
(1992) 12 MP CK 0020
In the Madhya Pradesh High Court
Case No : M.P. No. 886 of 1987

Suresh Chandra Mathe

APPELLANT

Vs

Jiwaji University and Others

RESPONDENT

Date of Decision : 02-12-1992

Acts Referred:

Industrial Disputes Act, 1947 — Section 2

Citation : (1994) J LJ 215 : (1994) 2 LLJ 462 : (1993) 38 MPLJ 805 : (1993) MPLJ 805

Hon'ble Judges : S.K. Chawla, J; R.C. Lahoti, J

Bench : Division Bench

Advocate : M.N. Upadhyaya, for the Appellant; J.P. Gupta and Sanjay Gupta, for the Respondent

Final Decision : Allowed

Judgement

S.K. Chawla, J.

By this petition under Articles 226/227 of the Constitution of India, the petitioner challenges the order of termination of his service dated January 23, 1986 (Annexure P-6) as also the appellate order dated September 11, 1987 (Annexure P-8), confirming the said order.

The petitioner was temporarily appointed as a Lower Division Clerk by order dated April 21, 1982 of the Registrar, Jiwaji University, Gwalior. Previous to that, the petitioner had worked intermittently on that post. The petitioner continued to work on the temporary post until November 6, 1984, when by an order passed on that day, he was placed on probation for a period of two years. But before that, on March 23, 1984 the petitioner was granted 10% additional allowance on his basic salary with effect from April 21, 1982 for working on the post of Upper Division Clerk. On November 15, 1984, he was granted further allowance at the rate of 20% on his basic salary with effect from April 1, 1984 on the same ground of rendering service as an Upper Division Clerk. His service was however

terminated before the expiry of the period of probation of 2 years,i.e., on January 23, 1986 by a non-speaking innocuous order, Annexure P-6, whereby, the petitioner was also given one month's salary of Rs. 946.90 in lieu of one month's notice. The petitioner's appeal carried to the Executive Council of Jiwaji University was dismissed, vide information given to the petitioner dated September 11, 1987, Annexure P-8.

It is also not disputed that on August 3, 1984, while the petitioner was serving in the University, he was detailed on the duty to receive examination fee from students of B.A. Part II Examination. On that day, the petitioner had received, among other sums, a sum of Rs. 36/-towards examination fee from a student named Ku. Sunita Yadav. The petitioner has handed over the entire sum collected throughout the day by him, excepting Rs. 36/-, to the Cashier of the University on the close of the day. What is remarkable is also the fact that whereas two copies of receipt used to be handed over to student paying the examination fee and one copy retained in the receipt book, in the case of the examination fee of Rs. 36/- received from Ku. Sunita Yadav, the petitioner happened to tear out all the three copies of the receipt from the receipt book, retaining none in the receipt book. Nearly 4 months after the above event i.e., in the month of December, 1984, the accounts of the University came to be audited and it was then found out that Rs. 36A were deposited less. It is not disputed that the petitioner then deposited the sum of Rs. 36/- with the University. On March 11, 1985, the Registrar of the University issued a memo (Annexure P-5) to the petitioner asking him to show cause why action be not taken against him under Statute 31, Clause 13(1) of Jiwaji University for the alleged act of defalcation and cheating. The petitioner submitted an explanation, Annexure P-5-A That was followed by the impugned order of termination dated January 23, 1986 (Annexure P-6) passed by the Registrar. No enquiry was admittedly held before passing the impugned order.

The case of the petitioner is that he had received the said sum of Rs. 36/- by means of a draft. There was, therefore, no question of defalcating any cash. It was because of heavy rush of work that he happened to tear even the third copy of the receipt in question. He lost no time in paying Rs. 36/- to the University as soon as mistake was detected. His termination was "arbitrary" and "whimsical" without conducting any kind of enquiry against him. The order of termination, although innocuously worded, was penal in character and as the petitioner had been punished without any kind of enquiry, the order of termination was, what the petitioner calls, "illegal", "void" and "unconstitutional". At any rate the University was an "industry" while the petitioner was a "workman". He had been in continuous service for more than a year. He was not paid any retrenchment compensation. No reasons for retrenchment were disclosed in the termination order. The termination order was in the circumstances void ab initio. This pleading appears to have been made with an eye on the provisions of Section 25F of the Industrial Disputes Act, 1947. A pointed reference to that provision was made by the petitioner in his rejoinder.

