

(2003) 12 AHC CK 0037

In the Allahabad High Court

Case No : C.M.W.P. No's. 21088 and 21092 of 2001

U.P. Power Corporation Ltd.

APPELLANT

Vs

Yogendra Kumar and Another

RESPONDENT

Date of Decision : 19-12-2003

Acts Referred:

Uttar Pradesh Industrial Disputes Act, 1947 — Section 10, 4K

Citation : (2004) 2 AWC 1775

Hon'ble Judges : Rakesh Tiwari, J

Bench : Single Bench

Advocate : S.C. Srivastava and Ranjit Saxena, for the Appellant; B.D. Mandhyan, S.C., for the Respondent

Final Decision : Allowed

Judgement

Rakesh Tiwari, J.—This writ petition is directed against the impugned award dated 14.2.2000 passed by the Labour Court, U.P., Agra, in Adjudication Case No. 120 of 1997 directing the petitioner to regularize respondent No. 1 in service from the date of reference, i.e., 2.9.1997 and pay him Rs. 5,000 as damages and also give him promotion since 31.12.1979, the date on which he was alleged to have been terminated with all the consequential benefits.

2. The State of U.P. made the following reference to the Labour Court, U.P., Agra for adjudication of dispute :

^ ^ D;k lsok;kstdksa }kjk vius Jfed ;ksxsUnz dqekj iq= Jh jes" k pUnz dh lsok,a fnukad 31-12-1979 ls lekIr fd;k tkuk mfpr ,oa oS/kkfud gS\\ ;fn ugha rks lacaf/kr Jfed fdl ykHk mi"ke@{kfriwfrZ ikus dk vf/kdkjh gS A vkSj fdl fooj.k lfgr \\

3. The case of the respondent-workman in his written statement filed before the Labour Court was that he was taken in service on 24.3.1977 as a daily wage coolie and he worked as such upto 31.12.1979. On 31.12.1979 he was retrenched without giving any charge sheet, notice or retrenchment compensation. He also stated that he had completed 240 days in a year.

4. In its written-statement the petitioner denied the claim of the respondent-workman, inter alia, stating that he was never employed nor he had worked in its organization and as such there was no relation of employer and employee between the parties and consequently there is no industrial dispute between them.

5. The respondent-workman appeared and made his statement. On behalf of the petitioner-Corporation Sri S.S. Chauhan, the then Executive Engineer, was examined and in his statement he proved the list of workmen who had worked in the Corporation for more than 240 days but in that list the name of the respondent-workman was not figured and as such the respondent-workman could not be taken to have worked 240 days in the petitioner-Corporation. Besides Sri S.S. Chauhan, Sri Prashant Kumar Ghosh (Shift Engineer, Urban Electricity Distribution Division, Agra), Sri Suresh Chand (Shift Engineer, Agra Fort Power Station) and Sri S.S. L. Bhatnagar (Executive Engineer, who was posted as Assistant Engineer Generation Division, Agra during the period 1973 to 1979) were also examined by the petitioner-Corporation. Since the dispute was raised after a lapse of about 18 years, it was specifically stated by the petitioner in its written-statement that the reference was barred by limitation.

6. The Labour Court after hearing both the parties allowed the claim of the respondent-workman vide its award dated 14.2.2000 which was published on 15.11.2000.

7. The Labour Court disbelieved the evidence of witness for employers and relying upon an alleged undated character certificate is said to have been issued by Sri S. S. L. Bhatnagar, stating that the two respondents Lokendra Kumar and Yogendra Kumar have worked under him from 24.2.1977 to 31.12.1979. It appears from the record that Sri S. S. L. Bhatnagar had been transferred from Agra to Kanpur on 5.2.1979.

8. Admittedly the services of the respondents were terminated on 31.12.1979. The dispute was raised by them in 1997 after eighteen years. They were daily wagers and muster-roll employees.

