

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com

Ashok Kumar and ors. Vs. Managing Director, U.P. Leather Development and Marketing Corporation and ors.

Ashok Kumar and ors. Vs. Managing Director, U.P. Leather Development and Marketing Corporation and ors.

SooperKanoon Citation : sooperkanoon.com/483570

Court : Allahabad

Decided On : May-21-1997

Reported in : (1998)ILLJ789All; (1997)2UPLBEC1315

Judge : S.P. Srivastava, J.

Acts : [Constitution of India](#) - Article 226; Uttar Pradesh Industrial Disputes Act, 1947 - Sections 2 and 2(2)

Appeal No. : C.M.W.P. Nos. 7269 and 7264/1984

Appellant : Ashok Kumar and ors.

Respondent : Managing Director, U.P. Leather Development and Marketing Corporation and ors.

Advocate for Def. : Standing Counsel

Advocate for Pet/Ap. : G.C. Gahrana, Adv.

Disposition : Petition partly allowed

Judgement :

ORDER

S.P. Srivastava, J.

1. The petitioners feel aggrieved by the communication contained in the letter of the Chief Manager informing them that on the expiry of the period of their services on April 1, 1984 their services were not required and they could collect their wages for the month of March on production of no dues certificates and in case the Corporation intended to fill up the post of Supervisor held by them they will be given preference.

2. The grievance of the petitioners is that the impugned communication in reality amounts to retrenchment as contemplated under the provisions of the U.P. Industrial Disputes Act and since the requisite conditions contemplated under Section 6-N of the Act were not satisfied or complied with their services could not be deemed to have been dispensed with. In the circumstances they have sought for the quashing of the impugned orders and for a direction requiring the respondents not to give effect to the impugned order and further treat the petitioners as continuing in their employment and entitled to their full wages and other benefits from the date of the wrongful termination of their service. They have further prayed for a direction requiring the respondents not to give effect to the impugned orders and permit the petitioners to discharge their duties,

3. I have heard learned Counsel for the petitioners and learned Counsel representing the respondent employer and have carefully perused the record.

4. The facts in brief shorn of details and necessary for the disposal of this case lie in a narrow compass. The petitioners had been initially engaged by the U.P. Leather Development and Marketing Corporation Limited on daily wage basis on the posts of Supervisor in the year 1981. These engagements were intermittent. The chart annexed with the counter-affidavit as Annexure 16 thereto indicates that Ashok Kumar, petitioner No. 1 was granted engagements for the periods ranging between 5 to 28 days in a month from June 1981 to January 1983. So far as Rakshpal Singh, petitioner No. 2 is concerned, he had been granted engagements for periods ranging between 21 to 28 days in a month during the period October, 1981 to January 1983. So far as Satya Bhan Singh petitioner No. 3 is concerned, he had been granted engagements for the period ranging between

17 to 29 days in a month during the period February 1982 to January, 1983.

5. Later on Ashok Kumar, petitioner No. 1 was appointed on February 2, 1983 for a period of three months. Under the terms and conditions of the appointment his services could be terminated without any notice even before the expiry of the aforesaid period and in any case were to stand automatically terminated on the expiry of the period unless otherwise decided by the management in the meantime. On the expiry of the period of service he had been granted fresh appointment on May 4, 1983 to August 3, 1983 then from August 6, 1983 to November 5, 1983, thereafter on November 7, 1983 to December 31, 1983 and lastly on January 2, 1984 up to April 1, 1984.

6. The other petitioners were also granted time bound appointments on similar conditions for the same period.

7. So far as the petitioner Om Prakash in Civil Misc. Writ Petition No. 7264 of 1984 is concerned, he has also come up with the same allegations as made by the petitioners in Civil Misc. Writ Petition No. 7269 of 1984. The petitioner in Civil Misc. Writ Petition No. 72647 1984 has asserted that he was appointed on daily wage basis in October 1981 and during the period February 2, 1983 to January 2, 1984 he was also granted time bound appointments on the same terms and conditions and in same manner in which the appointments had been granted to the petitioners of Civil Misc. Writ Petition No. 7269 of 1984, his services were also dispensed with indicating that though his appointment was only upto April 1, 1984, his services were no longer required with effect from April 1, 1984. This order was passed on March 31, 1984. The petitioner has prayed for the quashing of the order dated March 31, 1984 seeking the benefit under Section 6-N of the U.P. Industrial Disputes Act and has further prayed that he may be treated to be continuing in his employment.

8. Taking into consideration the nature of the facts and circumstances as well as the controversy involved in both the writ petitions, they were heard together and are being disposed of by this common order.