In the return filed jointly on behalf of Jiwaji University, by its Registrar and the Chairman, Executive Council, the defence taken was that the Registrar was entitled to satisfy himself as to whether the petitioner's continuance on probation was desirable and whether his work was satisfactory. The termination of the petitioner was not done by way of punishment. There was no question of holding any kind of formal enquiry against the petitioner. The termination was done by the Registrar because he had a right to terminate the petitioner's probation. The provisions of Industrial Disputes Act were not attracted to the present case. The petitioner was not a "workman". There was no question of paying any retrenchment compensation. On these grounds it was urged that, the petition deserved to be dismissed.

As we see it, an important controversy between the parties in the present case is, whether the provisions of Industrial Disputes Act, 1947, were attracted to the present case. This would depend on the question whether Jiwaji University is an "industry". The definition of "industry" is given in Section 2(j) of the Act. Over the years, a test which may be called a "triple test" has held the field to decide if certain activity is an industry. The test is: if there has been (i) systematic activity (ii) organised by cooperation between employer and employee (iii) for the production and/or distribution of goods and services calculated to satisfy human wants and wishes (not spiritual or religious), then the said activity is an industry.

With respect to education, which is the activity of a University, the question naturally arises, if education is a service. The view of our Apex Court in *University of Delhi and Another Vs. Ram Nath*, was that education seeks to build up personality of the pupil by assisting his physical, intellectual, moral and emotional development. To speak of this educational process in terms of industry sounds incongruous. Secondly, the view was also that since teachers did not come within the purview of the expression "workman" under Sections 2(s), the predominant activity of the University, namely, education carried on with the co-operation of teachers, could not be said to fall within the field of industry. Only subordinate staff in the University could be held to be workmen but that constituted a minor and insignificant section of the University. It could not be the policy of the Industrial Disputes Act that education should be treated as an industry for the benefit of a very minor and insignificant number of persons who might be employed by educational institution to carry on the duties of the subordinate staff. Thirdly, it was also the view that education is a mission and a vocation, rather than a profession, trade or business.

The decision in the case of *Delhi University (supra)* was overruled by a larger Bench of Judges of the Supreme Court in *Bangalore Water Supply and Sewerage Board Vs. A. Rajappa and Others*, With regard to the first ground about education being not a service, his Lordship Shri Krishna Iyer, J. in this case observed, (p. 388):

"Undoubtedly, education is a sublime cultural service, technological training and personality builder. A man without education is a brute and no body can quarrel

with the proposition that education in its spectrum, is significant service to the community. We have already given extract from Australian Judge Izak, J. to substantiate the thesis that education is not merely industry but the mother of industries. A philistine, illiterate society will be not merely uncivilised but incapable of industrialisation", (paragraph, 82.)

It was further observed (p. 391):

"It is true that our societal values assign a high place of honour to education but how does it follow from this that education is not a service? The sequitur is not easily discernible. The pejorative assumption seems to be that "industry" is something vulgar, inferior, disparaging and should not be allowed to sully the sanctified subject of education. In our view, industry is a noble term and embraces even the most sublime activity". (Paragraph 89)

With regard to the second ground of predominant activity of the University alluded to in the case of Delhi University (supra), it was observed (p. 391):

"The test is not the predominant number of employees entitled to enjoy the benefits of the Act. The true test is the predominant nature of the activity. In the case of the University or an educational institution, the nature of the activity is, ex- hypothesis, education which is a service to the community. Ergo, the University is an industry. The error has crept in, if we may say so with great respect in mixing up the numerical strength of the personnel with the nature of the activity", (para. 87).

With regard to the third ground given in the case of Delhi University (supra) that education is a mission and a vocation and cannot be equated to profession, trade or business, it was observed (p. 391):

The final ground accepted by the Court (in the case of Delhi University - addition by us) is that education is a mission and vocation, rather than profession or trade or business. The most that one can say is that this is an assertion which does not prove itself. Indeed, all life is a mission and a man without a mission is spiritually still-born. The high mission of life is the manifestation of the divinity already in man. To Christian education as a mission even if true is not to negate its being an industry. We have to look at educational activity from the angle of the Act, and so viewed the ingredients of education are fulfilled. Education is, therefore, an industry and nothing can stand in the way of that conclusion", (para 90)

It will thus be seen that all the three grounds based on which view was taken in the case of Delhi University (supra) that education is not an industry, were negated in the decision of Bangalore Water Supply, (supra) Expressly overruling the case of Delhi University it was observed (p. 392):

"Our conclusion is that the University of Delhi and Another Vs. Ram Nath, ase, was wrongly decided and that education can be and is, in its institutional form, an industry", (para. 93)

It was also observed (para 388):

"If the triple tests of systematic activity, cooperation between employer and employee and production of goods and services were alone to be applied, a University, a College, a Research Institution or teaching institution will be an industry", (para. 82)

