
(1995) 10 AHC CK 0007
In the Allahabad High Court
Case No : C.M.W.P. No. 25014 of 1995

U.P. Industrial Co-operative Association Ltd.	APPELLANT
Vs	
Presiding Officer, Labour Court and Another	RESPONDENT

Date of Decision : 13-10-1995

Acts Referred:

Constitution of India, 1950 — Article 254, 254(1), 254(2)
Industrial Disputes Act, 1947 — Section 25B, 25B(2), 25F
Uttar Pradesh Industrial Disputes Act, 1947 — Section 2, 4K, 6J, 6N, 6Q

Citation : (1996) 2 LLJ 324

Hon'ble Judges : S.R. Singh, J

Bench : Single Bench

Advocate : Vivek Kumar Birla, for the Appellant;

Final Decision : Allowed

Judgement

S.R. Singh, J.—Subject-matter of impingement in the instant petition is the Award dated 10.5.1995 published on 13.7.1995 rendered by the Labour Court. Kanpur In Adjudication Case No. 152 of 1993 consequent upon Reference by the State Government u/s 4K of the U.P. Industrial Disputes Act, 1947 (in short the Act") vide order dated 5.7.1993. The dispute referred to the Labour Court is extracted below:

2. The Labour Court by means of the impugned Award has tilted the scale of justice In favors of the second Respondent. It recorded a finding, vide order dated 12.1.1994 passed on application 9D moved on behalf of the workman for summoning his personal file, that It was not In dispute that the workman second Respondent was in the employment of the Petitioner from 1.11.87 to 8.8.1988. It has been held, Hide Award in question, that the period between 1.11.87 to 8.8.1988 during which the workman worked as Salesman, had ripened Into 240 days though under an unfair labour practice, his name was not shown in the muster roll maintained In the establishment and since the name of the. workman was not enumerated In the muster roll of the Petitioner's establishment, he

would, according to the Labour Court, be deemed to have been employed in pennant capacity and his services were dispensed with in a manner militating against the fair labour practice.

3. Sri V.K. Birla, counsel for the Petitioner canvassed that since the Respondent-workman had not endured in continuous service "for not less than one year" under the Petitioner, the provisions of Section 6N of the Act would not be attracted even if the Respondent-workman be held to have completed 240 days of service in broken bits during his employment under the Petitioner from 1.11.1987 to 8.8.1988. To paraphrase it, Sri Birla urged that as a condition precedent to the applicability of Section 6N of the Act, two things have to be reckoned with, viz., (1) the workman had been in employment "in continuous, service for not less than one year under the employer", and (ii) during this period of one year of his employment, the workman had completed not less than 240 days of continuous service.

4. The aforesaid submission made by the learned Counsel for the Petitioner cannot be lent countenance. Section 2 of the Act defines "continuous service" to mean "uninterrupted service and includes service which may be interrupted merely on ground of sickness and/or authorized leave or an accident or a strike which is not illegal, or a lock-out or cessation of work which is not due to any fault on the part of the workman and a workman, who during a period of 12 calendar months has actually, worked in an industry for not less than 240 days shall be deemed to have completed one year of continuous service in the industry". It is evident that the first part of Section 2 defines as to what is meant by "continuous service", while its second part creates a legal fiction which visualized actual work for not less than 240 days during a period of 12 calendar months as one year of continuous service. The expression "means and includes" in Section 2 makes the definition exhaustive. "Continuous service" means uninterrupted service", but interruption caused due to any of the grounds enumerated in the section is to be discounted. The second part of Section 2, in my opinion, carves out an exception to what is visualized by continuous service "for not less than one year" and equates actual service whether uninterrupted or interrupted due to any ground whatsoever, rendered for a period of 240 days, during a period of 12 calendar months "to continuous service for one year". The question is what is meant by the expression "during a period of 12 calendar months". In my opinion, the expression foretasted means "in the course of 12 calendar months" and it does not necessarily mean "throughout 12 calendar months" proceeding the relevant date from which the calculation is to be made in a given case. But the judicial pronouncement of binding character have construed the expression otherwise. In *Sur Enamel and Stamping Works (P) Ltd. Vs. Their Workmen*, the Supreme Court while construing the expression "continuous service for not less than one year" occurring in Section 25F of the Industrial Disputes Act, 1947 (in short the Central Act) observed as under:

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 those 12 calendar months, he worked for not less than 240 days.

