

(2017) 03 UK CK 0021
In the Uttarakhand High Court
Case No : 2333 of 2016 (M of S)

State of Uttar Pradesh and others

APPELLANT

Vs

Sri Dinesh Kumar Rouhila

RESPONDENT

Date of Decision : 06-03-2017

Acts Referred:

[Industrial Disputes Act, 1947](#), [Section 25F](#)/
[Section 25\(f\)\(a\)](#), [Section 25\(f\)\(b\)](#)/
[Section 25\(f\)\(c\)](#) - Conditions precedent to retrenchment
of workmen - Prohibition of financial aid to illegal strikes and lock-outs - Prohibition of
financial aid to illegal strikes and lock-outs - Prohibition of financial aid to illegal strikes
and lock-outs
[Uttar Pradesh Industrial Disputes Act, 1947](#), [Section 6\(n\)](#) -
Uttar Pradesh Industrial Disputes Rules, 1957, Rule 12(9), Rule 42

Citation : (2017) 03 UK CK 0021

Hon'ble Judges : Rajiv Sharma

Bench : Single Bench

Advocate : Beena Pandey

Judgement

1. The State of Uttar Pradesh has challenged the validity of Award dated 23.07.2011, rendered by Presiding Officer, Labour Court, Haridwar in Adjudication Case No. 183/2009 (Old Adjudication Case No.36 of 2006). 2. Key facts necessary for adjudication of this petition are that respondent/workman was engaged as Beldar on 01.02.1988. He was retrenched on 01.01.1991 without following the provisions of Section 6(N) of the U.P. Industrial Disputes Act, 1947 (hereinafter referred to as "The Act, 1947") and Rule 42 of the Uttar Pradesh Industrial Disputes Rules, 1957 (hereinafter referred to as "The Rules, 1957"). Thereafter, the workman raised an industrial dispute. The matter was referred to the Labour Court. The workman filed the claim petition. The reply was filed by the employer. 3. According to the averments made in the claim petition, the workman had worked for more than 240 days in a calendar year. The Award was passed in favour of the workman on 23.07.2011. Hence, the present writ

petition. 4. Smt. Beena Pandey, learned Standing Counsel appearing on behalf of State of U.P./petitioners has vehemently argued that the respondent/workman had not worked for 240 days in a calendar year and the appointment of the workman was for a limited period. 5. I have heard learned counsel for the parties and have gone through the Award dated 23.07.2011 passed by Presiding Officer, Labour Court, Haridwar carefully. 6. The workman had appeared as WW1 before the Labour Court. He has testified that he was retrenched without following the due process of law. He had worked for more than 240 days in a calendar year in the petitioner-department. 7. Thus, the Learned Labour Court, Haridwar has rightly drawn adverse inference against the employer. The certificate was also issued in favour of the workman by Assistant Engineer-I certifying therein that the workman had worked from 01.02.1988 to 31.01.1991. 8. The statement of the respondent-workman was not rebutted by the employer. Rule 12(9) of the Rules, 1957 reads as under:- "Rule 12(9):- "If the affidavit accompanying the written statement of the union or the workman is not rebutted by the employers, the Labour Court or the Tribunal, as the case may be, shall presume the contents of the affidavit to be true and make an award accepting the facts stated in the written statement." 9. Since, the workman had completed more than 240 days in a calendar year, hence, the employer was required to issue a notice and pay the compensation under Section 6-N of the Act, 1947 to the workman. 10. Ms. Beena Pandey, learned Standing Counsel appearing on behalf of State of U.P. has also argued that the irrigation department is not an "industry". 11. Their Lordships of the Supreme Court in (2013) 16 SCC 16 in the case of "State of Maharashtra and another v. Sarva Shramik Sangh, Sangli and others", relying upon the "Bangalore Water Supply" case have held that the activities of the Irrigation Department fall within the ambit of "industry". Their Lordships have held as under:- "26. To begin with, we must note that the workmen concerned were engaged as pump operators and chowkidars, etc. on 25 lift irrigation schemes, which were carrying out the process of pumping water. The process of pumping water is specifically covered under the definition of "manufacturing process" under Section 2 (k)(ii) of the Factories Act, 1948. Thus, the workmen concerned were engaged in a "manufacturing process". Once that is established, it follows that the activity of the undertaking in which they were working, constituted a "factory" within the meaning of Section 2 (m) of the said Act. Explanation (i) to Section 25-A of the ID Act, 1947, covers "factories" within the definition of an "industrial establishment", and therefore Chapter V-A of the ID Act, 1947 applies to "manufacturing process" of pumping water. Hence, it cannot be denied that the undertaking in which the workmen concerned were employed was covered under the provisions of the ID Act. 27. It is, however, contended on behalf of the appellant that the said undertaking was being run by the Irrigation Department of the first appellant, and the activities of the Irrigation Department could not be considered to be an "industry" within the definition of the concept under Section 2 (j) of the ID Act. As noted earlier, the reconsideration of the wide interpretation of the concept of "industry" in Bangalore Water Supply and Sewerage Board is pending before a larger Bench of this Court. However, as of now we will have to

