Mani Vs. State

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Court : Chennai

Decided On : Oct-14-2014

Judge : R.S.Ramanathan

Appellant : Mani

Respondent : State

Judgement :

IN THE HIGH COURT OF JUDICATURE AT MADRAS DATED: 16.9.2009 CORAM: THE HONOURABLE MR.JUSTICE P.JYOTHIMANI W.P.No.8494 of 1997 K.N.Asokan .Petitioner versus 1.

The Presiding Officer Labour Court, Coimbatore.

2.

The Management of Laidlaw Memorial School & Junior College rep.

by its Principal and Secretary Ketti 643 215 Nilgiris District.Respondents PRAYER: Petition under Article 226 of the Constitution of India for issue of a writ of Certiorarified Mandamus as stated herein.

For Petitioner : Mr.R.Krishnaswamy for Mr.V.Ajoy Khose For Respondents : Mr.S.Ragunathan for 2nd respondent

ORDER

The workman, who has lost the case in I.D.No.370 of 1991 on the file of the Labour Court, Coimbatore, has filed the present writ petition challenging the award dated 29.12.1995 and for a direction against the second respondent to reinstate him in service with all backwages and attendant benefits.

2.1.

It is the case of the petitioner that he was appointed in 1985 in the second respondent/School Management as a Baker and was paid salary of Rs.745/- per month and Rs.150/- as winter allowance.

According to the petitioner, in respect of service conditions certain conciliation proceedings were initiated by the Workers Union and while that was pending, on 12.4.1991, the petitioner and other workmen were terminated on the basis that the second respondent/School Management wanted to reorganize the work in the establishment.

The petitioner has sent a letter to the second respondent to reconsider the decision and as the same was not considered, he raised a dispute before the Labour Officer, Coonoor under Section 2A(2) of the Industrial Disputes Act, 1947 (for brevity, ".the Act".).According to him, even if there was no post of Baker, the petitioner should have been engaged as a Watchman.

2.2.

Since there was no settlement, the Conciliation Officer filed a failure report on 12.8.1991.

Based on the said report, the petitioner filed his claim before the fiRs.respondent/Labour Court.

Since there were identical disputes raised by other workmen, all the matters were taken for joint trial.

The petitioner has filed 11 documents, marked as Ex.W1 to W11, while the second respondent filed 4 documents, marked as Ex.M1 to M4.

The petitioner was examined as witness and there was no oral evidence on the side of the second respondent.

2.3.

Before the fiRs.respondent/Labour Court, it was the case of the second respondent that there was no need for Baker and therefore, the reorganization was required.

However, during the pendency of the dispute, the second respondent has asked the petitioner to rejoin duty as Baker.

The petitioner expressed his willingness to join, provided his backwages are paid.

The second respondent did not respond to the said request of the petitioner.

2.4.

The Labour Court, by common award dated 29.12.1995, dismissed the industrial dispute filed by the petitioner with a direction that he should be paid the retrenchment compensation with additional three months pay as compensation.

Challenging the said order, the present writ petition is filed for the relief stated supra.

3.1.

The fiRs.leg of argument raised by the learned counsel for the petitioner is that the termination of the petitioner by the second respondent on 12.4.1991, while the dispute relating to service conditions of the employees was pending conciliation, is hit by Section 33(1) of the Act and the same is not valid as the same has been passed without express permission from the authority before which the proceeding was pending.

3.2.

This aspect has been considered in detail by the fiRs.respondent and in fact, the fiRs.respondent has considered on merit about the allegation made against the

second respondent that the workers and their service conditions were not as per law and they were treated as slaves and rejected the said allegation stating that there was no evidence.

However, the fiRs.respondent/Labour Court has specifically found that during the time of arguments, the representative of Workmen has not pressed the said point relating to the permission under Section 33(1) of the Act.

