed because of the other finding that there is violation of provision of Section 25-G of the Act of 1947. With these findings, the correctness of the award has not been interfered with.

13. However, before parting with this case, with the consent of the learned counsel for the workman award of back wages was reduced to 40% in place of 50%

14. Aggrieved with the aforesaid judgment, this appeal has been preferred by the present appellants.

15. It has been contended by the learned counsel for the appellant that though workman has actually worked for 240 days during the 12 calendar months immediately preceding the date of termination of service, since respondent-workman was not employed for 12 calendar months, he was not entitled to benefit of Section 25-F, therefore, he cannot be held to be in continuous employment for a period of one year or more. He has placed reliance on the judgment of Supreme Court in State of Haryana Vs. Om Parkash and Another, It was, therefore, contended that since the workman was not in continuous service for one year or more on the relevant date Section 25-F of the Act of 1947 is not attracted.

16. This contention, in our opinion, is not justified.

17. In fact prior to Section 25-B was amended in 1964 vide Act No. 36 of 1964 w.e.f. December 19, 1964, while interpreting the provision as initially enacted the Supreme Court in Sur Enamel and Stamping Works (P) Ltd. Vs. Their Workmen, has held that before a workman can be considered to have completed "one year of continuous service" in an industry, it must be shown first that he was employed for a period of not less than 12 calendar months and next that during these 12 calendar months he had worked for not less than 240 days. Both these conditions had to be cumulatively satisfied.

18. However the substitution of old Section 25-B with the present one vitally changed the situation. It was first noticed by Supreme Court in Employers in Relation to Digwadih Colliery Vs. Their Workmen, The Court said though Section 25 speaks of continuous service of not less than one year under the employer, if the workman has actually worked for 240 days during the period of 12 calendar months both the conditions are fulfilled. The definition of continuous service need not be read with Section 25-B. The fiction converts service of 240 days in a period of 12 calendar months into continuous service for one calendar year.

19. Thereafter, the matter pointedly came before the Apex Court in Surendra Kumar Verma and Others Vs. Central Government Industrial Tribunal-Cum-Labour Court, New Delhi and Another, The Court after quoting a passage from Sur Enamel's case as to what precisely was held therein said that the Act 36 of 1964 has drastically changed the situation. In the words of CHINNAPPA REDDY, J. speaking for the Court:

"Act 36 of 1964 has drastically changed the position. Section 2(eee) has been repealed and Section 25-B(2) now begins with the Clause "where a workman is not in continuous service for a period of one year". These changes brought about

by Act 36 of 1964 appear to be clearly designed to provide that a workman who has actually worked under the employer for not less than 240 days during a period of twelve months shall be deemed to have been in continuous service for a period of one year whether or not he has in fact been in such continuous service for a period of one year. It is enough that he has worked for 240 days in a period of 12 months; it is not necessary that he should have been in the service of the employer for one whole year".

20. The same issue was also dealt with in the Division Bench judgment of this Hon"ble Court in D.B. Civil Special Appeal No. 600 of 2001 State of Rajasthan and Anr. v. Dhanna Ram and Ors., decided on July 24, 2001.

21. The Court found that decision in Om Prakash's case (supra) is contrary to earlier decision of larger Bench of the Supreme Court in 1981 SC 443, which has been referred to in the judgment. The Division Bench further noticed that in the case of Om Prakash the Court has tested the case of workman on anvil of both the provisions of Section 25-B namely Clause (1) and Clause (2) and has not found any material to satisfy both the tests. Thus, on facts the case of Om Prakash was distinguished.

22. The judgment relied on by the learned counsel for the appellant is a Bench consisting of two Judges, whereas Surendra Kumar's case is a larger Bench decision. In Om Prakash's case the earlier judgment of the larger Bench has not been considered. On the principle laid down by the Supreme Court about binding precedents the earlier judgment of larger Bench in the circumstances binds the High Court.

23. Moreover, we find that earlier other judgments of Supreme Court on the issue has also not been brought to notice of the Court in the case of State of Haryana v. Om Prakash (supra). Reference in this connection may be made in Ramakrishna Ramnath v. The Presiding Officer, Labour Court, Nagpur 1970 (21) FLR 159 and Workmen of American Express International Banking Corporation Vs. Management of American Express International Banking Corporation, in which like view has been expressed.

24. In the case of Workmen v. American Express International Banking Corporation (supra), the Court made it clear that the expression "actually worked under the employer" in Section 25-B(2)(a)(ii) must necessarily comprehend all those days during which the workman was in the employment of the employer and for which he had been paid wages either under express or implied contract of service by compulsion of statute, standing orders etc. To give any other meaning to that expression would bring the object of Section 25-F very close to frustration. It is not possible to limit that expression only to those days which are mentioned in the Explanation to Section 25-B(2) for the purpose of calculating the number of days on which the workmen had actually worked though he had not so worked. The explanation is only clarificatory, as all explanations are, and cannot be used to limit the expanse of the main provision.

25. Even assuming it that there is some scope for arguments on this issue on the alternative ground that the termination was in violation of Section 25-G, no such plea is available. The fact that a person junior to the workman remained in continuous service was not disputed.

26. The special circumstances in which the principle of "first come last go" is not required to be adhered to as envisaged u/s 25-G was not proved by the appellants. This finding is sufficient to sustain the finding as to invalidity of retrenchment. Consequently, no interference made in the relief granted by the Tribunal as modified by the learned single Judge by consent on any ground whatever.

27. Learned counsel for the appellant lastly urged that since appointment given in the first instance by the petitioner-appellant de hors the rules, no reinstatement could have been ordered. This contention is stated to be rejected. Firstly, regularity or irregularity of appointment was not the issue before the Labour Court. It is a question of fact whether engagement in first instance was legal or irregular or illegal. Moreover, the nature of appointment cannot alter the requirement of law for bringing about a valid retrenchment. If the workman is in continuous service for the period envisaged under Chapter VA of the Industrial Disputes Act, 1947, the termination must conform to pre-condition required to terminate the services must be followed. It may be noticed that for an employee, who is a workman within the meaning of Section 2(s) of the Act of 1947 termination of whatever kind otherwise than excepted in Section 2(o) of the Act is retrenchment. Valid retrenchment must conform to the requirement of Chapter VA or VB as the case may be. The provision of Chapter VA and VB relating to retrenchment has been given primacy over all the laws, rules or contract vide Section 25-J of the Industrial Disputes Act, 1947.

28. The question of illegal termination cannot be confused with illegal appointment. Illegal appointment is liable to be terminated cannot be doubted. But, before terminating if mechanism for terminating the services is provided by law, the termination of service of a workman must also conform to law. Chapter VA or VB does not prohibit termination of service nor it favours illegal appointment. Chapter VA/VB does not prohibit the termination of services of the workman, whose services are not required by the industry, it only laid down pre-condition to be fulfilled before termination could be affected. It ensures that no illegal or arbitrary exercise has taken place in terminating the services of a workman.

29. If the termination is found to be illegal as a result of adjudication by the Tribunal or Labour Court, as the case may be, the relief ordinarily follows is his reinstatement with full back wages. Therefore, mere allegation that there is some illegality or irregularity in original appointment cannot be a ground for not adhering to the provisions of a welfare statute like Industrial Disputes Act, which laid down the mandatory pre-condition before termination of any workman takes place by way of retrenchment.

30. As a result, we do not find any merit in the contention raised before us and the appeal is dismissed in limine.