5. Provisions of Sections 2 and 6N of the U.P. Industrial Disputes Act, 1947, have been construed in the like manner by a learned Judge of this High Court in *Bajnath Bhattacharya v. Labour Court, Allahabad and Anr.*, (1994) 3 UPLBEC 1842 . The position has, however, been altered since 19.12.1967 where after the first of the twin conditions formulated by the Apex Court in *Sur Enamel* (supra) need not be fulfilled for invoking Section 25F of the Central Act or Section 6N of the State Act. It may be noticed that Section 2 (eee) of the Central Act which defined the expression "continuous service" was in pari materia to the first part of Section 2 of the U.P. Industrial Disputes Act, 1947. The second part of which is couched in a language used in Section 25B of the Central Act as it stood before its substitution by Act 36 of 1964 w.e.f. 19.12.1964. As observed by the Supreme Court in *Surendra Kumar Verma and Others Vs. Central Government Industrial Tribunal-Cum-Labour Court, New Delhi and Another*, , "Section 25B as it read prior to Act 36 of 1964, in the light of the then existing Section 2(e) certainly lent itself to the construction that a workman had to be in service of the employer for a period of one year and should have worked for not less than 240 days before he could claim to have completed one year's service so as to attract provision of Section 25F but Section 2 (eee) has been omitted and Section 25B recast by Act 36 of 1964. The marginal title of Section 25B as stood recast by Act 36 of 1964 is "Definition of Continuous Service" while previously its marginal title was "Definition of one yet- of continuous service". Section 25B(2) of the Central Act, as it now stands, creates repugnancy to Section 2 of the State Act in so far as It provides that

(2) where a workman is not in continuous service within the meaning of Clause (1) for a period of one year or six months he shall be deemed to be in continuous service under an employer

(a) for a period of one year, if the workman, during a period of twelve, calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than

(i) one hundred and ninety days in the case of a workman employed below ground in a mine; and

(ii) two hundred and forty days, in any other case.

6. Fortified by the pronouncements foretasted, it can, indubitably, be said that the language employed in" Section 6N read with Section 2 of the Act suggests fulfillment of the twin conditions of a workman being in employment of an industry for one whole year and of having actually worked for not less than 240 days during the said period of one year as a sine qua non for attracting Section 6N of the Act but the question that emerges for considering by the Court is if Act 36 of 1964 is fraught with any consequence of bringing about any alteration in

the legal position aforesaid. In my opinion, it does have that effect. The reason is that the definition of "continuous service" given in Section 25B of the Central Act, as it stands substituted by Act 36 of 1964, shall override the definition of the said term as enshrined in Section 2 of the U.P. Industrial Disputes Act, 1947 and to the extent of inconsistency/repugnancy, Section 2 shall be void by virtue of Article 254(1) of the Constitution of India. It has been held by the Apex Court In The Industrial Credit and Investment Corporation of India Ltd. and others Vs. The Official Liquidator, H.C. Calcutta, and another, that "if the Parliament in exercising its power under proviso to Article 254(2) makes a law adding, amending, or repealing the Union law, predominance secured by the State law by the assent of the President is taken away and the repugnant State law, though it became valid by virtue of President's assent, would be void either directly or by its repugnancy with respect to the same matter." The Apex Court went on to hold "The Parliament may not expressly repeal the State law and by necessary Implication, the State law stands repealed to the extent of repugnancy, as soon as the subsequent law of the Parliament creating repugnance is made". In my opinion. Section 2 of the Act stands impliedly repealed to the extent it is inconsistent with Section 25B(2) of the Central Act. The predominance which the U.P. Act has, by virtue of Section 6R(2) over the Central Act, in respect of determination of the rights and liabilities of the employers and workmen, will make no difference. It may be noticed that Section 2 falls outside the periphery of Sections 6J to 6Q which provisions alone, according to Section 6R(i) of the Act, have been imparted predominance over "anything inconsistent therewith contained in any other law" and not the definition of "continuous service".

