

Workmen, Itpo Vs. Management, Itpo

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Court : Delhi

Decided On : Sep-03-2007

Reported in : [2007(115)FLR861]; (2008)ILLJ205Del; 2008(1)SLJ576(Delhi)

Judge : Hima Kohli, J.

Acts : [Industrial Disputes Act, 1947](#) - Sections 25F

Appeal No. : Writ Petition (C) No. 12343 of 2005

Appellant : Workmen, Itpo

Respondent : Management, Itpo

Advocate for Def. : Nidhi Bisaria, Adv.

Advocate for Pet/Ap. : Varun Prasad, Adv

Disposition : Petition allowed

Judgement :

Hima Kohli, J.

1. The present petition is directed against the award dated 27th January, 2005 passed by the Labour Court whereunder it was held that the retrenchment of the petitioner workmen was not illegal and thereforee they were not found entitled to any relief. By way of the present writ petition the petitioner workmen have assailed

the impugned award and sought directions to the respondent management for reinstating them in service as Beldars w.e.f. 19th April, 2003, with full back wages and continuity of service along with consequential benefits, and for setting aside the notice dated 12th April, 1993 by which the petitioner workmen were asked to collect their dues/amount offered as retrenchment compensation.

2. Brief facts of the case are that the in January 1987, certain casual workers and regular workers of the respondent management went on an indefinite strike and thereafter filed a Writ Petition in the Supreme Court. Vide common judgment dated 26th September, 1989, the Supreme Court held that 243 casual workers be reinstated in accordance with the judgment and further directed the respondents therein to prepare a seniority list of the casual workers and also to formulate a Scheme of Regularization. All the petitioner workmen were working as muster roll Beldar w.e.f. 1985 with the respondent management.

3. During 1990-1992, 352 casual workers, both on Muster roll and Office side were regularized and those who were not regularized, were found surplus according to need-based-assessment. Vide Notice dated 12th April, 1993, the respondent management declared 111 casual employees, including the petitioners herein, as surplus and ordered that their engagement shall cease on expiry of 7 days from the date of publication of notice w.e.f. 19th April, 1993 and no wages compensation in lieu of one month notice was paid to the petitioners on the said date. The petitioners raised an industrial dispute on the grounds that the respondent management had violated the provision of Section 25F(a) and (b) of the [Industrial Disputes Act, 1947](#) (hereinafter referred to as 'the Act'). On failure of conciliation proceedings, the matter was referred to the Labour Court for adjudication as per the following terms of reference:

Whether the retrenchment of the workmen whose names appear in the Annexure 'A' is illegal and/or unjustified and if so, to what relief are they entitled and what directions are necessary in this respect.

4. Based on the pleadings of the parties, the issue formulated was as to whether the retrenchment of the petitioner workmen was illegal or unjustified. After taking into account the submissions made on behalf of both the parties and the evidence

adduced by them, the Labour Court came to the conclusion that the circumstances of the case are peculiar and known to the parties in the light of the judgment of the Supreme Court. It was held that under the law, the management had a right to immediately retrench the workmen by tendering one month salary in case of immediate retrenchment or after giving one month's notice and that since in the present case, the management had not only given prior notice or information but had also offered something more than the retrenchment compensation, therefore there was no illegality in the order of termination of the services of the petitioner workmen. Accordingly, a no relief award was passed against the petitioner workmen, resulting in the filing of the present petition.

5. Counsel for the petitioner workmen urged that the order of retrenchment was illegal and unjustified since it was passed in violation of the provision of Section 25F of the Act. It was submitted that the notice dated 12th April, 1993 was not in accordance with the mandatory requirement of Section 25F(a) as instead of a notice of 30 days or salary in lieu thereof, only a 7 days notice was issued by the respondent management which was not even served on them and no salary in lieu of notice was paid to them. It was further submitted that once the workmen had completed 240 days of continuous service, their services could not be terminated without complying with the provision of Section 25F of the Act.

6. The second limb of arguments advanced on behalf of the petitioner workmen was that the notice dated 12th April, 1993 which required the workmen to collect their dues/amount offered as retrenchment compensation, did not specify whether it included the amount as contemplated under Section 25F(b) which is a condition precedent. Sub-clause (b) of Section 25F requires a workman to be paid compensation equivalent to 15 days average pay for every completed year of service or any part thereof in excess of six months at the time of or before his retrenchment. It was submitted that the requirement that the notice should necessarily spell out whether it included the amount as contemplated under Section 25F(b) of the Act, is mandatory in nature. Reliance in this regard was placed on the judgment rendered by the Supreme Court in the case of *Sain Steel Products v. Naipal Singh and Ors.* reported as AIR 2001 SC 2401. Reliance was also placed on the judgment rendered by the Apex Court in the case of *Pramod*

Jha and Ors. V. State of Bihar and Ors. 2003 L.I.C. 1449, to state that the provisions of Section 25F(a) and (b) are mandatory in nature and non-compliance with the same would nullify the retrenchment.