follow the interpretation of law presently holding the field as per the approach taken by this Court in *State of Orissa v. Dandasi Sahu*, referred to above. The determination of the present pending industrial dispute cannot be kept undecided until the judgment of the larger Bench is received." 12. It is settled law that if the retrenchment is void ab initio, the workman is entitled for reinstatement. Since, the mandatory provisions of Section 6(N) of the Act, 1947 were not complied with, the retrenchment of the workman was void ab initio. 13. Their Lordships of Hon"ble Supreme Court in (2013)10 SCC 324, titled as "*Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya (D.Ed.)*", on the issue of reinstatement of workman have held as under:- "37. After noticing several precedents to which reference has been made herein above, the two Judge Bench observed: "17. There is also a misconception that whenever reinstatement is directed, "continuity of service" and "consequential benefits" should follow, as a matter of course. The disastrous effect of granting several promotions as a "consequential benefit" to a person who has not worked for 10 to 15 years and who does not have the benefit of necessary experience for discharging the higher duties and functions of promotional posts, is seldom visualised while granting consequential benefits automatically. Whenever courts or tribunals direct reinstatement, they should apply their judicial mind to the facts and circumstances to decide whether "continuity of service" and/or "consequential benefits" should also be directed. 18. Coming back to back wages, even if the court finds it necessary to award back wages, the question will be whether back wages should be awarded fully or only partially (and if so the percentage). That depends upon the facts and circumstances of each case. Any income received by the employee during the relevant period on account of alternative employment or business is a relevant factor to be taken note of while awarding back wages, in addition to the several factors mentioned in *Rudhan Singh and Uday Narain Pandey*. Therefore, it is necessary for the employee to plead that he was not gainfully employed from the date of his termination. While an employee cannot be asked to prove the negative, he has to at least assert on oath that he was neither employed nor engaged in any gainful business or venture and that he did not have any income. Then the burden will shift to the employer. But there is, however, no obligation on the terminated employee to search for or secure alternative employment. Be that as it may. 19. But the cases referred to above, where back wages were awarded, related to termination/retrenchment which were held to be illegal and invalid for non-compliance with statutory requirements or related to cases where the Court found that the termination was motivated or amounted to victimisation. The decisions relating to back wages payable on illegal retrenchment or termination may have no application to the case like the present one, where the termination (dismissal or removal or compulsory retirement) is by way of punishment for misconduct in a departmental inquiry, and the court confirms the finding regarding misconduct, but only interferes with the punishment being of the view that it is excessive, and awards a lesser punishment, resulting in the reinstatement of employee. Where the power under Article 226 or Section 11-A of the Industrial Disputes Act

