
(1968) 02 RAJ CK 0006
In the Rajasthan High Court
Case No : Civil Writ Petition No. 579 of 1967

Viney Kumar Majoo

APPELLANT

Vs

State and Others

RESPONDENT

Date of Decision : 02-02-1968

Acts Referred:

Constitution of India, 1950 — Article 14, 16
Industrial Disputes Act, 1947 — Section 2, 25B, 25F, 25G

Citation : AIR 1968 Raj 227 : (1968) 2 LLJ 398 : (1968) RLW 325

Hon'ble Judges : Kan Singh, J

Bench : Single Bench

Advocate : M. Mridul, for the Appellant; R.N. Munshi, Additional Government Advocate and G.M. Mehta, Dy. Govt. Advocate, for the Respondent

Final Decision : Allowed

Judgement

Kan Singh, J.—This is a writ petition under Article 226 of the Constitution by one Viney Kumar Majoo and say it he questions the validity of an order dated 8-9-67 (Ex. 6 on record) passed by the Chief Engineer Project, Public Works Department (B. & R.), Rajasthan, retrenching certain Engineering Subordinates including the petitioner. In this order the petitioner's name occurs at serial No. 3. The relevant facts emerging from the writ petition are briefly these:

2. Petitioner was an Engineering Graduate having obtained his degree in the year 1966. He came to be appointed as a Junior Engineer in the Public Works Department (B and R). Project Organisation under an order of the Chief Engineer, Public Works Department (B and R) Rajasthan dated 25-7-66. He was appointed in the grade of Rs. 120-5-155-10-185-205-10-225 EB 22B 10-285-335-124-385. He was given a starting salary of Rs. 225/- per month and he joined the appointment on 28th October, 1966. Being a Junior Engineer the petitioner was included in the category of Engineering Subordinates within the meaning of Rule 4(e) of the Rajasthan Subordinate Services (Recruitment and other Service Conditions) Rules, 1960. The petitioner proceeded to say that he was senior to

Servashri M. G. Singhvi, M. C. Tyagi, R. L. Chauhan, C. S. Mehta, M. C. Gupta, R. K. Gupta and S. K. Garg. These persons were originally impleaded in the writ petition, but as their services came to be retrenched during the pendency of the writ petition, their names were deleted. According to the petitioner, a seniority list of Engineering Subordinates was prepared and in the seniority list (Appendix-A) the name of the petitioner was shown at No. 17, while those of the erstwhile respondents Nos. 4 to 10 were shown below the petitioner at Nos. 20, 21, 27, 28, 31 and 32 respectively. On 31-7-67 an order was passed by the Chief Engineer, Public Works Department (B. & R.) Project, Jodhpur, respondent No. 2, saying that on account of the abolition of two Divisions and 18 Sub-Divisions the services of certain Engineering Subordinates of the Project Organisation were retrenched with effect from 31-7-67. A list was appended to this order but no junior Engineer including the petitioner was listed for retrenchment. Thereafter the impugned order was passed by respondent No. 2 on 8-9-67. Petitioner claims that he is a workman within the meaning of Section 2(s) of the Industrial Disputes Act, 1947, hereinafter to be referred as the "Act" and consequently the order of his retrenchment has to fulfil requirements, of the Act.

3. In challenging the validity of this order the petitioner contends that it violates Sections 25F and 25G of the Act. The petitioner avers that although he had put in more than one year's service as contemplated by the Act, neither any compensation as contemplated by Section 25F of the Act was paid, nor were any wages in lieu of notice required by Section 25F were paid, in that the requisite notice was not served on him. It is further contended by the petitioner that the impugned order was bad as persons junior to him had been retained when he came to be retrenched on 8-9-67 and this violated Section 25G of the Act. In this context it was also contended that the way in which petitioner was chosen for retrenchment while his juniors were retained at the time of retrenchment, he was denied equality of treatment and the order thus violated also Articles 14 and 16 of the Constitution.

