

(1997) 10 AHC CK 0033

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 7770 (SS) of 1992

Uptron India Ltd.

APPELLANT

Vs

Presiding Officer, Industrial Tribunal VI and Others

RESPONDENT

Date of Decision : 01-10-1997

Acts Referred:

Constitution of India, 1950 — Article 14, 21
Industrial Disputes Act, 1947 — Section 2

Citation : (1997) AWC 789 : (1998) 2 UPLBEC 1505

Hon'ble Judges : S.L. Saraf, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

S.L. Saraf, J.—The petitioner has filed this writ petition challenging the award given by the Industrial Tribunal, Lucknow on 21.7.1992.

2. The facts in nutshell are as follows:

The respondent No. 2 joined the services of the petitioner as a lady operator (trainee) w.e.f. 13.5.1980. On completion of the training period she was absorbed as operator w.e.f. 13.7.1981 as such she was duly confirmed on 13.7.1982. The respondent No. 2 worked satisfactorily with the petitioners. Some time one and from 7th November, 1984 she proceeded on maternity leave and remained on the said leave till 29.1.1985. Thereafter, she absented herself without any application for leave or grant of leave w.e.f. 30.1.1985 to 12.4.1985. Though the respondent No. 2 has averred that on 15th February, 1985 she had sent a letter for leave through her father informing the petitioner that she is ill, a copy of the said letter was exhibited before the Tribunal, Another document which was exhibited was a certificate issued by Dr. Radha Sharma which says that on and from 27th February to 16th April, 1985 she was in her treatment. On 12th April, 1985 the petitioner terminated the services of the respondent No. 2 taking resort to the provisions of Clause 17 (g) of the Certified Standing Order. The said Standing Order reads as follows:

"17. (g) The services of a workman are liable to automatic termination if he overstays on leave without approval or absents himself without permissions for more than seven days.. In case of sickness, the medical certificate he must be submitted within a week."

3. Under the circumstances the petitioner sought a reference in the year 1985 which was marked as C.B. Case No. 310-1985 before the Deputy Labour Commissioner, Lucknow. The State Government on consideration of the facts and circumstances of the case referred the matter on 18.7.1990 before the Industrial Tribunal. Lucknow on the following question : -

^ ^ D;k lsok;kstdksa }kjk viuh efgyk Jfed Jherh "kEeh Hkku iq= lh- ,u- dkSy] vkijSVj dks lsok;sa vius i= fnukad 12-4-85 }kjk lekIr fd;k tkuk mfpr ,oa oS/kkfud gS \\ ;fn ughaa] rks Jfed D;k fgr ykHk ikus dh vf/kdkfj.kh gS rFkk vU; fdl fooj.k lfgr**

4. The Tribunal issued notice to the parties. The parties submitted their statements before the Tribunal. Several documents were exhibited. On a detailed consideration of the facts of the case of the Tribunal held that absence without leave constitutes misconduct but it is not open to the employer to terminate the services without notice or enquiry or at any rate without complying with the principles of natural justice. It relied upon a Supreme Court decision in the case of L. Robert D'souza Vs. Executive Engineer, Southern Railway and Another, . It further held that the termination of services of the respondent No. 2 amounted to retrenchment and the same was unconstitutional and without complying with all the prerequisites of such termination, as such the respondent No. 2 was entitled to the reinstatement and she was entitled to 50% of the backwages from the date of termination of service till she is reinstated.

5. Counsel for the petitioner has urged before this Court that the award of the Tribunal should be set aside as the same was contrary to the Certified Standing Orders inasmuch as, the respondent No. 2 has failed to join her services after the expiry of the period of seven days. According to the Counsel there was an automatic termination of the services of the respondent No. 2 as she over stayed on leave without approval or absented herself without application for more than seven days. The Counsel argued that the services of the respondent No. 2 cannot survive inasmuch as, the same falls within the excepted categories of Section 2(oo). Section 2(oo) reads as follows :

"2. (oo) "retrenchment" means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than disciplinary action, but does not include-

(a) voluntary retirement of the workman; or

(b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman " concerned contains a stipulation in that behalf;

(bb) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein; or

(c) termination of the service of a workman on the ground of continued ill-health."

6. Counsel for the petitioner strongly relied on Sub-clause (bb) which was introduced by way of amendment on 18.8.1984 by Act No. 49 of 1984. Counsel argues that the services of the respondent No. 2 were termination under a stipulation contained in the said contract of service.