(or any other similar provision) is exercised by any court to interfere with the punishment on the ground that it is excessive and the employee deserves a lesser punishment, and a consequential direction is issued for reinstatement, the court is not holding that the employer was in the wrong or that the dismissal was illegal and invalid. The court is merely exercising its discretion to award a lesser punishment. Till such power is exercised, the dismissal is valid and in force. When the punishment is reduced by a court as being excessive, there can be either a direction for reinstatement or a direction for a nominal lump sum compensation. And if reinstatement is directed, it can be effective either prospectively from the date of such substitution of punishment (in which event, there is no continuity of service) or retrospectively, from the date on which the penalty of termination was imposed (in which event, there can be a consequential direction relating to continuity of service). What requires to be noted in cases where finding of misconduct is affirmed and only the punishment is interfered with (as contrasted from cases where termination is held to be illegal or void) is that there is no automatic reinstatement; and if reinstatement is directed, it is not automatically with retrospective effect from the date of termination. Therefore, where reinstatement is a consequence of imposition of a lesser punishment, neither back wages nor continuity of service nor consequential benefits, follow as a natural or necessary consequence of such reinstatement. In cases where the misconduct is held to be proved, and reinstatement is itself a consequential benefit arising from imposition of a lesser punishment, award of back wages for the period when the employee has not worked, may amount to rewarding the delinquent employee and punishing the employer for taking action for the misconduct committed by the employee. That should be avoided. Similarly, in such cases, even where continuity of service is directed, it should only be for purposes of pensionary/retirement benefits, and not for other benefits like increments, promotions, etc. 20. But there are two exceptions. The first is where the court sets aside the termination as a consequence of employee being exonerated or being found not guilty of the misconduct. Second is where the court reaches a conclusion that the inquiry was held in respect of a frivolous issue or petty misconduct, as a camouflage to get rid of the employee or victimise him, and the disproportionately excessive punishment is a result of such scheme or intention. In such cases, the principles relating to back wages, etc. will be the same as those applied in the cases of an illegal termination. 21. In this case, the Labour Court found that a charge against the employee in respect of a serious misconduct was proved. It, however, felt that the punishment of dismissal was not warranted and therefore, imposed a lesser punishment of withholding the two annual increments. In such circumstances, award of back wages was neither automatic nor consequential. In fact, back wages was not warranted at all. 38.7. The observation made in J.K. Synthetics Ltd. v. K.P. Agrawal that on reinstatement the employee/workman cannot claim continuity of service as of right is contrary to the ratio of the judgments of three Judge Benches referred to herein above and cannot be treated as good law. This part of the judgment is also against the very concept of

reinstatement of an employee/workman. 40. The learned Single Judge agreed with the Tribunal that the action taken by the management to terminate the Appellant's service was per se illegal but set aside the award of back wages by making a cryptic observation that she had not proved the factum of non-employment during the intervening period. While doing so, the learned Single Judge not only overlooked the order passed by the Division Bench in Writ Petition No. 8404/2006, but also Rule 33 which prohibits an employee from taking employment elsewhere. Indeed, it was not even the pleaded case of the management that during the period of suspension, the Appellant had left the Headquarter without prior approval of the Chief Executive Officer and thereby disentitling her from getting subsistence allowance or that during the intervening period she was gainfully employed elsewhere. 41. In view of the above discussion, we hold that the learned Single Judge of the High Court committed grave error by interfering with the order passed by the Tribunal for payment of back wages, ignoring that the charges levelled against the Appellant were frivolous and the inquiry was held in gross violation of the rules of natural justice. 42. In the result, the appeal is allowed, the impugned order is set aside and the order passed by the Tribunal is restored. The management shall pay full back wages to the Appellant within four months from the date of receipt of copy of this order failing which it shall have to pay interest at the rate of 9% per annum from the date of the Appellant's suspension till the date of actual reinstatement. It is also made clear that in the event of non-compliance of this order, the management shall make itself liable to be punished under the Contempt of Courts Act, 1971." 14. Their Lordships of Hon'ble Supreme Court in (2015) 9 SCC 345, titled as "Raj Kumar Dixit v. Vijay Kumar Gauri Shanker," on the question of reinstatement of workman after his retrenchment is declared void ab initio have held as under:- "20. The High Court has exceeded in its jurisdiction in setting aside the Award passed by the Labour Court in awarding reinstatement of the Appellant-workman in his post along with 50% back wages which is erroneous in law as the High Court has not noticed the fact that the appropriate Government has referred the dispute to the Labour Court for its adjudication on the points of dispute referred to it. Since, there was non-compliance of the mandatory requirements as provided under the provisions of the Act by the Respondent-firm at the time of passing an order of termination against the Appellant-workman, therefore, the same has been held to be bad in law and as such it should have awarded full back wages to the workman from the date of termination till the date of passing the Award unless the employer proves that the workman was gainfully employed during the aforesaid period which fact is neither pleaded nor proved before the Labour Court. 21. Therefore, the impugned judgment of the High Court is bad in law as the normal rule to be followed by the Respondent-firm with regard to the termination of the services of the workman has not been done in the present case and further, the High Court has once again exceeded in its supervisory jurisdiction in exercise of its judicial review power Under Article 227 of the Constitution of India by setting aside the Award of reinstatement with 50% back wages passed by the Labour Court and