4. The writ petition has been opposed by the respondents. It is denied that the petitioner was a workman within the meaning of Section 2(s) of the Act. Consequently it is urged that Sections 25F and 25G were inapplicable. As regards the notice for retrenchment, it is stated that a notice was given and for that reliance is placed on the impugned order itself. The respondents deny that the petitioner can be said to have been in employment for a continuous period of one year so as to be able to claim the benefit of Section 25F of the Act.

5. The first question that arises for consideration is whether the petitioner can rightly claim to be a workman within the meaning of the Act. The term "workman" is defined by Section 2(s) which is as follows:--

"2(s) "Workman" means any person (including an apprentice) employed in any industry to do any skilled or unskilled manual, supervisory, technical or clerical work for hire or reward. whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial

dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person:

(i) who is subject to the Army Act, 1950 (XLVI of 1950) or the Air Force Act, 1950 (XLV of 1950) or the Navy (Discipline) Act, 1934 (XXXIV of 1934): or

(ii) who is employed in the police service or as an officer or other employee of a prison; or

(iii) who is employed mainly in a managerial or administrative capacity; or

(iv) who, being employed in a supervisory capacity, draws wages exceeding five hundred rupees per mensem or exercised, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature namely."

6. There can be no gainsaying the fact that the activity in which an Engineering Subordinate is engaged is an industrial activity and the organisation that is maintained in connection with the buildings and roads is an industry. According to the definition of the term "workman" any person employed in an industry to do any supervisory, technical or clerical work for hire or reward is a workman. Clause (iv) of Section 2(s) contemplates that a person employed in a supervisory capacity will also be a workman provided he does not draw wages exceeding Rs. 500/- per mensem. It is not disputed by the respondents that at the relevant time the petitioner was getting a salary of Rs. 255/- per month. As for ascertaining the duties of Engineering Subordinates a circular, which is standing order No. 158 of 12-12-62. issued by the Department, was brought to my notice. Parties are agreed that the duties of Engineering Subordinates which are those of Overseers are governed by this standing order. The duty of the Overseer inter alia is to collect engineering data required for preparation of correct estimates. He also prepares rough drawings and site plans on the basis of the survey conducted by him. He is required to prepare estimates for all works in his Section. He supervises the works under his charge and has to ensure that such works are done according to the specifications and drawings and in conformity with the standards laid down by the Department. If any work is done by a contractor below specifications, then it is the duty of the Overseer to bring it to the notice of the Assistant Engineer and to make a note on the Site Order Book. He is further to remain at the site of the work throughout the day and he has to attend the office of the Assistant Engineer only when he is called to do so or when he has any specific work in the office. He is required to submit progress reports of the work as may be required by the senior officer. He is to record in the Measurement Book the Measurements of work done by the contractor. He is to prepare indents for the drawal of the material from stores and has to maintain certain other records. A perusal of this standing order No. 158 does not leave any doubt in my mind that the duties of an Overseer or the Junior Engineer for

that matter are of technical character and they are both supervisory and clerical for certain jobs. Thus, the petitioner was undoubtedly a workman within the meaning of Section 2(s) of the Act. As he was drawing his salary less than Rs. 500/- a month, even though he may be doing supervisory work, he will certainly be taken to be a workman within the meaning of the Act

7. I may now proceed to examine whether the impugned order satisfies the conditions laid down in Sections 25F and 25G of the Act These sections read as follows:--

"25F. Conditions precedent to retrenchment of workmen. No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until.

(a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;

Provided that no such notice shall be necessary, if the retrenchment is under an agreement which specifies a date for the termination of service;

(b) the workman has been paid, at the time of retrenchment, compensation, which shall be equivalent to fifteen day's average pay for every completed year of service or any part thereof in excess of six months; and

(c) notice in the prescribed manner is served on the appropriate Government or such authority as may be prescribed by the appropriate Govt. by notification in the Official Gazette."

"25G. Procedure for retrenchment :--Where any workman in an industrial establishment who is a citizen of India, is to be retrenched and he belongs to a particular category of workman in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman."