9. The Labour Court has held that delay of 18 years is of no consequence. The Labour Court did not consider the matter of delay in the award. The question of delay of reference has been considered in a catena of decisions by the Apex Court starting from Shalimar Works Limited Vs. Their Workmen, The three-Judge Bench of the Supreme Court held that "It is true that there is no limitation prescribed for reference of a dispute to a Tribunal, even so it is only reasonable that dispute should be referred as soon as possible after they have arisen and when dispute relates to discharge of workmen, 3 years would be justified in refusing the relief of reinstatement to avoid dislocation of industry.

10. In the later decision in The Nedungadi Bank Ltd. Vs. K.P. Madhavankutty and Others, the Apex Court held that though no time limit is prescribed, it does not mean that power to refer can be exercised at any point of time. The Court also

held that though the order of reference is an administrative order, it is subject to judicial review and stale disputes cannot be referred. In this case the reference was made after seven years of cause of action. The Court in Paragraph 6 of its decision further held that it cannot be said that a complaint made after a lapse of seven years can give rise to an industrial dispute or that industrial dispute could be apprehended and reference of such a dispute was bad both on ground of delay and lack of industrial dispute existing or apprehended.

11. In one of the recent judgments on the point of delay in making reference was considered in Assistant Executive Engineer, Karnataka v. Shivalinga, (2002) 1 LLJ 457SC Reference of dispute was made after more than nine years. There arose a serious dispute or doubt about the relationship of employer and employee between the parties. The Hon'ble Supreme Court held that the long delay (9 years) would impede the maintenance of records and the reference was bad in these circumstances. The Labour Court had rejected the reference, but the High Court allowed the writ petition. The Apex Court set aside the order of the High Court holding that a situation of that nature would render the claim to have become stale and maintained the order of the Labour Court rejecting the belated reference on ground of delay. The Labour Court did not apply its mind to this glaring and undisputed fact of belated and stale reference in the present case.

12. The second point raised is about completion of 240 days of actual working and relationship of master and servant.

13. The matter of employment had become too stale and the witnesses cannot be expected to remember actual days of employment after such a long time without aid of record. The undated character certificate on which the Labour Court relied does not bear any dispatch number of the office nor was it countersigned by the Executive Engineer though Sri Bhatnagar who gave certificate admitted that it bears his signatures but he stated that he was not authorized to issue it. The certificate does not state the number of actual days of working. It is also clear that Sri Bhatnagar was transferred from Agra about 10 months ago. Then how he could give certificate of working under him upto December, 1979. This certificate is fake but the Labour Court blindly relied upon it. The petitioner filed office D.O. number 127 A.G.S.U. Jan/M-1, dated 19.12.1978 in which only 26 names of daily wager who had completed 240 days was mentioned. In this D.O. letter the names of Yogendra Kumar and Lokendra Kumar were not mentioned. Another official letter is dated 17.1.1980, which was issued by the then Executive Engineer, G.P. Nayyar (Generation Division) and sent by him to Government in which names of only 26 persons were mentioned. This list also does not contain the name of aforesaid two workmen. These two D.Os. are official correspondence whereas the Exhibit-5 is only a character certificate which is not based on any record. This was a private document which was admittedly unauthorized. It is worthwhile to mention here that Sri S. S.L. Bhatnagar was asked to clear the position about the certificate by letter dated 21.11.2002 after the award was given. The reply of Sri Bhatnagar is

Annexure-21 to the writ petition in which he has stated that the two employees were not employed under him between 24.3.1977 and 5.2.1979 and the certificate filed by them before the Labour Court was forged and fabricated. Before the Labour Court the alleged list of the workers who had completed 240 days had been filed as Exhibit-4. It has come in evidence that this list is full of cuttings and over-writings and the names of Lokendra Kumar and Yogendra Kumar have been added by hand at the end. Employer's witness produced before the Labour Court could not say as to how and who added their name and when? Sri Chauhan had come in service in 1999 after about 12 years of the date of the letter hence he naturally could not recognize the initials on the cuttings. The Labour Court has committed an error apparent on the face of the record in not considering about this aspect of the matter. The relevant evidence of the employer was not considered hence the findings of the Labour Court are unsustainable.