has instead awarded Rs. 2 lakhs as compensation to the Appellant-workman which is contrary to the law laid down by this Court. The High Court cannot exercise its supervisory jurisdiction and act as either original court or appellate court to set aside the finding of fact recorded on the points of dispute referred to the Labour Court on proper appreciation of pleadings and evidence on record in favour of the workman as has been done in the instant case. The Award of compensation of Rs. 2 Lakhs awarded in place of reinstatement with 50% back wages as awarded by the Labour Court has been modified by the High Court without assigning any cogent and valid reason which is not only erroneous in law but suffers from error in law as well, as the same is contrary to the catena of decisions of this Court. On this ground itself, the impugned judgment of the High Court is liable to be set aside and we pass an order to restore the Award passed by the Labour Court. 27. The grounds urged by the Appellant in this case are well founded and we accordingly pass the following order: "27.1. The Appeal is allowed. The impugned judgment and order passed by the High Court of Judicature at Allahabad in Writ Petition No. 19573 of 2010 dated 02.07.2014 is hereby set aside and the Award passed by the Labour Court in awarding reinstatement with 50% back wages from the date of termination till the date of passing the Award by the Labour Court is restored. 27.2. We further direct the Respondent-firm to pay full back wages to the workman from the date of passing of the Award by the Labour Court till the date of his reinstatement in service. The order shall be complied with by the Respondent-firm within six weeks from the date of receipt of copy of this order." 15. Their Lordships of Hon"ble Supreme Court in (2016) 6 SCC 541, titled as "Raj Kumar v. Director of Education and others", have observed that retrenchment of the service of the workman was in violation of Section 25(F) (a),(b) & (c) of the Industrial Disputes Act, 1947 and have ordered the reinstatement of the petitioner with full back wages. Their Lordships have held as under:- "57. For the reasons stated supra, we are of the view that the impugned judgment and order dated 28.07.2008 passed by the Delhi High Court is liable to be set aside and accordingly set aside, by allowing this appeal. The retrenchment of the appellant from his service is bad in law. The respondent-Managing Committee is directed to reinstate the appellant at his post. Consequently, the relief of back wages till the date of this order is awarded to the appellant, along with all consequential benefits from the date of termination of his services. The back wages shall be computed on the basis of periodical revision of wages/salary. We further make it clear that the entire amount due to the appellant must be spread over the period between the period of retrenchment and the date of this decision, which amounts to 13 years, for the reason that the appellant is entitled to the benefit under Section 89 of the Income Tax Act. The same must be complied with within six weeks from the date of receipt of the copy of this judgment. 16. The petitioners have never informed to the workman-respondent that his appointment was for a particular period in the project. 17. Their Lordships of Hon"ble Supreme Court in (2003) 4 SCC 27 in the case of "S.M. Nilajkar and others v. Telecom District Manager, Karnataka", have held that burden to prove the ingredients of sub-clause (bb) is on employer.