8. Section 25F postulates that the workman who claims the benefit of Section 25F shall be a workman who has been in continuous service for not less than one year under an employer Section 25B defines what is continuous service. This section reads as follows:

"25-B. Definition of continuous service; -- For the purposes of this Chapter:-

(1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or lock-out or a cessation of work which is not. due to any fault on the part of the workman;

(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 cases:

(b) for a period of six months, if the workman, during a period of six 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) ninety-five days, in the case of a workman employed below ground in a mine; and

(ii) one hundred and twenty days, in any other case Explanation -- For the purposes of clause (2), the number of days on which a workman has actually worked under an employer shall include the days on which-

(i) he has been laid-off under an agreement or as permitted by standing orders made under the Industrial Employment (Standing Orders) Act, 1946, or under this Act or under any other law applicable to the industrial establishment;

(ii) he has been on leave with full wages, earned in the previous years;

(iii) he has been absent due to temporary disablement caused by accident arising out of and in the course of his employment; and

(iv) in the case of a female, she has been on maternity leave; so, however, that the total period of such maternity leave does not exceed twelve weeks."

Sub-section (1) indicates that a workman shall be said to be in continuous service for a period, if for that period in uninterrupted service he had been away on account of sickness or authorised leave or an accident or a strike which is not illegal or lock out or a cessation of work not due to any fault on the part of the workman. The present case does not raise any dispute regarding Sub-section (1). Sub-section (2). to my mind, creates a fiction and a person is deemed to be in continuous service for a period of one year, if the workman during a period of 12 calendar months preceding the date with reference to which calculation is to be made has actually worked under the employer for not less than 190 days in the case of a workman employed below ground in a mine and 240 days in any other case. Clause (a) of Sub-section (2) thus contemplates that a period of 240 days in all in a case where the workman had not to work below ground in a mine will be sufficient in constituting the period of one year of continuous service. Clause (a) of Sub-section (2), in my view, shows as to with reference to what

period 240 days have to be calculated. In other words, if in a span of one year a workman had put in 240 days, then his service has to be deemed to be one year's continuous service.

9. In my view, the analysis of Section 25B is like this: Sub-section (1) provides that the definition of continuous service contained therein has to be taken for the purposes of the Chapter and in this Chapter Section 25F occurs. Sub-section (1) then defines what is taken to be continuous service for a period. It is laid down that the uninterrupted service would include periods of the service which would be interrupted on account of sickness or authorised leave or an accident or strike which is not illegal or lock out or a cessation of work which is not due to any fault on the part of the workman. Subsection (2) contemplates a case where a workman is not in continuous service within the meaning of Clause (1) for a period of one year and it thus provides an alternative by way of fiction when a certain period shall still be treated as continuous service for one year. Rendering of Sub-section (2), in my view, is that the workman shall be deemed to be in continuous service under an employer for a period of one year, if he satisfies the stated condition namely, that if during a period of 12 calendar months preceding the date with reference to which calculation is to be made, he had actually worked under the employer for not less than 240 days in the cases of employment other than those requiring a workman to work below ground in a mine. The words "has actually worked" for the stated period are, in my view, important and furnish the clue to the correct interpretation of the sub-section. The use of the expression "during a period of 12 calendar months preceding the date with reference to which calculation is to be made" is with a view to ensuring that the period of 240 days has to be in relation to a certain unit of measure of time which is provided to be one year. In other words, if a person renders service for not less than 240 days in a span of one year, then he is still entitled to be considered as one who had put in continuous service for a period of one year.

10. It was strongly contended both by learned Additional Government Advocate and learned Deputy Government Advocate, who argued the case by turns, that Sub-section (2) contemplates that the person concerned must be in actual service of the employer for the minimum period of 12 calendar months and if this condition is not fulfilled, then Sub-section (2) will be inapplicable. They cited *Sur Enamel and Stamping Works (P) Ltd. Vs. Their Workmen, and Employers in Relation to Digwadih Colliery Vs. Their Workmen*,

11. In *Sur Enamel and Stamping Works (P) Ltd. Vs. Their Workmen*, their Lordships were called upon to consider the implications of Sub-section 2(eee) and Section 25B as they stood prior to the amendment brought about in 1965. Section 25B was then in the following terms:--

""Section 25B. Definition of one year of Continuous Service. For the purposes of Sections 25G and 25F, 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.

