
(2005) 02 AHC CK 0129
In the Allahabad High Court
Case No : C.M.W.P. No. 67 of 2003

Umesh Chandra

APPELLANT

Vs

Nagar Nigam and Others

RESPONDENT

Date of Decision : 02-02-2005

Acts Referred:

Uttar Pradesh Industrial Disputes Act, 1947 — Section 2, 25F, 25J, 25J(1), 4K

Citation : (2005) 1 AWC 899 : (2005) 1 ESC 787 : (2005) 105 FLR 84 : (2005) 2 UPLBEC 1789

Hon'ble Judges : Ashok Bhushan, J

Bench : Single Bench

Advocate : R.B. Singhal, for the Appellant; R.K. Misra, U.K. Misra, B.N. Srivastava and R.K. Sharma and U.K. Sharma, S.C., for the Respondent

Final Decision : Partly Allowed

Judgement

Ashok Bhushan, J.—Heard Sri R. B. Singhal, learned counsel for the petitioner. Sri R. K. Misra, and Sri "U. K. Misra for the respondents No. 1 and 2. Counter and rejoinder-affidavits have been exchanged. With the consent of the parties the writ petition is being finally decided.

2. By this, writ petition the petitioner has prayed for quashing the award dated 20.9.2001, given by the labour court. U. P. Allahabad and the order dated 20.9.2002, rejecting the review application filed by the petitioner. A writ, order or direction in the nature of mandamus has been sought commanding the respondents to reinstate the petitioner on the post of Safai Naik with full back wages with effect from 31.10.1990.

3. Brief facts of the case as emerge from the pleadings of the parties are :

The petitioner was engaged as daily wager Safai Naik on 10.1.1989 by the respondent No. 1 which engagement came to end on 8.2.1989. The petitioner was subsequently again engaged by the respondent No. 1 on 30.5.1989 and claims to have worked upto 31.10.1990. The petitioner was not continued after

31.10.1990, an industrial dispute was raised by the petitioner which was referred by the order dated 7.2.1998 by the State Government u/s 4K of the U. P. Industrial Disputes Act, 1947, to the labour court Allahabad. The dispute referred was as to whether the action of the employers in terminating the services of the petitioner with effect from 1.11.1990 is valid or not and if not then to what relief the workman is entitled. Before the labour court the petitioner and the employer filed their respective written statements. The case of the employer was that the petitioner was engaged for a fixed period whose services came to an end after the expiry of the period. The termination of the petitioner cannot be treated to be retrenchment within the meaning of Section 2(oo)(bb) of the Industrial Disputes Act, 1947. The workman himself appeared as witness before the Tribunal. On behalf of the employer Sri Jagannath Pal was examined. Several documentary evidence were also filed by the parties. Labour court by the impugned award dated 20.9.2001, rejected the claim of the petitioner. The Tribunal held that the petitioner has not completed valid service of 240 days ; hence is not entitled for the benefit of Section 6N of the U. P. Industrial Disputes Act, 1947. The petitioner has not completed continuous service of one year within the meaning of Section 2 (g) of the U. P. Industrial Disputes Act, 1947.

4. Learned counsel for the petitioner challenging the award contended that the petitioner has completed 240 days of service in one calendar year preceding the date of termination which fact is clearly borne out even from the written statement filed by the employer. The finding of the labour court that the petitioner has not completed 240 days of working in a calendar year is against the record. Learned counsel for the petitioner has referred to written statement filed by the employer which is filed as Annexure-5 to the writ petition. The counsel for the petitioner further contended that the termination of the petitioner having been affected in violation of provisions of Section 6N, the petitioner was entitled for such declaration and reinstatement with full back wages. The learned counsel appearing for the respondents refuting the submissions of counsel for the petitioner contended that the petitioner is not entitled for the benefit of Section 6N of the U. P. Industrial Disputes Act, 1947. in view of the fact that the petitioner was only a fixed term employee on daily wages and in accordance with the definition of Section 2(oo)(bb) of the Industrial Disputes Act, 1947, the non-continuance of fixed term employee is not a retrenchment. The provisions of Section 2(oo)(bb) are fully applicable. The finding that the petitioner has not completed one year continuous service is a finding of fact which need no interference in writ jurisdiction. Disengagement of daily wage does not amount to retrenchment. The counsel for both the parties have placed reliance on various judgments of this Court and the Apex Court which shall be referred to and considered while considering the respective submissions.