14. The cases of daily wagers who claim retrenchment after many years stand on different footings from regular and temporary employees. Termination of their services is not retrenchment as held in the case of Himanshu Kumar Vidyarthi and Others Vs. State of Bihar and Others,

15. In order to get employment in Government Departments from back doors, false claims are generally set up by workmen. The Apex Court in Surendra Kumar Sharma Vs. Vikas Adhikari and Another, has held :

"The Court can take judicial notice of the fact that such employment is sought and given directly for various illegal considerations including money. The employment is given first for temporary periods with technical breaks to circumvent the relevant rules and is continued for 240 or more days with a view to give the benefit of regularization knowing the judicial trend that those who have completed 240 or more days are directed to be automatically regularized. A good deal of illegal employment market has developed resulting in a new source of corruption and frustration of those who are waiting at the employment exchanges for years. Not all those who gain such back door entry in the employment are in need of the particular jobs. Though already employed elsewhere, they join the jobs for better and secured prospectus. That is why most of the cases which come to the courts are of employment in Government departments, public undertakings or agencies. Ultimately it is the people who bear the heavy burden of surplus labour. The other equally injurious effect of indiscriminate regularization has been that many of the agencies have stopped undertaking casual or temporary works though they are urgent and essential for fear that if those who are employed on such works are required to be continued for 240 or more days have to be absorbed as regular employees although the works are time bound and there is no need of the workmen beyond the completion of the works undertaken. The public interests are thus jeopardized on both counts." (S.C.C. pp. 111-12, para 23)

16. It is apparent in this case also which I will deal in subsequent paragraphs.

17. The next contention of the petitioner is that the labour court has allowed full back wages without giving any reason and basis and without applying its mind in a mechanical manner. It has been repeatedly held by the Supreme Court that granting of back wages is discretionary power of the labour court but it has to consider the relevant facts and circumstances of each case before awarding back wages. In *Hindustan Tin Works Pvt. Ltd. Vs. The Employees of Hindustan Tin Works Pvt. Ltd. and Others*, , a three-Judge Bench of the Apex Court held :

"When fixing the back wages several factors need to be noted. It is a well-settled position in law that on reinstatement there is no automatic entitlement to full back wages. In *Hindustan Tin Works Pvt. Ltd. Vs. The Employees of Hindustan Tin Works Pvt. Ltd. and Others*, a three-Judge Bench of this Court laid down :

"In the very nature of things there cannot be strait-jacket formula for awarding relief of back wages. All relevant considerations will enter the verdict. More or less, it would be a motion addressed to the discretion of the Tribunal. Full back wages would be the normal rule and the party objecting to it must establish the circumstances necessitating departure. At that stage the Tribunal will exercise its discretion keeping in view all the relevant circumstances. But the discretion must be exercised in a judicial and judicious manner. The reason for exercising discretion must be cogent and convincing and must appear on the face of the record. When it is said that something is to be done within the discretion of the authority, that something is to be done according to the rules of reason and justice, according to law and not humour. It is not to be arbitrary, vague and fanciful but legal and regular. See *Sysannah Sharp v. Wakefield*, (1891) AC 173, 179."

18. Similarly in *P.G.I. of Medical Education and Research, Chandigarh v. Raj Kumar* 2001 (1) AWC 571 (SC) : (2001) 2 SCC 54, it has been held :

"Payment of back wages having a discretionary element "involved in it has to be dealt with in the facts and circumstances of each case and no straitjacket formula can be evolved, though, however, there is statutory sanctions to direct payment of back wages in its entirety. See *Hindustan Motors Ltd. v. Tapan Kumar Bhattacharya and Anr.* 2002 (3) AWC 2444 (SC) : AIR 2002 SCW 3008."

19. In case of *Hindustan Motors Ltd. v. Tapan Kumar* 2002 (3) AWC 2444 (SC) : 2002 LIC 2640, it was held that the back wages should not be allowed automatically on reinstatement. These principles regarding award of back wages has also been followed in the case of *Ram Asrey Singh v. Ram Bux* 2003 LIC 1210. The award of the Labour Court of full back wages is not proper exercise of judicial discretion. It was necessary for the Labour Court to give reasons.