9. From the documents annexed with the counter-affidavit, it is apparent that before the expiry of the period of their appointment on April 1, 1984 the management had decided that the strength of 12 quality control supervisors appointed on regular basis was sufficient to meet the existing work load of the Corporation and, therefore, since the Corporation did not require the extra hands of ten Quality Control Supervisors including the petitioners whose period of appointment was going to expire was not considered fit to be extended. However, the management decided that if in future the work load exceeds and requirement of quality control supervisors was felt, priority was to be given to such quality control supervisors whose services were not going to be extended.

10. Pursuant to the aforesaid decision the impugned orders had been issued.

11. It has been urged on behalf of the petitioners that the duties discharged by the petitioners included the checking of the manufactured shoes according to the specifications and give them code number according to specified categories. The duties of the quality control supervisor according to the petitioners didnot involve a supervising work as such in the sense that it did not require a supervisory activity over any other work in the process of manufacturing shoes or otherwise and the nature of their duties whereof manual and technical nature involving determination of the quality of manufactured shoes and categorizing them. It has also been urged that notwithstanding the issue of letters by the employer the petitioners had been in continuous service and the breaks were only artificial. It has further been asserted that the petitioners were neither paid the retrenchment compensation nor given one month's notice or pay in lieu thereof in terms of Section 6-N of the U.P. Industrial Disputes Act nor they had been given any opportunity of being heard before dispensing with their services. It has also been urged that the services of the petitioners had been terminated arbitrarily and in a discriminatory manner as many junior persons who were equally placed, were retained in service.

12. The writ petition has been opposed deny-ing the claim of the petitioners. It has been asserted that the petitioners had been appointed as quality control supervisors on account of the rush of work in footwear complex. The Corporation had sanctioned twelve posts of quality control supervisors which were to be filled

up on regular basis by open selection. However, whenever there was spurt of work due to some order requiring a large quantity of shoes, the production work was accelerated which re-quired the casual quality control supervisors as additional hands. It was in such a situation that the petitioners had been given time bound appointments. The duties attached to the post of quality control supervisor was of a supervisory nature as they used to supervise the work of the artisan who manufactured shoes and other leather goods and they also used to check the quality of the finished products and it was on their survey that the finished goods were pur-chased by the Corporation. The respondents assert that the petitioners could in no way be taken to be workmen as envisaged under the U.P. Industrial Disputes Act.

13. It was urged that the Corporation did not undertake the wo/k of manufacturing leather , goods but only purchased finished goods from local artisans who manufactured leather goods under the supervision of the employees of the Corporation. The artisans who manufactured leather goods on the orders and specifications of the Corporation were provided with the finance as well as other help by the Corporation so as to enable them to continue with their work of manufacturing leather goods. The duties attached to the post of quality control supervisors included the checking or the manufacturing process in the footwear complex as well as checking the quality of the manufactured goods in the procurement division. Whenever the work was in excess and quality control supervisors employed on regular basis were unable to cope with the extra load, the additional quality control supervisors for time bound periods were appointed. The petitioners fell on that category.

14. It has also been urged that the petitioners had accepted their appointment subject to the terms and conditions contained therein and in fact no notice was required to be given. The Corporation had only intimated them that their services were no longer required subsequent to April 1, 1984.

15. The contention is that it was not a case of retrenchment as the appointments had automatically come to an end with the expiry of the period for which it had been granted. So far as the assertions in regard to the retention of the persons

junior to the petitioners was concerned it was asserted that the service of all the quality control supervisors who had been appointed for a specific period of time was dispensed with along with the petitioners. However, some of such persons were appointed subsequently after selection against the vacancies in the regular posts of salesman and were not working as quality control supervisors.

16. A plea has also been raised to the effect that the petitioners could approach Labour Court under the provisions of U.P. Industrial Disputes Act and no interference is called for by this Court in the present proceedings under Article 226 of the [Constitution of India](#).

17. The question which arises for consideration is as to whether the impugned action amounts to retrenchment as contemplated under the provisions of the U.P. Industrial Disputes Act and as to whether such action stands vitiated in law on account of the non-compliance of the mandatory requirements contemplated under Section 6-N of the said Act.