7. It was contended that the aforesaid notice was not served on the petitioner workmen individually, and therefore the notice could not be said to have been duly served on the petitioner workmen. The attention of the Court was drawn to the stand taken by the respondent management in its written statement filed before the Labour Court and to the evidence of Shri. K.S. Dabas, the then Deputy General Manager of the respondent management, to state that the management had proceeded on a wrong premise that the respondent workmen were employed as daily rated workers on a casual basis, and therefore there was no requirement of serving individual notices upon them, and since the notice was put up on the notice board, the mandate of the Act had been fulfilled.

8. On the other hand, learned Counsel for the respondent management submitted that the provisions of Section 25F were duly complied with as it was clearly mentioned in the notice dated 12th April, 1993 that the petitioner workmen were required to collect notice pay and that it was also decided that the petitioner workmen were also to be granted 50% ex-gratia payment additional to what they were to receive as dues. On the question of back wages, it was submitted that the petitioner workmen ought not to be granted any back wages since they had not made any averment in the statement of claim or in their affidavit filed before the Labour Court that they were not gainfully employed in any establishment during the period of their termination.

9. Rebutting the aforesaid arguments raised on behalf of the counsel for the respondent management, it was stated on behalf of the petitioner workmen that the law on the requirement to make a specific averment to the effect that the workman had not been gainfully employed elsewhere during the period of his termination from service had developed only over the past few years, and there was no such requirement at the time when the proceedings were going on in the Labour Court, i.e., prior to and in the year 1995. Instead the counsel for the petitioner workmen placed reliance on a number of judgments, to state that once

the termination is found to be illegal, the petitioner workmen would normally become entitled to reinstatement in service. Counsel for the petitioner workmen sought to draw support from the following judgments to canvass that even in cases where the workman did not specifically state that he was not gainfully employed throughout, backwages have been awarded by the Supreme Court in certain cases:

(i) Hindustan Motors Ltd. v. Tapan Kumar Bhattacharya : (2002)IILLJ 1156 SC

(ii) Allahabad Jal Sansthan v. Daya Shankar Rai and Anr. 2005 V AD (S.C.) 224

10. I have heard the counsels for the parties and have perused the material placed on record including the impugned award and the notice dated 12th April, 1993. The basic issue that needs to be addressed herein is as to whether the requirements of Section 25F have been complied with by the respondent management before retrenching the petitioner workmen or not.

11. Much emphasis has been placed in the impugned award on the fact that both the petitioner workmen, as well as the respondent management were aware that the workmen were being removed because of the need based arrangement, under which the surplus workmen were to be removed from services. It has been observed that the respondent management by issuing a general notice dated 12th April, 1993, informed the workmen that their services would cease after 7 days from the date of publication of the said notice and that since this information was coupled with the direction to the workmen to collect the statutory compensation, no illegality could be attributed to the respondent management because the procedure as prescribed under Section 25F of the Act had been followed. However, a perusal of the aforesaid notice shows that it simply states that the casual workers concerned were to collect their dues on 19th April, 1993 and no mention has been therein as to whether the dues pertained to the statutory compensation as was required to be paid to the petitioner workmen under Section 25F or not. In the case of Sain Steel Products (supra), the Supreme Court held that when it is not clearly spelt out in the notice that the amount sought to be paid is compensation under Section 25F, in that case, the provisions of Section 25F cannot be said to have been complied with. Relevant extract is reproduced as

under:

Para 3: Secondly, he contended that the termination of services of the respondent was in terms of Section 25F of the Act as the order of termination discloses that it is open to the respondent to collect the dues before leaving and in this context he relied upon two decisions of this Court in : (1962)ILLJ420SC *Straw Board ., Saharanpur v. Covind* and : (1965)ILLJ458SC *Management of Delhi Transport Undertaking v. Industrial Tribunal, Delhi* to contend that even an offer of payment is as good as payment itself in terms of Section 25F of the Act. However, a reading of the letter dated 8-9-1975 on which reliance is placed, it is clear that all that is stated is to ask the respondent to collect whatever is due to him but it does not spell out whether it included the amount as contemplated under Section 25F or not. In these circumstances we cannot take this sentence to be making an offer in terms of Section 25F of the Act comply with the terms thereof. Hence the view taken by the Labour Court as affirmed by the High Court stands to good reason and it does not call for any interference at our hands.