7. Counsel for the respondent No. 2 submits that the expression of termination of service for any reasons whatsoever in the definition of the expression "retrenchment" in Section 2(oo) of the Industrial Disputes Act covers every kind of termination of service except those not expressly included in Section 25F or not expressly provided for by other provisions of the Act. Such as Section 25FF or 25FFF. When the case does not fall in any of the excepted categories, the termination of services even if it be according to the automatic discharge from service under agreement would nevertheless be retrenchment within the meaning of expression to Section 2(oo) so that if the name of the workman is struck off the rolls that itself would constitute a retrenchment, therefore, the termination of service for unauthorised absence from duty. In this case "would be retrenchment" within the meaning of section 2(oo) in as much as the precondition of a valid retrenchment set out in Section 25F must be satisfied. It was urged on behalf of the respondent's Counsel that Sub-clause (bb) of Section 2(oo) has no application whatsoever in the case of respondent No. 2, as the service of the respondent No. 2 were not contractual nor was the same terminable by efflux of time or for non-renewal of contract of service. The respondent Counsel unfair urged before this Court that the said termination was future unjust and unreasonable and in violation of the principles of natural justice. It was further urged that the order of termination was in flagrant violation of Articles 14 & 21 of the Constitution of India.

8. I have carefully considered the submissions made by the Counsel for the parties. Admittedly the services of the respondent No. 2 was terminated without following the principles of natural justice, without issuing any show-cause notice, without holding any enquiry and without seeking any explanation. Such termination of service is ipso facto illegal and void. The Apex Court in a catena of judgment in the case of L. Robert D'Souza v. Executive Engineer 1982 (1) SCC 654; Delhi Cloth and General Mills v. Shambhoo Nath Mukherji 1977 (4) SCC 412 ; Santosh Gupta Vs. State Bank of Patiala, ; The State Bank of India Vs. Shri N. Sundara Money, ; Hindustan Steels Limited v. Presiding Officer, Labour Court 1976 (4) SCC 822 and in the Constitutional Bench of the Supreme Court in Punjab Land Development and Decimation Corporation Ltd., Chandigarh v. Presiding Officer, Labour Court, Chandigarh 1993 SCC 682, has laid down that a

termination of service for any reason whatsoever in the definition of expression "retrenchment" is very comprehensive and includes all types of termination of service. It also includes automatic termination of service contained in the Certified Standing Orders. It was held that striking the name from the rolls for unauthorised absence from duty amounted to termination of service and absence from duty for eight consecutive days amounts to misconduct and. termination of service on such grounds without compliance of the principles of natural justice could not be justified.

9. I hold that the principles of natural justice be read into as part of the inbuilt procedure of Clause 17 (g) of the Certified Standing Orders which allows the management to terminate the services of the appellant otherwise the same would become unjust, arbitrary and unfair violating the principles of Article 14 of the Constitution. It also violates Article 21 of the Constitution of India, inasmuch as, Article 21 clubs life with liberty, dignity of person which means a livelihood without which the glorious contents of the dignity of the person would be reduced to animal existence. When it is interpreted that the colour and content of procedure establishment by law must be in conformity with the minimum fairness and processual justice. For the aforesaid reasons I rely strongly on a decision of the Supreme Court in the case of D.K. Yadav v. J.M, A. Industries Limited 1993 (67) F.L.R.3.

10. The argument of the counsel for the petitioner that the case of the respondent No. 2 falls under the amended provision of Section 2(o)(bb) is without any merit and has no force whatsoever. Admittedly the services of the respondent No. 2 was regular and permanent in nature. According to the writ petition itself, the respondent No. 2 was absorbed as an operator w.e.f. 13.7.1981 and was confirmed as such on 13.7.1982. If that be so, the question of appointment being terminated with efflux of time or for non-renewal of contract did and or does not arise. The case cited by the Counsel for the petitioner in Civil Appeal No. 3406 of 1992, Scooters India v. Vijai E. V. Eldred, is of no help to the petitioner. The Supreme Court was pleased to allow the appeal of the management and set aside the judgment of the High Court primarily on three grounds. Firstly, though the matter should have been adjudicated as an industrial dispute involving the termination of the disputed questions of fact the workman never for which the remedy under the Industrial laws was available to the workman. Secondly, the writ petition was filed more than six years after the date on which the cause of action arose. Thirdly, the High Court was pleased to declare the Standing Orders as invalid. In the facts of the present case, there was no delay on the part of the respondent No. 2 in approaching the State Government for making the reference to the Industrial Tribunal. It did not approach the High Court directly. Further Clause 17 (g) of the Certified Standing Order is not being declared as invalid. I only hold that the principles of natural justice should be read into Clause 17 (g) of the Certified Standing Orders as such the decision of the Supreme Court relied on by the petitioner is of no help to the petitioner.

