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Court : Mumbai

Decided On : Sep-17-1991

Reported in : (1991)93BOMLR595; (1992)IILLJ693Bom; 1992(1)MhLj131

Judge : B.N. Srikrishna, J.

Appeal No. : W.P. No. 137/1990

Appellant : Auro Engg. Pvt. Ltd.

Respondent : R.A. Gadekar and Others

Judgement :

1.This petition impugns an Order of the Industrial Court, Nasik, dated July 31, 1989, made in Complaints (ULP) Nos. 741 to 744 of 1987 under the provisions of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (hereinafter referred to as 'the Act').

2. The petitioner is an employee in the Engineering Industry. The respondents 2, 3, 4, and 5 were employed as fitters in the factory of the petitioner. The petitioner had a total complement of 37 workmen at all material times. From 1st of April, 1987, the petitioner laid off some of the workmen intermittently. The workmen laid off included respondents 2 to 5. The lay-off was on account of the financial difficulty of the petitioner which continued unabated despite the lay-off. On September 8, 1987 respondents 2 to 5 were told by the financial situation of the petitioner-company was getting worse, and, since the lay-off resorted to had not made any discernible improvement in the situation, the petitioner was left with no recourse but to retrench the workmen. Respondents 2 to 5 were the workmen who were to be retrenched. There is some dispute as to whether the retrenchment actually took place on September 8, 1987 itself. This controversy, however is irrelevant inasmuch as it is admitted that, by letters dated September 9, 1987 dispatched by Registered A.D. Post, the petitioner terminated the services of respondents 2 to 5 by way of retrenchment for reasons specifically stated therein. It is also not disputed that, along with each such letter, the petitioner had enclosed bank drafts of what were alleged to be the amounts payable by way of one month's salary in lieu of notice, retrenchment compensation, gratuity and salary for balance of earned wages for the month of August. We are not concerned, in the present petition, with the other amounts, except the retrenchment compensation. Retrenchment compensation was calculated by the petitioner on the basis of the salary that was payable for the month of July, 1987. The petitioner deducted therefrom the amount which had been paid to each of the four workmen as lay-off compensation for the period of the lay-off. On this basis, certain amounts were enclosed by bank drafts along with the letter addressed to each of the four workmen on September 9, 1987. It is not in dispute that each of these four workmen (respondents 2 to 5) received the said letter, together with the accompanying bank draft on September 16, 1987. Each one of them encashed the bank draft thereafter. On September 17, 1987, respondents 2 to 5 filed Complaints (ULP) Nos. 741 to 744 of 1987 before the Industrial Court, Nasik, alleging inter alia, therein that the petitioner had engaged in unfair labour practice under item 9 of Schedule IV of the Act. The basis of the complaints was that the retrenchment effected by the petitioner was contrary to the provisions of Section 25F of the Industrial Disputes Act, inasmuch as (a) the

employer had illegally deducted from the amount of retrenchment compensation payable the amount paid as lay-off compensation for the period of lay-off and (b) the employer had wrongly calculated the retrenchment compensation payable under the statute by not taking into account the annual increment of Rs. 75/- which was payable to each of the four workmen concerned with effect from August 1, 1987. The petitioner contested the complaints, and denied that the retrenchment had been effected on September 8, 1987, as alleged. It pointed out that, though the Manager of the factory had attempted to serve the orders of retrenchment on September 8, 1987, each of the four concerned workmen had refused to accept the same, and, consequently, the said orders had been dispatched on September 9, 1987 accompanied by the statutory dues payable in accordance with Section 25F of the Industrial Disputes Act and other provisions of law. The petitioner also contended that there was an Agreement dated April 2, 1987, between itself and all its workmen, under which it was agreed that the workmen would be laid off and paid compensation at the rate of 50% of their total wages for the period of the lay-off, and further that, in the event of any workman resigning his service or being retrenched by the petitioner, the amount paid towards lay-off would be set off from the compensation payable at the time of retrenchment. However, the employer did not plead anything on the issue as to whether the retrenchment compensation had been calculated by including the annual increment which became due and payable to workmen from August 1, 1987.