Explanation. In computing the number of days on which a workman had actually worked in an industry, the days on which-

(a) he has been laid off under an agreement or as permitted by standing orders made under the Industrial Employment (Standing Orders) Act, 1946 (XX of 1946), or under this Act or under any other law applicable to the industrial establishment, the largest number of days during which he has been so laid off being taken into account for the purposes of this clause,

(b) he has been on leave with full wages, earned in the previous year, and

(c) in the case of a female, she has been on maternity leave, so however that the total period of such maternity leave shall not exceed twelve weeks, shall be included."

Sub-section 2(eee) was in the following terms:--

"Continuous Service" means uninterrupted service, and includes service which may be interrupted merely on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lockout or a cessation of work which is not due to any fault on the part of the workman";

It was in the context of the statutory position then obtaining that their Lordships held that for the purposes of Section 25F the workman must actually be in the employment for the minimum period of one year. This case being thus before the amendment of Section 25B, which I am called upon to consider, is not, with all due deference, of much help.

12. In *Employers in Relation to Digwadih Colliery Vs. Their Workmen*, the award that came to be considered by their Lordships was of 3rd August, 1962. That was again of a date prior to the amendment. Learned Additional Government Advocate, however, relies on certain passages in that case that although their Lordships were considering the position in the light of the unamended section, they had made certain observations which tend to show that the amendment did not introduce any material change. For appreciating the observations I may extract them in extenso:

"Shri B. Sen drew our attention to the Industrial Disputes (Amendment) Act, 1964, which was passed last December. By Section 2 (iii) of the amending Act of 1964, Clause (eee) of Section 2 of the principal Act was omitted and by Section 13 for Section 25B in the principal Act the following was substituted:

"25B. For the purposes of this chapter, --

(1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lockout or a cessation of work which is not due to any fault on the

part of the workman;

(2) where a workman is not in continuous service within the meaning of Clause (1) for a period of one year.... 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:--

The explanation to Section 25B. is the same mutatis mutandis as before. Sri Sen contended that the change in the law brought out his contention. We do not agree. The amended Section 25B only consolidates the previous Sections 25B and 2(eee) in one place, adding some other matters which are not relevant to the present purpose, but the purport of the new provisions is not different. In fact the amendment of Section 25F of the principal Act by substituting in Clause (b) the words "for every completed year of continuous service"" for the words "for every completed year of service" now removes a discordance between the unamended Section 25B and the unamended Clause (b) of Section 25F. Neither before these several changes nor after these is uninterrupted service necessary if the total service is 240 days in a period of twelve calendar months. The only change in the new Act is that this service must be during a period of twelve calendar months preceding the date with reference to which calculation is to be made. The last amendment now removes a vagueness which existed in the unamended Section 25B."

In the above passage their Lordship have certainly referred to change in the law when they observed that the only change in the new Act is that the service must be during a period of twelve calendar months preceding the date with reference to which calculation is to be made and the new amendment had removed the vagueness which existed in the unamended section. Having considered these observations, I am clearly of the opinion that what I have already said does not go against what their Lordships were pleased to lay down. One year's period contemplated in Sub-section (2) of Section 25B of the Act only furnishes a unit of measure and if during that unit of measure the period of service actually rendered by a workman is 240 days, then that workman can be considered to be such as has rendered one year's continuous service for the purposes of the Act. These observations, in my view, do not support the submission that even under the amended section the employee must have actually been in the service for the statutory period of one year,. In my view, the avowed object of the amendment was to confer certain benefits on the workman and this being a beneficent piece of legislation has to be so construed as to advance the underlying object of conferring benefits on workman and in my view, it should not be so construed as