11. Further Clause(bb) of Section 2(oo) of the Industrial Disputes Act has been examined by Punjab and Haryana High Court in a decision reported in 1990 L.L.J. 443, Bhikku Ram v. Presiding Officer, Industrial Tribunal-cum-Labour Court, Rohtak; has held as under:-

"The amended provision in the Section 2(oo)(bb) cannot be so construed as to drastically restrict the orbit of the term "retrenchment". Clause (bb) is an exception which must be interpreted narrowly. It cannot be given meanings which nullify or curtail the ambit of the principal clause. No doubt the intention of Parliament in enacting this clause was to exclude certain categories of workers from the term "retrenchment" but there is nothing in this clause which allows an outlet to unscrupulous employers to shunt out workers in the garb of non-renewal of the contract even when the work subsists. This clause as a whole has to be construed strictly in favour of the workman as far as possible as to ensure that the Act is implemented in the letter and spirit. If the termination is meant to exploit an employee or to increase the bargaining power of the employer, then it has to be excluded from the ambit of Clause(oo) and the definition of the term "retrenchment" has to be given full meaning. The contractual clause enshrined in Clause(bb) cannot be resorted to frustrate the claim of the employee against uncalled for retrenchment or for denying the other benefits. It cannot be so interpreted as to enable an employer to resort to the policy of hire and fire and give unguided power to the employer to renew or not to renew the contract irrespective of the circumstances in which it was entered into or the nature and extent of work for which he was employed.

Clause (bb) has to be so interpreted as to limit it to cases where the work itself has been accomplished and the agreement of hiring for a specific period was genuine. If the work continues the non-renewal of the contract has to be dubbed as mala fide."

12. Similar view has been taken by Rajasthan High Court in a case reported in (paragraph 33) in the case of Ram Prasad v. State of Rajasthan 1992 L. I.C. 2139, which is as under :

"The work may be of a casual nature and may be of a limited scope .and in such cases, the employer cannot be saddled with making permanent employment. If the Court comes to a conclusion that the provisions of Section 2(oo)(bb) are being misutilised by the unscrupulous employers, it can grant relief to the employees."

In a decision Bhikhu Ram v. Presiding Officer, Industrial Tribunal 1995 L.I.C. 2448, the Bench of Punjab and Haryana High Court has been pleased to observe as follows :

"From the above, it is clear that termination of service of a workman, who has worked under an employer for 240 days, in a period of twelve months preceding the date of termination of service will ordinarily be declared as void if it is found that the employer has violated the provisions of Sections 25F(a) and (b). If the

employer resists the claim of the workman and invokes Section 2(oo)(bb), burden lies on the employer to show that though the employee has worked for 240 days in twelve months prior to termination of his service, such termination of service cannot be treated as retrenchment because it is in accordance with the terms of the contract of employment or on account of non-renewal of the contract of employment. It has also to be shown by the employer that the workman had been employed for a specific work and the job which has being performed by the employee is no more required. Only a bonafide exercise of right by an employer to terminate the service in terms of the contract will be covered by Clause(bb). If the Court finds that the exercise of rights by the employer is not bona fide or the employer has adopted the methodology of fixed term employment as a conduct or mechanism to frustrate the rights of the workman, the termination of the service will not be governed by the exception contained in Clause(bb). Instead the action of the employer will have to be treated as an act of unfair labour practice, as specified in the Fifth Schedule of the Act. The various judgments rendered by the different High Courts and by the Supreme Court clearly bring out the principle that only a bonafide exercise of the powers by the employer in cases, where the work is of specified nature or where the temporary employee is replaced by a regular employee that the action of the employer will be upheld. In all other cases, the termination of service will be treated as retrenchment unless they are covered by other exceptions set out hereinabove."

13. In the decision of Arun Kumar Mathur v. Labour Court 1993 (66) F.L.R. 211, when the name of the petitioner was struck off from the muster roll it was held that the case did not fall within the excepted categories including Sub-clause (bb) of Section 2(oo).

14. In the case of Dilip Shirkee v. Zila Parishad 1990 L.I.C. 100, the Bombay High Court has held that if the employer resort to contractual employment as a device to simply take it out of the principal Clause 2 (oo) such contractual engagement will have to be decided on the anvil of fairness, propriety and bonafides. The amended sub-Clause(bb) would only apply to such case where the work ceases with the employment or the post itself ceases to exist or such analogous cases where the contract of employment is found to be fair and bonafide. In the instant case, the service of the respondent No. 2 was not terminable under any contract of service with efflux of time nor it was a case for non-renewal of contract. Termination of service of the respondent No. 2 which was permanent could only be done by following the procedure laid down under the Industrial Disputes Act and not on the sweet will of the management. I hold that Section 2(oo) contains in-built procedure of mechanism of the principles of natural justice and the same must be complied with wherever there is a termination of service by the employer of the employees. In the instant case the employer has miserably failed to follow the principles of natural justice and as such the order of termination amounted to illegal and malafide retrenchment of the respondent No. 2.

15. In the result, the petition fails and is accordingly dismissed. The award dated 21.7.1997 is hereby affirmed.

16. In the facts of this case, the petitioner should not have dragged the workman to the High Court and force her to meet the enormous litigation expenses. As such it is a fit case where costs against the petitioner be awarded, which is assessed at Rs. 15,000/-. The same be paid by the petitioner within a period of four weeks from the date of this order.