Employment must be shown to be under a contract which stipulates that it would come to an end with the expiry of the project or scheme and the workers must be shown to have been made aware of such stipulation at the commencement of their employment. Their Lordships further held that the workmen under the project or scheme, subject to satisfying the prescribed conditions, would be entitled to notice and compensation under Section 25-F (b). Their Lordships have held as under:- "11. It is common knowledge that the Government as a welfare State floats several schemes and projects generating employment opportunities, though they are short-lived. The objective is to meet the need of the moment. The benefit of such schemes and projects is that for the duration they exist, they provide employment and livelihood to such persons as would not have been able to secure the same but for such schemes or projects. If the workmen employed for fulfilling the need of such passing-phase-projects or schemes were to become a liability on the employer-State by too liberally interpreting the labour laws in favour of the workmen, then the same may well act as a disincentive to the State for floating such schemes and the State may opt to keep away from initiating such schemes and projects even in times of dire need, because it may feel that by opening the gates of welfare it would be letting-in onerous obligations entailed upon it by extended application of the labour laws. Sub-clause (bb) in the definition of retrenchment was introduced to take care of such like-situations by Industrial Disputes (Amendment) Act, 1984 with effect from 18.8.1984. 12. "Retrenchment" in its ordinary connotation is discharge of labour as surplus though the business or work itself is continued. It is well-settled by a catena of decisions that labour laws being beneficial pieces of legislation are to be interpreted in favour of the beneficiaries in case of doubt or where it is possible to take two views of a provision. It is also well-settled that the Parliament has employed the expression "the termination by the employer of the service of a workman for any reason whatsoever" while defining the term "retrenchment", which is suggestive of the legislative intent to assign the term "retrenchment" a meaning wider than what it is understood to have in common parlance. There are four exceptions carved out of the artificially extended meaning of the term "retrenchment", and therefore, termination of service of a workman so long as it is attributable to the act of the employer would fall within the meaning of "retrenchment" de hors the reason for termination. To be excepted from within the meaning of "retrenchment" the termination of service must fall within one of the four excepted categories. A termination of service which does not fall within the categories (a), (b), (bb) and (c) would fall within the meaning of "retrenchment". 13. The termination of service of a workman engaged in a scheme or project may not amount to retrenchment within the meaning of Sub-clause (bb) subject to the following conditions being satisfied:- (i) that the workman was employed in a project or scheme of temporary duration; (ii) the employment was on a contract, and not as a daily-wager simpliciter, which provided inter alia that the employment shall come to an end on the expiry of the scheme or project; and (iii) the employment came to an end simultaneously with the termination of the scheme or project and consistently with the terms of

the contract. (iv) the workman ought to have been apprised or made aware of the above said terms by the employer at the commencement of employment. 14. The engagement of a workman as a daily-wager does not by itself amount to putting the workman on notice that he was being engaged in a scheme or project which was to last only for a particular length of time or upto to occurrence of some event, and therefore, the workman ought to know that his employment was short-lived. The contract of employment consciously entered into by the workman with the employer would result in a notice to the workman on the date of the commencement of the employment itself that his employment was short-lived and as per the terms of the contract the same was liable to termination on the expiry of the contract and the scheme or project coming to an end. The workman may not therefore complaint that by the act of employer his employment was coming to an abrupt termination. To exclude the termination of a scheme or project employee from the definition of retrenchment it is for the employer to prove the above said ingredients so as to attract the applicability of Sub-clause (bb) above said. In the case at hand, the respondent-employer has failed in alleging and proving the ingredients of Sub-clause (bb), as stated herein above. All that has been proved is that the appellants were engaged as casual workers or daily-wagers in a project. For want of proof attracting applicability of Sub-clause (bb), it has to be held that the termination of the services of the appellants amounted to retrenchment. 15. The appropriate provision which should govern the cases of the appellants is Section 25FFF, the relevant part whereof is extracted and reproduced hereunder:- "25FFF. Compensation to workmen in case of closing down of undertakings.-(1) Where an undertaking is closed down for any reason whatsoever, every workman who has been in continuous service for not less than one year in that undertaking immediately before such closure shall, subject to the provisions of Sub-section (2), be entitled to notice and compensation in accordance with the provisions of Section 25F, as if the workman had been retrenched: Provided that where the undertaking is closed down on account of unavoidable circumstances beyond the control of the employer, the compensation to be paid to the workman under Clause (b) of Section 25F shall not exceed his average pay for three months. [Explanation : An undertaking which is closed down by reason merely of- (i) financial difficulties (including financial losses); or (ii) accumulation of undisposed of stocks; or (iii) the expiry of the period of the lease or licence granted to it; or (iv) in a case where the undertaking is engaged in mining operations, exhaustion of the minerals in the area in which such operations area carried on, shall not be deemed to be closed down on account of unavoidable circumstances beyond the control of the employer within the meaning of the proviso to this sub-section.] 1A. [Not reproduced] 1B. [Not reproduced] (2) Where any undertaking set-up for the construction of buildings, bridges, roads, canals, dams or other construction work is closed down on account of the completion of the work within two years from the date on which the undertaking had been set up, no workman employed therein shall be entitled to any compensation under Clause (b) of Section 25F, but if the construction work is not so competed within two years, he shall be