5. I have considered the submissions of counsel for both the parties and perused the record.

6. From the perusal of the award of the labour court it is clear that the reason for

non-acceptance of the claim of the petitioner as given by the labour court is that the petitioner has not completed one year's continuous service within the meaning of Section 2(g) of the U. P. Industrial Disputes Act, 1947, hence the petitioner is not entitled to the benefit of Section 6N of the Industrial Disputes Act. The first question for consideration in the writ petition is as to whether the labour court is right in its view that the petitioner has not completed one year continuous service.

7. Copy of the written statement filed by the employer is annexed as Annexure-5 to the writ petition. In paragraph 2 of the written statement it has been stated that the petitioner was taken into employment as daily wager Safai Naik on 10.1.1989 in Kumbh Mela which engagement came to end on 8.2.1989. It has further been stated that the applicant was taken into employment again on 30.5.1989 to 31.8.1989. A chart has been given in paragraph two of the written statement of petitioner's working which is as follows : SI. Period To No. From 1. 10/01/89 08/02/89 2. 30/05/89 31.08.1989 3. 01/09/89 31.10.1989 4. 01/11/89 31.12.1989 5. 01/01/90 31.03.1990 6. 01/04/90 30.09.1990 7. 10/10/90 31.10.1990

8. From perusal of chart as stated above it is clear that the petitioner's services from 30.5.1989 to 31.10.1990 are continuous without even a break of one day. Petitioner's services were terminated with effect from 1.11.1990. Continuous service has been defined in Section 2 (g) of U. P. Industrial Disputes Act, 1947, which is quoted below :

"2. (g) "continuous service" means uninterrupted service, and includes service which may be interrupted merely on account of sickness or authorized leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman, and a workman, who during a period of twelve calendar months has actually worked in an industry for not less than two hundred and forty days shall be deemed to have completed one year of continuous service in the industry,"

9. Section 2 (g) provides that a workman who during a period of twelve calendar months has actually worked in an industry for not less than two hundred and forty days shall be deemed to have completed one year of continuous service in the industry.

10. The termination having been claimed on 1.11,1990. Twelve calendar months have to be taken preceding twelve calendar months. From chart as shown in paragraph 2 of the written statement of the employer the working of the petitioner immediately preceding termination is continuous for a period of one year. The working of the petitioner from 31.10.1989 to 31.10.1990 is continuous without break of even one day. Even in the calendar year 1990 beginning from 1.1.1990 the working of the petitioner upto 31.10.1990 is more than 240 days. Thus, the working of the petitioner is continuous within the meaning of Section 2 (g) which fact is proved from the written statement of the employers themselves.

The labour court also in paragraph 9 of its judgment has accepted the fact that the petitioner after his appointment on 30.5.1989, continued upto 31.10.1990, without any actual break. Even after noting above fact the labour court erroneously observed in paragraph 10 that from examination of the working of the petitioner in the year 1989-90 the conclusion is drawn that the petitioner has not completed 240 days. As noted above, the petitioner's working for more than 240 days in the calendar year is proved from the own case of the employer. The petitioner thus had fully completed continuous service for one year and the reasons given by the Tribunal for denying the claim of the petitioner is erroneous. The submission raised by the counsel for the respondents is that the petitioner's appointment was for fixed term hence the termination of services of the petitioner cannot be retrenchment within the definition given in Section 2(oo) (bb) of the Industrial Disputes Act, 1947. In support of the submission the learned counsel for the respondents has referred to the period of engagement of the petitioner as mentioned in the written statement. The learned counsel for the respondents has also placed reliance on the judgment of the Apex Court in *Hindalco Industries Ltd. v. Labour Court, Varanasi* and Anr. 2002 SCC 187