12. Coming to the question regarding compliance of Section 25F(a) of the Act, it is to be noted that this clause requires that the workman proposed to be retrenched should be given one month's notice in writing indicating the reasons for retrenchment, and the period of notice should expire before retrenchment, and alternatively, it provides that the workman may be paid in lieu of such notice, wages for the period of notice, i.e. for a period of one month. This clause affords a safeguard to a retrenched workman and having regard to the object which is intended to be achieved by this clause, it has been held to be mandatory in nature, in various judgments. [see *Bombay Union of Journalists v. State of Bombay* : (1964)ILLJ351SC ; *Delhi Cloth and General Mills Ltd. v. Shambhu Nath Mukherji and Ors.* : (1978)ILLJ1SC ; *Pramod Jha and Ors.*(supra)]

13. It is also not disputed that while the notice was dated 12th April, 1993, it was to become effective within a period of 7 days from the date of publication of such notice. Thus, in effect the petitioner workmen were given only 7 days notice, instead of the 30 days notice, as was the condition precedent under Section 25F(a) of the Act. As has been stated above, the provisions of Section 25F are

mandatory in nature and non-compliance of the said provision renders the retrenchment illegal and void abinitio. Reliance in this respect can be placed on the judgment rendered by a Division Bench of the Orissa High Court in the case of *Rabindra Kumar Prusty v. Government of Orissa* reported as 1985 L IC 1770, wherein a termination order given to the workmen on 7th July 1983, terminating their services w.e.f. 31st July, 1983 was held to be bad since the notice was not for 30 days, and consequently, the retrenchment was held to be illegal.

14. The contention of the respondent management that it was mentioned in the aforesaid notice itself that the petitioner workmen were required to collect the notice pay and other dues, to be paid to them, is not borne out from a perusal of the notice itself. The offer made by the respondent management to pay 50% of the statutory compensation as ex-gratia payment to the petitioner workmen cannot be permitted to be treated as a substitute for the provision of Section 25F(a) of the Act, which is mandatory in nature. In fact, while the respondent management in its counter affidavit has stated that the petitioner workmen were duly served, but they did not bring this fact on record. Instead, their main stand before the Labour Court was that although the petitioners were casual workers and had not worked on permanent basis or continuously with the respondent management, still the provisions of Section 25F were complied with by putting up the notice on the notice board and calling upon them to collect their dues.

15. As a result of the above discussion, it is held that the termination of the petitioner workmen by the respondent management is illegal and unjustified, the same being in contravention of the provisions of Section 25F(a) and (b) of the Act.

16. In so far as the issue of back wages is concerned, it is admitted that the workmen did not raise a specific plea, either in their statement of claim or in their affidavits, that they were not gainfully employed after their termination. It is a settled law that back wages is not a natural consequence of wrongful termination; there is an element of discretion in the grant of back wages, which the Court has to exercise keeping in view the facts and circumstances of the case.

17. Reference may be made to the judgment of a Division Bench of this Court in the case of *Thankur Singh Rawat and Ors. v. Jagjit Industries Ltd.* (2006) 1 LLJ

775, wherein this Court held that the state of employment or unemployment of the workman is within the special knowledge of the workman and therefore it should be his first duty to make an assertion that he was unemployed. Having so asserted in his statement of claim, he may even state on oath about his state of unemployment, for nothing more is required to prove his side of the case. It will then be for the management to assert or prove if the workman was at all employed. Similar view has also been taken by the Apex Court in the case of *Kendriya Vidyalaya Sangathan and Anr. v. S.C. Sharma* : (2005)IILLJ153SC , where it was held as under:

Para 15: ...When the question of determining the entitlement of a person to back wages is concerned, the employee has to show that he was not gainfully employed. The initial burden is on him. After and if he places materials in that regard, the employer can bring on record materials to rebut the claim....