It is relevant to point out that the Labour Court has taken all the batch of cases in respect of 24 workmen for common trial and found that the representative of the workmen has not pressed the said point under Section 33(1) of the Act and none of the petitioners before the fiRs.respondent/Labour Court, except the writ petitioner herein has chosen to object to the said stand taken by the representative of the workmen.

3.3.

Section 33(1) of the Act applies to cases where the employer is prevented from altering the conditions of service in respect of which a dispute is pending or in cases of misconduct connected with the dispute.

Section 33(1) of the Act reads as follows: ".Section:33.

Conditions of service, etc., to remain unchanged under certain circumstances during pendency of proceedings.- (1) During the pendency of any conciliation proceeding before a conciliation officer or a Board or of any proceeding before an arbitrator or a Labour Court or Tribunal or National Tribunal in respect of an industrial dispute, no employer shall- (a) in regard to any matter connected with the dispute, alter, to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceeding; or (b) for any misconduct connected with the dispute, discharge or punish, whether by dismissal or otherwise, any workman concerned in such dispute, save with the express permission in writing of the authority before which the proceeding is pending."., 3.4.

In respect of cases where proceedings are pending regarding industrial dispute, the employer can alter the service conditions or take action for the misconduct not connected with the dispute, by discharging or punishing by way of dismissal or otherwise of the workman provided one month salary is paid and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer.

3.5.

Therefore, while Section 33(1) of the Act imposes a prohibition on the employer in respect of the matter connected with the pendency of the conciliation proceedings, etc., by imposing a condition that such dismissal can be affected only after express permission in writing from authority before which the proceeding is pending, Section 33(2) of the Act empowers the employer to alter the service conditions or take action for the misconduct not connected with the dispute, by discharging or punishing by way of dismissal or otherwise of the workman on payment of one month salary and to thereafter, approach the authority for approval of the action taken.

Section 33(2) of the Act reads as follows: ".Section:33.

Conditions of service, etc., to remain unchanged under certain circumstances during pendency of proceedings.- (1) *** (2) During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with standing orders applicable to a workman concerned in such dispute or, where there are no such standing order, in accordance with the terms of the contract, whether express or implied, between him and the workman- (a) alter, in regard to any matter not connected with the dispute, the conditions of service applicable to that workman immediately before the commencement of such proceeding; or (b) for any misconduct not connected with the dispute, discharge or punish, whether by dismissal or otherwise, that workman: Provided that no such workman shall be discharged or dismissed, unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer.".

3.6.

In the claim filed by the petitioner before the fiRs.respondent/Labour Court, it is no doubt true that certain conciliation proceedings are stated to be pending before the Government Labour Officer, Coonoor and therefore, during that time the retrenchment effected against the petitioner and others is not valid.

Whereas, in the counter statement, the second respondent has stated that pendency of any talk before the Government Labour Officer, Coonoor has no bearing or connection with the retrenchment.

3.7.

In Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd.v.Ram Gopal Sharma and otheRs.[2002].2 SCC244 while dealing with Section 33(2)(b) proviso which relates to approval after the action taken, the Constitution Bench of the Supreme Court, overruling the earlier decision in Punjab Beverages (P) Ltd.v.Suresh Chand, [1978].2 SCC144 has held that failure to make an application for approval of the order of discharge or dismissal will render discharge or dismissal void.

It was also held that it is a mandatory provision which cannot be violated by the employer.

The operative portion is as follows: ".13.

The proviso to Section 33(2)(b).as can be seen from its very unambiguous and clear language, is mandatory.

This apart, from the object of Section 33 and in the context of the proviso to Section 33(2)(b).it is obvious that the conditions contained in the said proviso are to be essentially complied with.

Further, any employer who contravenes the provisions of Section 33 invites a punishment under Section 31(1) with imprisonment for a term which may extend to six months or with fine which may extend to Rs.1000 or with both.

This penal provision is again a pointer of the mandatory nature of the proviso to comply with the conditions stated therein.