18. In its decision in the case of State of Rajasthan v. Rameshwar Lal Gahlot, reported in (1996-I-LLJ-888) the Apex Court had pointed out reiterating its earlier view in the case of M, Venugopafv, Divisional Manager, LIC reported in (1994-I-LLJ-597), that once an appointment was for a fixed period, Section 25F of the Industrial Disputes Act equivalent to Section 6-N of the U.P. Act did not apply on account of the same being covered by the Clause (bb) of Section 2(oo) of the Act. It was emphasised that when the appointment is for a fixed period unless there is finding that power under Clause (bb) of Section 2(oo) was misused or vitiated by its mala fide exercise, it cannot be held that the termination is illegal. However, in its absence, the employer could terminate the services in terms of the letter of appointment unless it is a colourable exercise of power. The Apex Court went on to observe in its aforesaid decision that it must be established in each case that the power was misused by the management or the appointment for a fixed period was a colourable exercise of power and where the termination is in terms of the letter of appointment saved by Clause (bb) neither reinstatement nor fresh appointments could be made.

19. In the present case what I find as that on the own showing of the respondent employer the petitioner Ashok Kumar had been granted an appointment on February 2, 1983 in the time scale of pay Rs. 250-400 for a period of three months. This appointment was continued upto April 1, 1984 with the gap of two days on three occasions and one day on the fourth occasion. Similar was the position in the case of other two petitioners. Even prior to the appointments given to the petitioners in the time scale of pay for the specified periods they had been given engagements on daily wage basis during the period January 1982 to January 1983 with breaks ranging between 2 to 7 days.

20. The 'continuous service' as contemplated under Section 2(g) of the U.P. Industrial Disputes Act refers to uninterrupted service and includes service which may be interrupted merely on account of sickness or authorised leave or an accident or strike which is not illegal, or a lock out or a cessation of work which is not due to any fault on the part of the workmen and a workman who during a period of 12 calendar months has actually worked in an industry for not less than two hundred and forty days is deemed to have completed one year of continuous service in the industry.

21. The continuous service of a workman as envisaged under Section 2(g) of the U.P. Industrial Disputes Act embraces within its fold even an interrupted service where the interruption is caused or based on the grounds or reasons enumerated therein which include sickness authorised leave, an accident, strike which is not illegal, a lock out and a cessation of work that is not due to any fault on the part of the workman. It is on account of a legal fiction that the legislature has included the service which may be interrupted on account of any one of the aforesaid reasons within the ambit of 'continuous service' for the purposes of the Act.

22. On the facts established on record it is apparent that the interruption in the service referred to herein above was not due to any fault on the part of the workman, the employer had been granting engagements with intermittent breaks and the duration of the breaks are clearly indicative of the fact that the requirement which necessitated the engagement/appointment of the petitioners continued to subsist during the entire period elapsing between the date of their engagement in

the year 1981 upto April 1, 1984. These breaks or interruption in service during the aforesaid period to which a reference has been made above, it seems to me were artificial breaks or interruptions in service which were not caused on account of the fault on the part of the workman. During the subsistence or continuance of the requirement if the employer takes recourse to such artificial breaks or interruption such an action it seems to me amounts to unfair labour practice and misuse by the management of its powers and such breaks or interruption which are ostensibly given a colour of fresh engagement or fresh appointments being in colourable exercise of powers cannot be deemed to be so being a mala fide exercise of power. Such breaks or interruption cannot have any effect on the continuity of service as envisaged under Section 2(g) of the U.P. Industrial Disputes Act.

23. Learned counsel for the petitioners has urged that the designation of the posts held by the petitioners was clearly a misnomer and the petitioners' status vis-a-vis the employer continued to be that of a workman. The term 'workman' as defined under the provisions of the U.P. Industrial Disputes Act has been interpreted to have a very wide connotation and means and includes any of such employee who prima facie appears to be officer and Manager.

24. It may be noticed that as provided under the Industrial Disputes Act the term 'workman' does not include any such person who being employed in a supervisory capacity, exercises either by the nature of the duties attached to the officer or by reason of the powers vested in him functions mainly of a managerial nature.

25. The word 'supervise' and its derivatives have to be construed in the light of the context. What determines the question as to whether a person is doing supervisory work mainly of a managerial nature or not depends much on the nature of the duties and functions assigned to him. The absence of supervisory work is the supervision by one person over the work of others and it embraces within its fold the authority to control and give directions occupying a position of command or authority to take a decision and act within the limit of his authority in an independent manner. Having regard to the various categories of the services the use of different words like 'supervisory', 'managerial' and 'administrative' it is not necessary to import the motions of one into the interpretation of others.

Dealing with the disputes with respect to the nature of the work performed by an employee as to whether it was of supervisory nature or otherwise the industrial adjudication generally considers the essence of the matter and does not attach undue importance to the designation of the employee. It is always a matter of determining what the primary duties of an employee were and the emphasis is not on the junctions incidental to his main duties.