11. Elaborating his submission the learned counsel for the petitioner has contended that the definition of retrenchment as contained in Section 2(oo)(bb) of the Industrial Disputes Act, 1947 (Central Act) is not applicable in the present case. Learned counsel for the petitioner for the above submission placed reliance on the judgment of the Apex Court in *U. P. State Sugar Corporation Ltd. v. Om Prakash Upadhyay* 2003 SCC 77 and *Engineering Kamgar Union Vs. Electro Steels Castings Ltd. and Another*, The decision of the Apex Court in *U. P. State Sugar Corporation Ltd. v. Om Prakash Upadhyay* (supra) do support the contention of the counsel for the petitioner. Following the decision of the Apex Court in *U. P. State Sugar Corporation Ltd. v. Om Prakash Upadhyay* (supra) two Judgments of this Court in *Rajya Krishi Utpadan Mandi Parishad, U. P., Meerut and Ors. v. Prescribed Authority Industrial Tribunal (V), Meerut and Ors.* 2002 (2) AWC 1639 : 2002 (93) FLR 1084 and *U.P. State Sugar Corporation Ltd. Vs. Presiding Officer, Labour Court and Another*, have been relied by the counsel for the petitioner in which this Court has laid down that the definition of retrenchment as contained in Section 2(oo)(bb) of the Industrial Disputes Act, 1947 (Central Act) is not applicable in the State of U. P. The judgment of the Apex Court in *Hindalco Industries Ltd. v. Labour Court, Varanasi* and Anr. (supra) was a case in which the workman was terminated on the ground of medical unfitness. From paragraph 2 of the judgment in *Hindalco Industries Ltd, v. Labour Court, Varanasi* and Anr. (supra) it is clear that in the said Judgment learned counsel appearing for the workman did not dispute that the provisions of Section 25J was overlooked by the High Court. According to which the definition of retrenchment contained in Central Act is to be the basis for deciding the controversy. The judgment is based on concession whereas in the judgment of the Apex Court In *U. P. State Sugar Corporation Ltd. v. Om Prakash Upadhyay* (supra) the question as to whether the definition of Section 2(oo)(bb) will be

applicable Under the U. P. Industrial Disputes Act, 1947, was specifically gone into. The Apex Court examined the rival contentions of both the parties and took the view that the operation of the said Act will not be affected by the Central Act and the judgment of the High Court which treated the retrenchment of the workman as per definition of the retrenchment given in the U. P. Industrial Disputes Act, 1947, was upheld. The Judgment of the Apex Court in U. P. State Sugar Corporation Ltd. v. Om Prakash Upadhyay's case (supra) is fully applicable in the facts of the present case. There is one more reason for accepting the contention of counsel for the workman. Section 25J of the Central Act itself contain a proviso to the effect that if a workman is entitled to benefits in respect of any matter which are more favourable to him than those to which he would be entitled under this Act, the workman shall continue to be entitled to the more favourable benefits in respect of that matter. Section 25J is extracted below :

"25J. Effect of laws inconsistent with this Chapter.-(1) The provisions of this Chapter shall have effect notwithstanding anything inconsistent therewith contained in any other law (including standing orders made under the Industrial Employment (Standing Orders) Act, 1946 (20 of 1946) :

Provided that where Under the provisions of any other Act or Rules, orders or notifications issued thereunder or under any standing orders or any award, contract of service or otherwise a workman is entitled to benefits in respect of any matter which are more favourable to him than those to which he would be entitled under this Act, the workman shall continue to be entitled to the more favourable benefits in respect of that matter, notwithstanding that he receives benefits in respect of other matters under this Act.

(2) For the removal of doubts, it is hereby declared that nothing contained in this Chapter shall be deemed to affect the provisions of any other law for the time being in force in any State in so far as that law provides for the settlement of industrial disputes, but the rights and liabilities of employers and workmen in so far as they relate to lay-off and retrenchment shall be determined in accordance with the provisions of this Chapter."