To put it in another way, the said conditions being mandatory, are to be satisfied if an order of discharge or dismissal passed under Section 33(2)(b) is to be operative.

If an employer desires to take benefit of the said provision for passing an order of discharge or dismissal of an employee, he has also to take the burden of discharging the statutory obligation placed on him in the said proviso.

Taking a contrary view that an order of discharge or dismissal passed by an employer in contravention of the mandatory conditions contained in the proviso does not render such an order inoperative or void, defeats the very purpose of the proviso and it becomes meaningless.

It is well-settled rule of interpretation that no part of statute shall be construed as unnecessary or superfluous.

The proviso cannot be diluted or disobeyed by an employer.

He cannot disobey the mandatory provision and then say that the order of discharge or dismissal made in contravention of Section 33(2)(b) is not void or inoperative.

He cannot be permitted to take advantage of his own wrong.

The interpretation of statute must be such that it should advance the legislative intent and serve the purpose for which it is made rather than to frustrate it.

The proviso to Section 33(2)(b) affords protection to a workman to safeguard his interest and it is a shield against victimization and unfair labour practice by the employer during the pendency of industrial dispute when the relationship between them is already strained.

An employer cannot be permitted to use the provision of Section 33(2)(b) to ease out a workman without complying with the conditions contained in the said proviso

for any alleged misconduct said to be unconnected with the already pending industrial dispute.

The protection afforded to a workman under the said provision cannot be taken away.

If it is to be held that an order of discharge or dismissal passed by the employer without complying with the requirements of the said proviso is not void or inoperative, the employer may with impunity discharge or dismiss a workman.".

3.8.

That was also the view in respect of Section 33(1) of the Act as held by the Division Bench of this Court in Arasu Viraivu Pokkuvarathu Oozhiyar Sangam v.

State Express Transport Corporation Ltd., 2006-III-LLJ245 In fact, in the said judgment, the Division Bench has referred to the judgment of the Supreme Court in Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd.v.Ram Gopal Sharma and otheRs.supra, and held as follows: ".13.

*** It is thus clear that the order, which has been passed in violation of the mandatory provisions of Section 33 of the Act, is void and inoperative and it is not necessary for the workmen to approach the Labour Court, and especially when there is no factual dispute, such an order can be interfered with under Article 226 of the Constitution of India.".

3.9.

It is relevant to note that it has been the stand of the second respondent that the removal of the petitioner as Baker was retrenchment, since the service of Baker was not required to the school and college and it requires a review due to surplus staff and in the letter dated 20.6.1991, the second respondent, by insisting the same, has directed the petitioner to receive the retrenchment benefits and reiterated the earlier stand of the second respondent in the letter dated 12.4.1991, marked as Ex.M1.

Under Ex.M3, dated 6.2.1993, the second respondent has asked the petitioner his consent to join as a Baker in the newly created post and an order to that effect has also been passed on 23.3.1993, marked as Ex.M4.

It is the admitted case of the petitioner that he has not given his willingness to join.

3.10.

In such circumstances, as correctly found by the Labour Court in the impugned award, what was effected against the petitioner in the year 1991 by the second respondent was not either dismissal or discharge or alteration of conditions of service so as to attract the provisions of Section 33(1) or 33(2) of the Act.

4.1.

The next question to be considered is as to whether such retrenchment effected by the second respondent on the basis of surplus nature of work can be deemed to be alteration of conditions of service.

4.2.

Alteration or change of conditions of service requires notice as per Section 9-A of the Act.

Fourth Schedule to the Act, which speaks about the conditions of service wherein notice has to be given, is as follows: ".Conditions of Service for Change of which notice is to be given: 1.

Wages, including the period and mode of payment; 2.

Contribution paid, or payable, by the employer to any provident fund or pension fund or for the benefit of the workmen under any law for the time being in force; 3.

Compensatory and other allowances; 4.