It is therefore clear that education is a kind of service, although sublime service, and that University is an "industry" within the meaning of Section 2(j) of the Industrial Disputes Act, 1947. The further question whether a clerk of the University, like the petitioner, was a "workman" u/s 2(s), admits of no doubt. A person employed to do clerical work is expressly mentioned in the definition of a "workman". Pausing here it may be mentioned that a new definition of "industry" has been given by Act 46 of 1982 whereby a new Clause (i) will take the place of Clause (j), from a date to be notified upon enforcement of Section 2(c) of the Act. When that new definition will get substituted, educational, scientific, research and training institutions will cease to fall within the purview of "industry" by virtue of Clause (3) of that definition. Till that happens, a University will continue to be held to be an "industry".

This clears the ground for proceeding further in the case. The contention of the petitioner is that his termination order (Annexure P-6), although innocuously worded, was penal in character and he was in reality punished without any kind of enquiry. On that ground it was desired by the petitioner that the termination order be quashed. Confining ourselves to industrial jurisprudence, we have taken the view in the case of *Mukthiyar Singh v. F.C.I. and Ors.* M.P. 489/1989 decided on August 8, 1992 (reported in 1992 MPLJ 902) to which both of us were party, that innocuously worded termination order given by an employer to his workman under Labour Law is not invalid on the basis of the contention that it was really a punitive order not preceded by any enquiry. We have taken the view that an employer has a right to adduce evidence in justification of such an order, even though for the first time, when an industrial dispute arising therefrom is referred to the Labour Court or Tribunal. We have also taken the view that it is wrong to quash such an order without letting the matter being adjudicated before the Labour Court or Tribunal. The quashing of such an order may not bring an end to strife and discord or remove the root cause. On the other hand, the award of the Labour Court or Tribunal may take care of all aspects and help to bring about an early and final settlement of all kinds of disputes between the employer and workman touching the termination. On this view, we are not inclined to interfere with the termination order, Annexure P-6, even if the same is assumed to be penal in character not preceded by any kind of enquiry. The first ground of challenge to the termination order therefore fails.

This takes us to the second ground of challenge, which is that the impugned termination was "retrenchment" not fulfilling essential pre-requisites mentioned in Section 25-F of the Industrial Disputes Act, 1947 and was therefore void ab initio or non est. This must be said to be an inconsistent stand taken by the

petitioner workman. His stand earlier was that termination order was punitive in character by way of disciplinary action without any kind of enquiry. If that was so, it was not "retrenchment" by virtue of express mention in the definition of "retrenchment" contained in Section 2(oo) stating that punishment inflicted by way of disciplinary action is not retrenchment. This is clear from the words "otherwise than as a punishment inflicted by way of disciplinary action" used in the definition. But we find that even the employer/University has come with the stand that termination was done, not by way of punishment but was, what may be called, discharge of a probationer by his employer finding him to be unsatisfactory. Had it been the stand of the employer that termination was by way of punishment then it would have been an admitted position that termination in question was by way of punishment and therefore outside the ambit of "retrenchment". But considering the stand taken by the employer we have decided to examine the other alternative stand taken by the petitioner that termination in question was "retrenchment" and that the same was void ab initio as not fulfilling the essential pre-requisites contained in Section 25F of the Industrial Disputes Act, 1947. Among the prerequisites, although the petitioner was paid along with the notice one month's pay, required by Clause (a) of Section 25F he was not paid retrenchment compensation calculated at the rate mentioned in Clause (b), nor notice in the prescribed manner was given by the employer to the appropriate Government or to specified authority as contemplated by Clause (c) thereof. There is, therefore, no doubt that the retrenchment was non est and invalid. It is an undisputed position that the petitioner had worked continuously for far more than 240 days, in fact for about 4 years or so, and so entitled to the benefits of retrenchment.

The stand taken by the University/employer is that termination of petitioner's service was discharge of a probationer because his services were found to be unsatisfactory. But even such termination comes within the ambit of "retrenchment" as defined in Section 2(oo) of the Industrial Disputes Act, 1947. There is a direct decision of the Supreme Court on this point which is *Management of K-S.R.T.C. Mangalore v. M. Boraiah*, in (1984 1 LLJ 1 10). The ratio of that decision is that discharge of a probationer amounts to retrenchment within the meaning of Section 2(oo) being terminated by the employer of the services of workman for "any reason whatsoever", in the words of that provision. So if while discharging a probationer, the requirements of Section 25F are not complied with, the order of termination is void.