7. In Surendra Kumar Verma and Others Vs. Central Government Industrial Tribunal-Cum-Labour Court, New Delhi and Another, , the concerned workmen were In the employment under an industry from 4.5.1974 to January 29, 1975 and during this period, they had worked for more than 240 days. As the period from May, 1974 to January 29, 1975 fell short of one year. It was conceded before the Labor Court that there was no breach or violation of the provisions of Section 25F of the Industrial Disputes Act, 1947, a provision which is in pari materia with Section 6N of the U.P. Industrial Disputes Act, 1947. The concession was impeached before the Hon"ble Supreme Court and it was urged that there was non-compliance with the requirement of Section 25F of the Industrial Disputes Act 1947. The Supreme Court reckoned in notice its earlier decision rendered by a three Judge Bench in Sur Enamel and Stamping Works (P) Ltd. Vs. Their Workmen, as also the related provisions including Section 25B as It stood before and after Its amendment by Act 36 of 1964 and held that according to the amended provisions of the relevant statute "a workman who has actually worked under the employer for not less than 240 days during a period of 12 calendar 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." The Supreme Court went on to hold that "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 service of the employer for one whole year."

8. In *Workman of American Express International Banking Corporation*. AIR 1986 SC 458, the concerned workman had joined the service of the American Express International Banking Corporation on November 4, 1974 as a typist-clerk in a temporary capacity and he was employed as such with number of short breaks till October 31, 1975, i.e., he was in the employment for a period of less than 12 calendar months, but he had actually worked under the employer for not less than 240 days. The provisions of Section 25F read with Section 25B of the Industrial Disputes Act, 1947 were held applicable to the facts of that case and the concerned workman was directed to be .restituted to service with full back wages. The view taken in *Baynath Bhattacharya v. Labour Court, Allahabad* 1994 UPLBEC 1842, reliance on which was vehemently placed by the learned Counsel appearing for the Petitioner cannot be counter-named. It is true that the learned Judge in *Bay Nath's* case (supra) did take notice of the pronouncement of the Supreme Court in *Surendra Kumar* (supra) but I do not fish out any ground on which the view taken by the Supreme Court in *Surendra Kumar* (supra) could be distinguished particularly In view of the above discussion. The decision by the Supreme Court in 1980 (4) SCC 443 (supra) that it is enough that the workman has worked for 240 days in a period of 12 calendar months" and "it is not necessary that he should have been in service of the employer for one whole year", "has been distinguished, It may be observed with due respect to the learned Judge, on incorrect quotation of Section 2 of the Act. The section as quoted by the learned Judge in the foretasted decision seems to have been picked out from *Sur Enamel's* case (supra) as quoted in the Uttar Pradesh Local Acts, Vol. VI by V.K.S. Chaudhary, 2nd Edition p. 53 and the effect of Act 36 of 1964 has been ignored possibly on the basis of the Apex Court's decision In *U.P. Electric Supply Company v. R.K. Shukla*. AIR 1970 SC 336, where the Apex Court, it may be observed, was not called upon to consider the effect of inconsistency and repugnancy between Section 2 of the Act and Section 25B of the Central Act. Once Section 2 of the Act is held to be void to the extent it is inconsistent with Section 25B(2) of the Central Act, the predominance which the Act has, by virtue of Section 6R(2) in respect of determination of the rights and liabilities of the employer and workman, would make no difference in that Section 2 of the Act falls outside Sections 6J to 6Q and, therefore, while construing Section 6N, reliance has to be placed on Section 25B(2) of the Central Act which visualises a situation not comprehended by Section 2 (g) of the Act so far as the meaning of continuous service" is concerned.