3. The Industrial Court held the retrenchment to be illegal on both counts. First, it held that the retrenchment was contrary to Section 25-F of the Industrial Disputes Act, inasmuch as the amount of compensation had been wrongly calculated by not including in the overall pay the amount of increment which was due and payable to the workmen as on August 1, 1987. Secondly, it held that the retrenchment was illegal because the retrenchment had been effected on September 8, 1947 itself, without making any payment, as contemplated by Section 25-F of the Industrial Disputes Act, 1947. On all other points, it overruled the contentions of the workmen and held in favour of the petitioner. As a consequence of its reasoning, the Industrial Court, following the judgment of the Supreme Court in *S.G. Chemicals and Dyes Trading employees' Union and S.G. Chemicals and Dyes Trading Ltd. and another* : (1986)ILLJ490SC , took the view that contravention of the provisions of the statute, which must be held to be part and parcel of the employment contract, amounted to breach of the employment contract itself, and therefore, there was unfair labour practice within the meaning of item 9 of Schedule IV of the Act. The Industrial Court was, however, satisfied that the factory of the petitioner had been closed with effect from December 17, 1988 and, therefore, there was no question of granting any relief for the period subsequent thereto. Consequently, the Industrial Court set aside the orders of retrenchment against the respondents 2 to 5, and held that they were entitled to full back wages for the period from September 8, 1947 till December 17, 1988. It is these orders of the Industrial Court which have been impugned in the present petition.

4. Mr. Habbu, learned counsel for the petitioner, vigorously stacked the order of the Industrial Court as erroneous. He urged that the petitioner was a factory employing less than 50 workmen, and hence, the only statutory provision applicable to the employer with regard to retrenchment was the one contained in Section 25-F of the Industrial Disputes Act. He urged that, though Section 25C of the said Act would not, in term, apply to the factory of the petitioner, there number of workmen being less than 50, by virtue of the Agreement dated April 2, 1987, the employer had acquired the right to lay the workmen off, upon payment of compensation simulated therein. He further urged that clause (5) of this Agreement specifically provides for setting off of the lay-off compensation paid against the retrenchment compensation ultimately payable in case of retrenchment. This, in the submission of Mr. Habbu, is quite within the contention of Section 25C of the said Act, particularly the two provisos contained therein, even if the section were to apply in fact. There is no contravention of Section 25-F of the said Act in the circumstances, according to Mr. Habbu. This contention of learned counsel, undoubtedly, has merit. Though in view of the fact that the number of workmen was less than 50, Section 25C might not, in term, have applied to the situation, the retrenchment cannot be faulted on that ground. The retrenchment could not also be faulted on the other ground which appealed to the Industrial Court, viz., that the workmen were retrenched on September 8, 1987 and the notice-pay and retrenchment compensation were dispatched along with the letter dated September 9, 1987. Even if we were

to take the case made out by the respondents 2 to 5 as fully proved, it would only mean that, on September 8, 1987, they were not given work. It is not disputed that, on September 9, 1987 a formal order of retrenchment accompanying the amount of compensation and notice-pay, inter alia was dispatched by Registered A.D. Post and was received by the concerned workmen on September 11, 1987, and that they stood retrenched only from that date. In my view, therefore, the Industrial Court was wrong in taking the view that the retrenchment became effective on September 8, 1987, as the statutory compensation and notice-pay had not been tendered to the workmen (then).

5. the above discussion, however does not help the petitioner in overcoming the other formidable difficulty which appears insuperable. The Industrial Court had, and, in my opinion, rightly, held that the amount of compensation calculated was not in accordance with Section 25F(b) of the Industrial Disputes Act, inasmuch as the petitioner had, while calculating the compensation and notice-pay, failed to include the increment due and payable from August 1, 1985, in the wages. Though this point was specifically pleaded in the complaints filed by the concerned workmen, there was no reply thereto in the written statement of the petitioner before then Industrial Court. What is more, it is admitted, vide ground (c) in the present petition, that in computing the one month's salary in lieu of notice and the retrenchment compensation, the petitioner did not take into account the annual increment due on August 1, 1987. Mr. Habbu, however, assailed the finding of the Industrial Court that the retrenchment was illegal on this count. He urged that there were no mala fides in not taking into account the annual increment due on August 1, 1987 for the purpose of complained with sub-sections (a) and (b) of Section 25-F of the Act. He urged that, at the highest, it was an act of inadvertence due to non-application of mind, which could not vitiate the retrenchment itself. Factually, he points out that the shortfall in the notice-pay was to the tune of Rs. 75/- while, in the retrenchment compensation, the shortfall would be about Rs. 25/- in each case. Such a venial infraction ought not to be visited with harsh punishment by granting of entire back wages, as the Industrial Court has done, submits the learned counsel. I am afraid that this submission cannot be accepted. It is settled law that Section 25-F of the Act was introduced into the statutes book by Parliament as a measure of amelioration. The section is specifically intended to so often the blow of unemployment which would fall upon workman, who is suddenly deprived of his source of livelihood. Considering the constraints on the economy of the country as a whole and that of the industrial units, Parliament has limited this amelioration to what is specifically provided in clauses (a) and (b) of Section 25-F, viz., payment of one month's wages in lieu of notice and retrenchment compensation calculated in accordance with clause (b) of Section 25-F. It is also settled law that, considering the negative language used in Section 25-F, the section imposes a mandatory duty on the employer which is a condition precedent to retrenchment of workmen. Consequently, contravention thereof, however slight, vitiates the act of retrenchment itself. When a statute mandates a duty as a condition precedent for effecting retrenchment, there is no difficulty in holding that breach of the said condition invalidates the retrenchment and renders it void ab initio. This has been the uniform view taken in a catena of judgments of the Supreme Court and the various High Courts, including our High Court, and I do not think it necessary to make reference in them in detail. I am therefore, unable to accede to the argument of Mr. Habbu that the Court can take a benign view of the matter and condone this minor lapse on the part of the petitioner employer, and hold that there is substantial compliance with the provisions of Section 25-F, clauses (a) and (b). Where there is breach of statutory mandate, expression of contrition does not excuse.