26. Taking into consideration the pleadings of the parties and the nature of the duties performed by the petitioners as indicated by the contesting respondent in the counter-affidavit and the implications arising under the expression 'supervise' as indicated herein above, it seems to me that there can be no escape from the conclusion that the petitioners could not under the law be taken to be an employee as contemplated under Section 2(z)(iv) of the U. P. Industrial Disputes Act, 1947 so as to be out of the purview of the aforesaid Act. In my considered opinion on the facts admitted by the contesting-respondent and the nature of the duties performed by the petitioners as indicated by them in the counter-affidavit. There can be no manner of doubt that the status of the petitioners visa-vis the employer-respondent continued to be that of a workman as contemplated under the U. P. Industrial Disputes Act.

27. In the present case taking into consideration the facts and circumstances as brought on record and the conclusions indicated herein above the impugned action of the employer clearly amounts to retrenchment. It is further apparent that the mandatory requirements contemplated under provisions contained in Section 6-N of the U.P. Industrial Disputes Act cannot be taken to have been complied with which made it incumbent on the employer to pay the workman the wages for the period of notice in lieu of the notice. I had an occasion to consider in quite detail the implications arising under the non-compliance of the mandatory requirements as envisaged under the provisions contained in Section 6-N of the U.P. Industrial Disputes Act in the decision in the case of U.P. Vidyut Mazdoor Sangh v. U.P. State Electricity Board (Civil Misc. Writ Petn. No. 16885 of 1992) decided on April 11, 1997 reported in 1997 All U 1662. As indicated in the aforesaid decision it is apparent that an order dispensing with the services of workman purporting to terminate the relationship of master and servant taking recourse to a retrenchment

which is rendered ab initio void on account of the non-compliance of the mandatory requirements contemplated under the provisions of the U.P. Industrial Disputes Act has to be taken as ab initio void and the workman concerned has to be taken to be continuing in service/employment inspite of the order terminating his service and it should be deemed that his service was never terminated. If an order is null and void it has no existence in the eyes of law. It is non- est.

28. It was, however, noticed in the aforesaid decision that ordinarily a workman Whose service has been illegally terminated would be entitled to full back wages except to the extent he was gainfully employed during the enforced idleness, but there can be no (sic) straight jacket formula for awarding relief of back wages and the party objecting to it must establish the circumstance necessitating departure.

29. The learned counsel for the respondents have vehemently urged that the petitioners have an efficacious alternative remedy for the redressal of their grievances in the forum provided for under the provisions of the U.P. Industrial Disputes Act and, therefore, this Court while exercising the extraordinary jurisdiction envisaged under Article 226 of the [Constitution of India](#) should decline to interfere leaving it open to the petitioners to avail the statutory alternative remedy for the redressal of their grievances. The learned counsel for the petitioners, however, has urged that the writ petition was entertained by this Court long back in the year 1992 and since no investigation into any disputed question of fact is involved and further when, even on the facts asserted in the counter-affidavit filed by the respondents the impugned retrenchment is ex-fade without jurisdiction and manifestly illegal and liable to be ignored altogether being non-est, the discretion vested in this Court as contemplated under Article 226 of the [Constitution of India](#) deserves to be exercised in favour of the petitioners without relegating them to the alternative remedy which is a time consuming alternative remedy. It has been urged that the existence of the alternative remedy in such circumstances will only result in the prolonging of the harassment of the petitioners.

30. Learned counsel for the respondents in support of his submission has placed reliance upon the Full Bench decision of this Court in the case of Chandrama

Singh v. Managing Director, U.P. Co-operative Union, Lucknow, reported in 19912 UPLBEC 898. The Full Bench of this Court after noticing various observations made by the Apex Court in its decisions indicating that where a statute provides a complete machinery for obtaining relief against the orders passed by the authorities, a petitioner cannot be permitted to abandon that machinery and to invoke the jurisdiction of the High Court under Article 226 of the [Constitution of India](#), emphasised that where a complete machinery/remedy for obtaining relief is provided in a statute and such machinery and remedy fully covers the grievances of the petitioners then unless ex-traordinary or exceptional circumstance exists or the machinery/remedy does not cover the grievances of the petitioner or the machinery or remedy is demonstrated and proved by the petitioners to be inadequate or inefficacious the petitioner has to be relegated to the alternative' remedy and the Court should not entertain a writ petition under Article 226 of the [Constitution of India](#) for the redressal of his grievances.