Learned counsel for respondent sought to take out the case of instant termination from the ambit of retrenchment, by relying on the provision of Sub-clause (bb) added to Section 2(oo) by Act 49 of 1984, i.e., after the decision of the Supreme Court in *M. Boraiah's* case (*supra*) in the year 1983. It was contended that Sub-clauses (a), (b) and (c) of Section 2(oo) enumerate "excepted categories" wherein termination would be taken out of the category of retrenchment. Sub-clause (bb), a newly added provision in the year 1984, enumerates one more excepted category wherein termination would now not

amount to retrenchment. It was argued that ter-1 mination in the present case was under a stipulation, i.e., under Clause 10(a) of Statute No. 31 of Jiwaji University, Gwalior, and hence fell within the ambit of the expression "of such contract being terminated under a stipulation in that behalf contained therein" used in the latter part of Sub-clause (bb) and therefore* fell within excepted category and hence was not retrenchment. Clause 10(a) of Statute No, 30 of Jiwaji University, Gwalior, may be profitably reproduced here:-

"10(a) If the appointing authority is not satisfied that the work and/or conduct of the employee on probation is satisfactory, his services may be terminated. In case of termination of the services of employee on probation, one month's notice shall be given to him or in lieu of notice he shall be paid salary of one month. The probationer may also terminate the engagement by giving one month's notice or one month's salary".

We have taken the view in Mukthyar Singh's case (supra) that Sub-clause (bb) does not assume for its applicability that the work should be of temporary character or that if the work is continuing, the provision of (bb) is inapplicable. The employment of the probationer as a clerk in the University was not of temporary character. But on that ground Sub-clause (bb) would not become inapplicable. At the same time, it is necessary for the applicability of that provision [the latter part of Sub-clause (bb)] that the stipulation for terminating the contract of employment should be "contained therein". Proper effect must be given to these words. Keeping in mind these words, it must be held that before the excepted category mentioned in the latter part of Sub-clause (bb) is attracted, it is necessary that there should be an express stipulation in the contract of employment itself enabling the termination of the contract of employment. It will not do to say that such a stipulation is contained elsewhere, for example in the present case, in Clause 10(a) of Statute No. 31 of Jiwaji University, or that such a stipulation can be implied considering the very nature of employment. It will not thus do to say that looking to the nature of employment of a probationer, since his service can be at any time dispensed with if found unsatisfactory during probation, the termination of his employment is within the excepted category, taken out of the purview of even retrenchment. If this argument were stretched further, the same thing can be said about almost all kinds of employees except permanent ones. It can, for example, be said that considering the nature of the employment of a temporary employee, a stipulation is implied in the contract of his employment that his service can be terminated at any time and hence termination of his service also falls within the above excepted category. The same thing can be said about daily rated, ad hoc or a casual employee. In that way the exception to the main provision, i.e., Sub-clause (bb) in relation to the main provision of Clause (oo) of Section 2 of the Industrial Disputes Act, 1947, would swallow the main provision itself. Almost any termination, barring that of permanent employee, would be taken out of the purview of the main provision of retrenchment. This cannot be said to be the function of an exception. It is wrong to allow an exception to devour the main

provision itself. Hence, it must be held that for the applicability of the latter part of Sub-clause (bb), it is not open to say that it will apply even when the stipulation about termination is contained elsewhere or because the same is necessarily implied. It is absolutely necessary that such stipulation must be one which is "contained therein", i.e., one which is contained in the contract of employment itself. Since the stipulation about termination in the present case is said to be contained elsewhere, i.e., in certain clause of a statute of Jiwaji University, the provision in question i.e., Sub-clause (bb) is not applicable. The termination in the present case, therefore, did not fall within an excepted category to take it out of the purview of retrenchment. The termination was retrenchment and a void one at that. That being the position, it is proper to quash the same.

The petitioner in the present case did not avail of the alternative remedy available to him under the Industrial Law but came directly to this Court in a writ petition. In such a situation, while quashing the void order of termination, it may not be proper for this Court to direct payment of back wages to the petitioner. He can in this regard be left to seek his remedy available to him in law. Reference may be made to the decision in *Managing Director, Uttar Pradesh Warehousing Corporation and Another Vs. Vijay Narayan Vajpayee*, in which Allahabad High Court's direction for payment of back wages was deleted by the Supreme Court.

For the foregoing reasons, this petition is allowed. The order of termination of petitioner's service dated January 23, 1986 (Annexure P-6), as also the appellate order dated September 11, 1987 (Annexure P-8) confirming the said termination order, are quashed. The petitioner shall be deemed to have continued in service from the date of his wrongful termination i.e., from January 23, 1986. The petitioner shall be at liberty to seek his remedy available to him under law to recover back wages. No order as to costs. The amount of security outstanding, if any, shall be refunded to the petitioner.