6. Finally Mr. Habbu decided to take the bull by the horn, and contended that, in a situation of lay-off, there is suspension, of the contract of employment, and, therefore, there would be no automatic liability to pay increments, even if they are otherwise payable under a time-rated wage-scale prescribed by the contract of employment. He expounded his contention and submitted that the suspension of contract of employment could arise in a situation of lay-off strike or lock-out. In all such cases, according to the learned counsel, the workmen have no right, and the employer has no liability, conversely, to pay the increment, if any, arising under a time-rated wage-scale. This contention, though novel and at first blush, attractive, also does not impress. It cannot be gainsaid that a situation of lay-off must arise expressly under the contract of employment itself, and that, if there is no right to lay-off which can be founded on the contract of

employment, be it by way of a settlement, rule, regulation or standing order, then there is no right to lay-off at all (see in this connection, the judgment of the Supreme Court in *Workmen of Firestone Tyre and Rubber Co. of India (P.) Ltd. and The Firestone Tyre and Rubber Co. : (1976)ILLJ493SC* . In the instant case, however, Mr. Habbu takes recourse to the Agreement dated April 2, 1987, as affording the right of lay-off to the employer. Let us assume it to be so. This would only mean that the petitioner is stayed from the mischief of the rule enunciated in firestone's case (supra). But what is more important is that there is nothing, even in this Agreement dated April 2, 1987, to show that, during the period of lay-off the workmen would not be entitled to earn their annual increments. It is not disputed that the workmen were on a time-rated scale which prescribed regular annual increments. Because the employer had resorted to lay-off, even if the lay-off is assumed to be legal and justified, time and tide would not cease to flow, increments would not cease to be earned. The only consequence of the contract of employment being suspended, by way of lay-off strike or lock-out, would be that the employees would have no right to demand wages, nor would the employer be liable to make payment of wages during such period, or until there is an adjudication of the inter se rights and liabilities by a competent industrial adjudicator. Even then, what would be payable would not be wages but only compensation for deprivation of wages, which may be a portion thereof or the whole, depending upon whether the industrial adjudicator takes the view that lay-off/strike/lock-out is legal and/or justified. I do not see any warrant for the proposition, either on principle or precedent, that in a situation of lay-off/strike/lock-out, the annual increment is evident or not earned.

7. There is another way of approaching the problem. Let us assume the contention of Mr. Habbu to be correct. If the lay-off had continued, law for a period of two years and had then been lifted, the petitioner-employer could justifiably say that the workmen would be entitled only to the wages which they were drawing immediately prior to the commencement of lay-off. The situation would be the same in the case of a strike or lock-out. If the contention is acceded to, in my view, it would amount to introduction of a discontinuity in the contract of employment under the guise of suspension of the contract of employment. It is settled laws that the continuity of service under a contract of employment remains unaffected by onslaughts of lay-offs, strikes or lock-outs, to rise like the Phoenix, after the supervening circumstance subsides, (see in this connection the decision of the Supreme Court in *Express Newspapers (P.) Ltd., v. Michel Mark : (1962)ILLJ220SC* and that of our High Court in *Jairama Sonu Shoagala v. New India Rayon Mills Co. Ltd. 1958 I LLJ 28* Without multiplying authorities, it might be safely stated that a situation of strike, lock-out or lay-off, though it might suspend, pro tem, the contract of employment, does not introduce a discontinuity or description in the contract of employment. I am, therefore, unable to accede to the argument of Mr. Habbu, as, in my view, notwithstanding the lay-off, the workmen were entitled to earn their increment at the ends of each year. The petitioner was, therefore, wrong in ignoring the amount of increment, which because due and payable to the workmen, for the purpose of calculating the notice-pay and retrenchment compensation payable to them under clauses (a) and (b) of Section 25-F of the Industrial Disputes Act. Consequently, the retrenchment of respondents 2 to 5, effected by letters dated September 11, 1987, has been rightly held to be vitiated and illegal by the Industrial Court. I see no infirmity in the reasoning of the Industrial Court on this count. I must therefore, affirm and uphold the order of the Industrial Court.

8. In the result, the petition fails, and is hereby dismissed. the Rule is discharged with no order as to costs.