31. It was also observed by the Full Bench that the High Court must not allow its extraordinary jurisdiction under Article 226 of the [Constitution of India](#) to be invoked if the petitioner has got an alternative remedy and such remedy is not pleaded and proved to be adequate or inefficacious or if it is not established from the material on record that there exist exceptional or extra- ordinary circumstances to deviate from the well settled normal rule of relegating the petitioner to avail alternative remedy and permit him to bypass the alternative remedy.

32. It was also pointed out that the hurdle of alternative remedy cannot be allowed to be skipped over lightly on a casual and bald statement in the petition that there is no other equally efficacious or alternative remedy than to invoke the extraordinary jurisdiction of the High Court under Article 226 of the [Constitution of India](#) emphasising that the petitioner must furnish material facts and particulars to sustain such a plea.

33. In the case of U.P. Vidyut Mazdoor Sangh v. U. P. State Electricity Board (supra) 1 had also considered in detail the aforesaid aspect and after noticing various decisions of this Court as well as the Apex Court, it was observed that when there is no dispute on material questions of fact and no enquiry or

investigation into facts is involved or called for and on admitted or uncontrovertible or irrefutable facts, ex facie the impugned action is demonstrated to be without jurisdiction null and void and further where the matter is entertained for consideration by this Court and kept pending for a long period the relegating of the petitioners to the alternative remedy for the redressal of their grievances in such a case will not be a proper exercise of discretion envisaged under Article 226 of the [Constitution of India](#).

34. Drawing support from the above observations of the Apex Court a learned Single Judge of this Court in the decision in the case of Bank Employees Union v. District Co-operative Bank Limited, reported in 1992 1 UPLBEC 159 had observed that the correct position is that it has to be determined on facts of every case as to whether a petitioner should be relegated to the alternative remedy or he can be permitted to assert his rights in the proceedings under Article 226 of the [Constitution of India](#) emphasising that there may be circumstances where in spite of the existence of an alternative remedy a writ petition can be entertained and decided on merits.

35. The provision contained in Article 226 of the [Constitution of India](#) vests the High Court with a very wide discretion in the matter of framing its writs to meet the exigencies of a particular case and if on facts admitted, or un-controverted or irrefutable or established on record, the parties are found entitled to a particular relief the same can always be granted to ensure compliance of the mandate of law or discharging or a duty which stands statutorily cast upon a party or authority. This jurisdiction which is a special jurisdiction for the enforcement of fundamental rights conferred by part III of the Constitution or for any other purpose ought to be exercised or permitted to be invoked only where circumstances are exceptional and do warrant the exercise of such power. It is not, I may hasten to add, intended to provide an additional remedy which is otherwise available and is adequate to meet the needs of the case. In a case, however, where on the irrefutable or un-controvertible facts brought on record the conclusion even in the alternative proceedings if initiated has to be the same, then in such a case in view of the inescapable conclusion it will be futile to relegate the petitioner to seek redressal availing the alternative remedy which will only result in the postponement of the

grant of relief prolonging the continuance of the breach of law and in such a case it will not be appropriate to decline the entertainment of the writ petition for consideration on merits.

36. The Division Bench of this Court in the case of *Jai Kishun v. U.P. Co-operative Bank Limited, Lucknow*, reported in 1989 2 UPLBEC 144 clearly observed that if an order is void and the petition does not involve controversial questions of facts the High Court may not refuse to exercise its jurisdiction. The pendency of the writ petition for several years in the High Court was also taken to be a justifiable ground for not relegating the petitioners to get their grievances redressed under the provisions of the Industrial Disputes Act holding that in such circumstances it will not in any manner advance the cause of justice if after the lapse of several years this Court is to tell the workmen to go to the Labour Court for seeking redressal of their grievances more so in a case where there was no controversy over the relevant facts. Support for the aforesaid view was drawn by the Division Bench from the observations made by the Apex Court in its decision in the case of *Hriday Narain v. Income tax Officer, Bareilly*, reported in AIR 1971 SC 33.

37. In the aforesaid view of the matter the contention urged on behalf of the contesting respondent referred to herein above is rejected.

38. In the result, in view of my conclusions indicated herein above, this writ petition succeeds in part with the direction that the petitioners shall be deemed to be continuing in service unaffected by the impugned retrenchment and this order shall be sufficient authority for proceeding under Section 6-H of the U.P. Industrial Disputes Act for recovery of the amount due to the petitioner workmen which shall be determined in accordance with law in the aforesaid proceedings. It shall, however, be open to the respondents to take recourse to retrenchment of the petitioners in accordance with law hereafter.

39. There shall, however, be no order as to costs.