12. The definition of retrenchment as contained in Section 2 (s) of the U. P. Industrial Disputes Act, 1947, is more wider than contained in Section 2(o)(bb) of the Industrial Disputes Act, 1947, whereas several categories are excluded from the retrenchment in the definition as given in Section 2(o)(bb) of the Central Act. .The proviso to Section 25J(1) is thus exception to the general rule and the proviso to Section 25J(1) support the contention of the workman that the retrenchment has to be construed in accordance with the definition as given in Section 2 (s) of the U. P. Industrial Disputes Act, 1947. The submission of counsel for the respondents thus cannot be accepted that the termination of workman was not a retrenchment.

13. The contention of counsel for the respondents further is that the workman being a daily wager, is excluded from the protection of Section 6N. Reliance was

placed by the respondents on the judgment of the Apex Court in Himanshu Kumar Vidyarthi and Ors. v. State of Bihar and Ors. 1997 (76) FLR 237. Refuting the submission of counsel for the respondents, the learned counsel for the petitioner has placed reliance on the judgment of Apex Court in Deep Chandra v. State of U. P. and Ors. 2001 (88) FLR , and State of U.P. and Another Vs. Rajendra Singh Butola and Another,

14. The judgment of the Apex Court relied by the counsel for the respondents was a case which arose from Patna. The Apex Court in the said judgment has considered the provisions of Section 25F of the Industrial Disputes Act, 1947. The appellants in the Apex Court in the above case, were appointed in the Cooperative Training Institute, Deoghar, whose services were terminated by the Principal. Challenging the said termination writ petitions were filed in the High Court. In the High Court the violation of Section 25F of the Industrial Disputes Act, 1947, was alleged. The Apex Court in the said judgment took the view that every department of the Government cannot be treated to be "industry". When the appointments are regulated by the statutory rules, the concept of "industry" to that extent stands excluded. In the above background the Apex Court held that the concept of retrenchment, therefore, cannot be stretched to such an extent as to cover such employee. The judgment of the Apex Court in Himanshu Kumar Vidyarthi and Ors. v. State of Bihar and Ors. (supra) was on its facts and does not lay down the daily wagger working in an industry, was not entitled for protection of the U. P. Industrial Disputes Act, 1947. The Judgment of the Apex Court in State of U. P. and Anr. v. Rajendra Singh Butola and Anr. (supra) was a case of daily wagers who were held entitled to the provisions of Section 6N of the U. P. Industrial Disputes Act, 1947. Moreover, the definition of "continuous service" as contained in Section 2 (g) of the U. P. Industrial Disputes Act, 1947, also refers to muster roll. Explanation (U) of section makes it clear that the workman whose name is borne in the muster roll of industrial establishment, can also claim benefit of continuous service. Thus, a workman whose name is entered in the muster roll of the establishment, is also entitled for the benefit of the U. P. Industrial Disputes Act, 1947 and the submission of the counsel for the respondents that the benefit cannot be extended to daily wagers muster roll employees, cannot be accepted.

15. In view of the aforesaid discussion it is clear that the petitioner has completed one year's continuous service within the meaning of Section 2 (s) of the U. P. Industrial Disputes Act and the termination of the petitioner was in violation of Section 6N since the said termination was without any notice and retrenchment compensation consequently the award dated 20.9.2001 is quashed.

16. Now the question arises as to what benefit the petitioner is entitled. Learned counsel for the petitioner contended that the petitioner is entitled for the full back wages. From the facts of the present case it is clear that the petitioner was engaged only as daily wagger, his engagement was not against any post nor he was appointed in any regular capacity. Workman was paid his wages for the

period he has discharged his duties. The work was taken from the petitioner upto a fixed period thereafter he was not engaged. Ends of justice will be served in directing the payment of wages to the petitioner by the respondent from the date of publication of the award. It is thus held that the termination of the petitioner with effect from 1.11.1990. was invalid being in violation of Section 6N of the U, P. Industrial Disputes Act, 1947. The workman is also held entitled for the wages with effect from 19.1.2002, the date of publication of the award.

17. The writ petition is partly allowed to the extent as indicated above. Parties shall bear their own cost.