Hours of work and rest intervals; 5.

Leave with wages and holidays; 6.

Starting alteration or discontinuance of shift working otherwise than in accordance with standing ordeRs.7.

Classification by grades; 8.

Withdrawal of any customary concession or privilege or change in usage; 9.

Introduction of new rules of discipline, or alteration of existing rules, except in so far as they are provided in standing ordeRs.10.

Rationalisation, standardisation or improvement of plant or technique which is likely to lead to retrenchment of workmen; 11.

Any increases or reduction (other than casual) in the number of persons employed or to be employed in any occupation or process or department or shift, not occasioned by circumstances over 1 which the employer has no control.".

4.3.

As pointed out by Mr.S.Ragunathan, learned counsel appearing for the second respondent, it is true that the Supreme Court in L.Robert D'Souza v.

Executive Engineer, Southern Railway, AIR 1982 SC854has held that the term ".retrenchment".

does not come under the conditions of service set out in Fourth Schedule.

The operative portion is as follows: ".9.

It was obligatory upon the employer, who wants to retrench the workmen to give notice as contemplated by clause (a) of Section 25-F.

When a workman is retrenched it cannot be said that change in his conditions of service is effected.

The conditions of service are set out in the Fourth Schedule.

No item in the Fourth Schedule covers the case of retrenchment.

In fact, retrenchment is specifically covered by Item 10 of the Third Schedule.

Now, if retrenchment which connotes termination of service, cannot constitute change in conditions of service in respect of any item mentioned in Fourth Schedule, Section 9-A would not be attracted.

In order to attract Section 9-A the employer must be desirous of effecting a change in conditions of service in respect of any matter specified in Fourth Schedule.

If the change proposed does not cover any matter in Fourth Schedule Section 9-A is not attracted and no notice is necessary (see Workmen of Sur Iron & Steel Co.(P.) Ltd.v.Sur Iron & Steel Co.(P) Ltd., [1971].1 Lab LJ570(SC).Tata Iron & Steel Co.Ltd.v.Workmen, [1973].1 SCR594 AIR 1972 SC1917and Assam Match Co.Ltd.v.Bijoy Lal Sen, [1974].1 SCR116 AIR 1973 SC2155.

Thus if Section 9-A is not attracted, the question of seeking exemption from it in the case falling under the proviso would hardly arise.

Therefore, neither Section 9-A nor the proviso is attracted in this case.

The basic fallacy in the submission is that notice of change contemplated by Section 9-A and notice for a valid retrenchment under Section 25-F are two different aspects of notice, one having no correlation with the other.

It is, therefore, futile to urge that even if termination of the service of the petitioner constitutes retrenchment it would nevertheless be valid because the notice contemplated by Section 25-F would be dispensed with in view of the provision contained in Section 9-A proviso (b).That apart, it is an indisputable position that none of the other pre-conditions to a valid retrenchment have been complied with in this case because the very letter of termination of service shows that services were deemed to have been terminated from a back date which clearly indicates no notice being given, no compensation being paid and no notice being given to the prescribed authority.

Therefore, termination of service, being retrenchment, for failure to comply with Section 25-F, would be void ab initio.".

4.4.

On the facts and circumstances of the case, as it is found by the Labour Court in the impugned award, in my view correctly, what was effected against the petitioner and other workmen, who have not raised any objection, was retrenchment attracting Section 25F of the Act.

It was on that basis, the Labour Court has directed the second respondent to pay the compensation as per Section 25F of the Act, apart from a further amount equivalent to three months salary as further compensation.

The Labour Court has also found, on fact, that action has not been taken by the second respondent against the petitioner by way of punishment and therefore, it cannot be treated as either dismissal or discharge.

For the foregoing reasons, there is no reason to interfere with the impugned award of the Labour Court.

The writ petition fails and the same is dismissed.

No costs.

sasi To: The Presiding Officer Labour Court, Coimbatore