20. The counsel for the petitioner-Corporation further submits that besides ordering reinstatement the Labour Court has further ordered that they will be treated as regular employees from the date of reference, i.e., 2.9.1997 and will be entitled to seniority, gratuity, pension, annual increments, time bound promotion, revised pay and continuous service w.e.f. 31.12.1979, the date of

termination, though there was neither any such pleadings and evidence nor such relief could be granted to a daily wager. The award, therefore, is beyond the scope of pleadings and reference.

21. The Labour Court has awarded regularization though according to the respondents they have worked for less than 2 years. There is no finding that the workman was appointed against any post and there was any vacancy. The Corporation has rules for recruitment, regularization and promotion. Without considering the relevant facts and circumstances the labour court has granted regularization, promotion, seniority, gratuity, pension, etc. without any basis. Recently in the case of Jawaharlal Nehru Technological University v. T. Sumaltha 2003 LIC 3172, it has been held that even long satisfactory service is no ground to sustain plea of regularization. Promotion is a managerial function. The cases of the eligible person, vacancy, suitability and rules are to be considered before granting promotion. There was no such case before the labour court and the workman could not have been granted promotion on its own and has committed an illegality. These directions of the labour court are without jurisdiction.

22. The last submission of the petitioner is that in this case award has been obtained by collusion and fraud. Sri Nagendra Kumar was an employee of the petitioner-Corporation who used to represent the petitioner-Corporation before the Labour Court and other authorities. Though he was real brother of Lokendra Kumar and Yogendra Kumar, the workmen concerned, he did not disclose this fact to the authorities of the Corporation during the pendency of the dispute before the Labour Court. It is submitted by the counsel for the petitioner that he helped his brothers in all possible ways and did not properly conduct and effectively represented the Corporation in the case.

23. After the award was published, he even did not appear before the Deputy Labour Commissioner on any date as a result of which the application of his real brother for implementation of the award was allowed and recovery certificate for a sum of about Rs. 6.5 lac was issued against the petitioner.

24. It was only thereafter that the Corporation was informed by some body thereafter by letter-dated 12.6.2001 (Annexure-29 to this writ petition) and Nagendra Kumar admitted that he was the brother of the two workmen concerned.

25. In these circumstances the counsel for the petitioner submits that possibility cannot be ruled out that Nagendra Kumar, brother of the other workmen, managed to add the names of his two brothers in the list of workers who had completed 240 days and got the industrial dispute raised after eighteen years and managed to obtain fraudulently an undated certificate from the Executive Engineer which is not part of record of the Corporation.

26. The counsel for the respondent-workmen has laid much emphasis on the fact that the findings given by the Labour Court are based on appreciation of evidence, hence this Court cannot interfere in the findings of facts. He has relied

upon (1) S.K. Dutt, Income Tax Officer and Another Vs. Anglo-India Jute Mills Co. Ltd., S.M. Nilajkar and Others Vs. Telecom, District Manager, Karnataka, in support of his case that even termination of services of daily wager who complete service of 240 days is illegal and void without compliance of Section 6N of the U. P. Industrial Disputes Act, 1947. These cases are clearly distinguishable on facts and law that the present case was liable to be referred and employment for 240 days or even employment is doubtful.

27. In view of the facts and law the contention raised by the learned counsel for the respondents are not acceptable. For the element of fraud and non-application of mind to the relevant circumstances by the Labour Court, this award is vitiated.

28. In my opinion the contentions raised by the petitioner regarding fraud and forgery have force and they cannot be lightly brushed aside. The conduct of Sri Nagendra Kumar in not disclosing his relationship to the company with his brothers, the two workmen concerned, makes the case put up by respondents workmen as highly doubtful and unreliable and collusive. Taking these circumstances in totality the award given by the Labour Court cannot be sustained and is liable to be set aside.

29. The Labour Court has failed to apply its mind to the admitted facts. It has not considered relevant documents and recorded findings on the basis of doubtful documents and granted relief beyond the scope of matter of reference, outside pleadings and against settled legal principles.

30. The petition is allowed. Interim order is vacated. The award is unsustainable and is set aside. No order as to costs. This judgment will apply to the connected Writ Petition No. 21092 of 2001, U. P. Power Corporation Ltd. v. Lokendra Kumar and Anr.