to deny such benefits. If this were not so, this might lead to some irrational results which may not have been intended by the Legislature. For example, there may be a workman who has rendered 240 days service as a matter of fact and he had been in service for a period of 365 days. There may be another workman who may have rendered service for 360 days and he had been in service only for 360 days. Then it will mean that the person who had put in 240 days service though he had been in actual employment for 365 days will get the benefits, whereas the workman who had worked on all the 360 days will not be entitled to claim a farthing. This could not have been the intention of the Legislature. Therefore, Sub-section (2) has to be construed as it is, without straining a word here or there, or saying anything by way of addition. It would not have been difficult for the Legislature to say, if it wanted to do so, that the workman must have actually been in employment for the minimum period of one year. The idea seems to be that if within a unit period of one year a person had put in, at least 240 days, then he must get the benefits conferred by the statute.

13. In the present case the petitioner came to be employed on 28-10-66 and he came to be retrenched by the impugned order on 8-9-67. It is nobody's case that his service during the period was not uninterrupted. This means that he had put in the minimum service of 240 days during his tenure of service. Section 25F is therefore, attracted in the present case. As the workman had put in more than the requisite period of service, he was undoubtedly entitled u/s 25F to compensation as contemplated by Clause (2) thereof from the employer before the latter could retrench the workman. This has indisputably not been paid to the workman when he was retrenched.

14. Learned Deputy Government Advocate contended on the basis of Ex. 6 that the notice for one month had been given to the petitioner. Ex.-6 inter alia recited that all retrenched Engineering Subordinates shall get one month's notice pay. In view of the language of this order it cannot be said that it was an advance notice for termination of the employment. That in fact was a direction for the payment of one month's notice pay. One month's notice pay is required to be paid when an employer does not wish to serve the advance notice as required, but in lieu thereof he chooses to pay one month's wages. Now it may be open to an employer not to give a notice, but in that event it will be incumbent on him to pay one month's wages in lieu of notice, that is, for the period of the notice. This is to be done before the actual retrenchment. It is to precede the retrenchment and not to follow it. This has obviously not been done in the present case and, therefore, the condition precedent for the retrenchment envisaged by Section 25F of the Act has not been fulfilled and this invalidates the order of retrenchment itself.

15. I may next turn to consider the contention raised on the basis of Section 25G of the Act. This section prescribes a procedure for retrenchment. It provides that where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workman in that

establishment then in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman. The invalidity of the impugned order has to be examined in the state of things obtaining when the order was passed. On that date the erstwhile respondents Nos. 5 to 10 namely Servashri M. C. Singhvi, M. C. Tyagi, B. L. Chauhan, C. S. Mehta, M. C. Gupta, R. K. Gupta and S. K. Garg were retained in employment. According to the seniority list embodied in Ex-2 at page 44 of the paper book the name of the petitioner finds place above the names of these erstwhile respondents. In these circumstances even though it was open to the respondents to retrench the services of the petitioner before that of the erstwhile respondents, yet according to Section 25G it was necessary for the respondents to record reasons. The impugned order does not record any reason whatsoever for retrenching the petitioner prior to the erstwhile respondents. As I have already observed above, these respondents too came to be retrenched, but that was subsequent to the retrenchment of the petitioner. As already stated, the validity or invalidity of the impugned order has to be examined in the light of the state of things obtaining at the time the order was made and subsequent events cannot make the order valid, if it was otherwise invalid or vice-versa. In view of this consideration I am satisfied that the impugned order was passed in violation of the provisions of Section 25G of the Act. Apart from every thing since it was an employment under the State, the State was duty bound to accord equal treatment to all those who were similarly circumstanced and if it did not formulate any principle for retrenching some of the workmen in a particular category while not retrenching others, then, in my view, that also violates Articles 14 and 16 of the Constitution.

16. From whatever angle the matter might be viewed, the order under challenge turns out to be one which is in clear contravention of not only the provisions of the Act, but Articles 14 and 16 of the Constitution and the order has to be struck down qua the petitioner.

17. In the result, I accept this writ petition with costs and set aside the impugned order Ex-6 qua the petitioner and forbid the respondents from giving effect to it against him.