9. It was next urged by Sri Birla that the second Respondent was not a workman" within the meaning of Section 2 of the Act in that he was not appointed by or on behalf of the Managing Director of the society who alone was competent to appoint a person on behalf of the Petitioner. "Sri Arun Kumar Gupta appearing for the second Respondent tried to repudiate the submissions and canvassed that it was beyond the pale of dispute that the second Respondent was the workman and further that the Labour Court cannot transgress beyond

the dispute referred to it. According to him, the dispute referred to the Labour Court did not admit of any enquiry into the question whether the second Respondent was a workman within the meaning of Section 2 of the Act and all that was required to be adjudicated by the Labour Court was whether deprivation of the second Respondent from the work with effect from 8.8.1988 was proper and valid and if not, what relief the workman was entitled to. In my opinion, the dispute as referred to the Labour Court was comprehensive enough to permit adjudication on the question as to whether the second Respondent was at all a workman so as to be entitled to be a recipient of the benefits flowing from Section 6N of the Act. The Respondent No. 2 cannot be said to have been employed by the Petitioner unless he had been employed with express or Implied authority of the "executive officer", i.e., the appropriate officer competent to make appointment on behalf of the Petitioner as provided in Section 2 (iii) of the Act. It was the case of the Petitioner that the Branch Manager was vested with no power to make regular appointment on behalf of the Petitioner-establishment. The counsel for the Petitioner, however, makes no bones about the fact that the Branch Manager could make casual/temporary appointment at the various sales centre in connection with exhibition and extension counter. The second Respondent, it was alleged by the Petitioner in its written statement, was engaged by the Petitioner/Branch Manager in connection with exhibition and extension counter purely on casual and temporary basis from 1.11.1987 to 29.1.1988 and 30.1.1988 to 8.8.1988 for which period, he had been paid his wages. The finding of the Labour Court that the second Respondent was appointed on regular basis does not appear to be rooted in any evidence on record. The Labour Court was not justified in Issuing out the conclusion that the second Respondent was in the employment of the Petitioner on regular basis merely because his name was not shown In the muster rolls maintained by the establishment. The Labour Court before holding that the second Respondent was employed on regular basis ought to have adverted Itself to the question whether the Branch Manager was empowered to make appointment and If not, whether his appointment was expressly or impliedly approved of by the Managing Director and In no case it could come to that conclusion without any valid material on record. Intertwined with this question Is the question whether the second Respondent was appointed for specific purpose and for specific period. It cannot be repudiated that the appointment for specific purpose and for specific period comes to an end automatically on fulfillment of the object and expiration of the period of appointment. It does not amount to retrenchment In view of the definition of the term "retrenchment" as delineated In Section 2 of the Central Act as amended by Amending Act of 1984 which definition would prevail over the definition of the term given In Section 2 of the U.P. Industrial Disputes Act, 1947 by virtue of Article 254 of the Constitution. The Labour Court having failed to advert itself to this question, the Award given by it stands vitiated. It is also vitiated for the failure of the Labour Court to record a categorical finding on number of days for which the second Respondent had "actually worked" under the Petitioner from 1.11.1987 to 8.8.1988. Since the total period for which the

second Respondent was in the employment of the Petitioner is less than one year, he could not get the benefits of Section 6N of the Act unless it is found that he had "actually worked for 240 days" during the period of his employment which was admittedly less than one year. The matter has to be re examined by the Labour Court afresh In accordance with law and in the light of the observations indicated above.

10. In the result, the petition succeeds and is allowed. The impugned Award is quashed. The Labour Court is directed to process its award afresh in accordance with law within a period of four months from the date of production of a certified copy of this Judgment.