entitled to notice and compensation under that section for every [completed year of continuous service] or any part thereof in excess of six months." 17. It was submitted on behalf of the respondent that on account of delay in raising the dispute by the appellants the High Court was justified in denying relief to the appellants. We cannot agree. It is true, as held in *Shalimar works Limited v. Their Workmen* (supra) that merely because the Industrial Disputes Act does not provide for a limitation for raising the dispute it does not mean that the dispute can be raised at any time without regard to the delay and reasons therefore. There is no limitation prescribed for reference of disputes to an industrial tribunal; even so it is only reasonable that the disputes should be referred as soon as possible after they have arisen and after conciliation proceedings have failed particularly so when disputes relate to discharge of workmen wholesale. A delay of 4 years in raising the dispute after even re-employment of the most of the old workmen was held to be fatal in *Shalimar Works Limited v. Their Workmen* (supra). In *Nedungadi Bank Ltd. v. K.P. Madhavankutty and Ors.* (supra), a delay of 7 years was held to be fatal and dis entitled the workmen to any relief. In *Ratan chandra Sammanta and Ors. v. Union of India and Ors.* (supra), it was held that a casual labourer retrenched by the employer deprives himself of remedy available in law by delay itself; lapse of time results in losing the remedy and the right as well. The delay would certainly be fatal if it has resulted in material evidence relevant to adjudication being lost and rendered not available. However, we do not think that the delay in the case at hand has been so culpable as to disentitle the appellants for any relief. Although the High Court has opined that there was a delay of 7 to 9 years in raising the dispute before the Tribunal but we find the High Court factually not correct. The employment of the appellants was terminated sometime in 1985-86 or 1986-87. Pursuant to the judgment in *Daily Rated Casual Employees Under P & T Department v. Union of India* (supra) the department was formulating a scheme to accommodate casual labourers and the appellants were justified in awaiting the outcome thereof. On 16.1.1990 they were refused to be accommodated in the scheme. On 28.12.1990 they initiated the proceedings under the Industrial Disputes Act followed by conciliation proceedings and then the dispute was referred to the Industrial Tribunal-cum-Labour Court. We do not think that the appellants deserve to be non-suited on the ground of delay." 18. Learned Standing Counsel for the State of Uttar Pradesh/petitioners has vehemently argued that there is a delay in raising the industrial dispute. However, the fact of the matter is that the employer has not challenged the reference made by the State Government. Moreover, the question of delay can be seen at the time of moulding the relief. 19. Since, the retrenchment of the workman was void ab initio, hence, he was entitled to be reinstated with all service benefits. He is also entitled to get the service related benefits after the date of his retrenchment. 20. There is no illegality or perversity in the award dated 23.07.2011 passed by Presiding Officer, Labour Court, Haridwar in Adjudication Case No.183 of 2009 (Old Adjudication No.36 of 2006). 21. Accordingly, there is no merit in this petition and the same is hereby dismissed. Petition dismissed.