18. Also, reliance placed by the counsel for the workman on the judgment of the Supreme Court in the case of *Allahabad Jal Sansthan* (supra) is misconceived. In the said case, the Supreme court made a survey of the entire case law existing on the issue and came to the following conclusion:

Para 6: A law in absolute term cannot be laid down as to in which cases, and under what circumstances, full back wages can be granted or denied. The Labour Court and/or Industrial Tribunal before which industrial dispute has been raised, would be entitled to grant the relief having regard to the facts and circumstances of each case. For the said purpose, several factors are required to be taken into consideration. It is not in dispute that the Respondent No. 1 herein was appointed on an ad hoc basis; his services were terminated on the ground of a policy decision, as far back as on 24.1.1987. The Respondent No. 1 had filed a written statement wherein he had not raised any plea that he had been sitting idle or had not obtained any other employment in the interregnum. The learned Counsel for the Appellant, in our opinion, is correct in submitting that a pleading to that effect in the written statement by the workman was necessary. Not only no such pleading was raised, even in his evidence, the workman did not say that he continued to remain unemployed. In the instant case, the Respondent herein had been

reinstated from 27.2.2001.

Para 16: We have referred to certain decisions of this Court to highlight that earlier in the event of an order of dismissal being set aside, reinstatement with full back wages was the usual result. But now with the passage of time, it has come to be realized that industry is being compelled to pay the workman for a period during which he apparently contributed little or nothing at all, for a period that was spent unproductively, while the workman is being compelled to go back to a situation which prevailed many years ago when he was dismissed. It is necessary for us to develop a pragmatic approach to problems dogging industrial relations. However, no just solution can be offered but the golden mean may be arrived at.

19. No doubt the Supreme Court granted 50% back wages to the workman therein applying the golden mean, but what may be noted is that, the said case was one where the Labour Court had granted full back wages even in the absence of any averment by the workman to the effect that he was not gainfully employed during the period of termination of his services and considering the facts and circumstances of the case, and reiterating the law that it is mandatory for the workman to make a pleading to the effect that he had been sitting idle or was not gainfully employed, the Supreme Court therein reduced the back wages from 100% to 50%. However, since no back wages have been granted in the present case even on facts, the said decision of Allahabad Jal Sansthan (supra) is of no use to the petitioner workmen.

20. Similarly even in Tapan Kumar Bhattacharya's case (supra), the Supreme Court was considering a case where the Industrial Tribunal had granted full back wages to the workman despite the fact that no pleading was made or evidence led on the issue as to whether the workman was not gainfully employed during the period of his termination from service. However, considering the long interregnum, and the facts and circumstances of the case, the Supreme Court only decreased the amount of back wages payable to the workman therein to 50%. The said judgment is also therefore, of no help to the petitioner workmen.

21. Now, coming to the relief to which the petitioner workmen would be entitled to, as discussed above, there is force in the submission of the counsel for the

respondent management that the law regarding grant of back wages as is settled today, requires a workman to make an averment that he was not gainfully employed during the period when his services stood terminated. Even if the court accepts the submissions of the counsel for the petitioner workmen that at the time when the proceedings were pending before the Labour Court, this was not the position of law, and that the law in this respect has developed only over the past few years, fact still remains that no averment has been made in the writ petition to the effect that the petitioner workmen were not gainfully employed elsewhere during the period of their termination. It is also to be kept in mind that the nature of job performed by the petitioner workmen is such that it is difficult to perceive that they must have been sitting idle all this while. In this view of the matter, it is not appropriate to grant back wages to the petitioner workmen as claimed by them.

22. While holding that the termination of the petitioner workmen was in contravention of Section 25(F)(a) & (b) of the Act, one cannot lose sight of the fact that pursuant to the orders of the Supreme Court dated 26th September, 1989, in the case of B.R. Singh v. Union of India, some of the workers were regularized in the year 1992-1993 and after making a need based assessment, the respondent management decided to retrench the surplus workmen including the petitioners herein. It would therefore not be appropriate to foist the petitioner workmen back on the respondent management by directing their reinstatement, in view of the fact that their services were dispensed with by the respondent management because they were found to be surplus.

23. Also, it is pertinent to note that the services of the petitioner workmen were terminated in April, 1993 and almost 14 long years have passed since. Thus for all effects and purposes, the petitioner workmen have failed to contribute to the respondent management in any material way for a period of 14 years. The interest of justice shall therefore be met, if the petitioner workmen are directed to be paid a lump sum compensation in lieu of reinstatement.

24. In view of the aforesaid facts and circumstances, the impugned award dated 27th January, 2005 is set aside. The respondent management is directed to pay a lump sum amount of Rs. 1,00,000 (One Lakh only) in lieu of reinstatement to

each of the petitioner workmen within a period of four weeks from today, failing which, the petitioner workmen shall be entitled to receive interest thereon @ 9 % p.a. till the payment is made by the respondent management. The writ petition is allowed to the aforesaid extent. No order as to costs.

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