Anoop Sharma vs Exec.Eng.Pub.Health Division ... on 9 April, 2010

Author: G.S. Singhvi

Bench: Asok Kumar Ganguly, G.S. Singhvi

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 3478 OF 2010
(Arising out of SLP(C) No. 17965 of 2008)

Anoop Sharma ...Appellant

Versus

Executive Engineer, Public Health Division No.1
Panipat (Haryana) ...Respondent

J U D G M E N T

G.S. Singhvi, J.

1. Leave granted.

2. The only question which requires consideration in this appeal is whether the Division Bench of Punjab and Haryana High Court erred in upsetting award dated 1.8.2002 passed by Industrial Tribunal-cum-Labour Court, Panipat (hereinafter referred to as "the Labour Court") for reinstatement of the appellant without even recording a finding that the same suffered from any jurisdictional error or violation of the rules of natural justice or was vitiated by an error of law apparent on the face of the record.

3. The appellant was engaged/employed by the respondent as Mali-cum- Chowkidar with effect from 11.10.1995. He was paid monthly wages at the rate of Rs.1900/-. His service was discontinued with effect from 25.4.1998. The dispute raised by the appellant was referred by the Government of Haryana to the Labour Court under Section 10(1)(c) of the Industrial Disputes Act, 1947 (for short, "the Act"). In the statement of claim filed by him, the appellant pleaded that he had worked for a period of more than two years and six months; that his service was discontinued with effect from 25.4.1998 without giving him notice or pay in lieu thereof or retrenchment compensation and without complying with mandate of Section 25-N of the Act. Another plea taken by the appellant

was that no seniority list of the workers had been prepared and persons junior to him, namely, Ramesh, Amarjit, Jagbir and Rohtash were retained in service. In the written statement filed by the respondent, it was pleaded that the services of the appellant and other similarly situated employees were discontinued because the State Government had issued instructions to that effect in the wake of financial crisis. It was further pleaded that the workman was offered compensation along with the letter of termination, but he refused to accept the same and left the station and, therefore, demand draft bearing No.056997 dated 25.4.1998 for a sum of Rs.5,491/- was sent at his residence. For the sake of convenient reference, the relevant portions of the written statement, as contained in the paper book of this appeal, are extracted below:-

"PRELIMINARY OBJECTION

1. xxx xxx xxx

2. That as per rules prescribed in section 25-F of Industrial Dispute Act, the workman was offered the amount of compensation with termination letter but the claimant refused to take the same and soon after he left the station also. A demand draft bearing No.056997 dated 25.4.98 amounting to Rs.5491/- was sent to the 18.8.1998 workman residence but he refused to accept it and registered letter received back undelivered. The said draft/banker cheque was once again sent to the claimant home address. 2nd time the same was received/accepted by the claimant. Keeping-in-view the facts stated above the respondent is not at fault in any manner so the present claim statement filed by the claimant is not maintainable in any manner.

ON MERIT

1. That in reply to para no.1 of the claim statement it is stated that the claimant was engaged as casual labour in 12/95 and his services were dispensed with on 25.498 due to financial crunch being experienced by the Govt. of Haryana as already explained in para no.1 of the preliminary objection.

a) That para no.1(a) of the claim statement is wrong and denied, the notice dated 25.4.98 along with a demand draft bearing No.056997 dated 25.4.98 amounting to Rs.5491/- was offered to the claimant on dated 25.4.98 but the claimant refused to take the same and soon after he left the station also, later on the said draft was sent to the claimant residence which was received by him.

b) That the para no.1(b) of the claim statement is wrong and denied as already explained above the retrenchment compensation as per Section 25-F of the I.D. Act was offered to the claimant on 25.4.98 but he refused to take the same and soon after left the station also. The demand draft was sent to his home address which was received by him.

c) xxx xxx xxx
d) xxx xxx xxx"

4. The appellant appeared as WW-1 and reiterated the averments contained in the statement of claim. On behalf of the respondent, Shri Ram Chander was examined as MW-1. He stated that the appellant had worked as casual labour from December 1995 to 25.4.1998 with breaks and that he was given retrenchment compensation with letter Ex. M-1 dated 25.4.1998, which he refused to accept. Shri Ram Chander further stated that the amount of compensation was sent to the appellant at his home address by demand draft Ext. M-3 dated 25.4.1998. According to Shri Ram Chander, no person junior to the appellant was retained in the department. However, no evidence was produced by the respondent to corroborate the oral assertion of Shri Ram Chander that the appellant had refused to accept the compensation.

5. After considering the pleadings and evidence of the parties, the Labour Court recorded the following conclusions:

(1) That the total number of employees in the department was about 400 and, therefore, compliance of Section 25-N of the Act was mandatory before terminating the services of the workman.

(2) From Ext. M-4 it is clear that the workman received the amount of compensation on 18.8.1998, i.e., after the months and 23 days. (3) The plea of the management that compensation was refused by the workman is not supported by any proof or other evidence. (4) The workman is entitled to reinstatement with full back wages.

6. The respondent challenged the award of the Labour Court in Writ Petition No. 6849/2004. By the impugned order, the Division Bench of the High Court allowed the writ petition and set aside the award by observing that there was no reason for the Labour Court to record a finding that the compensation was not offered to the workman at the time of retrenchment. The Division Bench also held that the appellant cannot be reinstated in service because he was not appointed against any sanctioned post and he was initially employed without complying with the statutory provisions. This is evinced from the following extract of the impugned order:

"During the course of arguments, learned counsel appearing for the petitioner argued that in view of the nature of appointment of respondent No.1, he cannot be ordered to be reinstated. The respondent has not shown before the Labour Court or before this Court that he had been appointed on a sanctioned post in consonance with the provisions of Articles 14 and 16 of the Constitution of India. It has further not been shown that the entry in service of the respondent was legal and in accordance with the statutory provisions and rules framed thereunder. A person who has taken entry illegally by the back door cannot be permitted to be reinstated in view of the law laid down by the Hon'ble Supreme Court in recent judgments."

For arriving at the aforementioned conclusion, the Division Bench relied upon the judgments of this Court in Himanshu Kumar Vidyarthi v. State of Bihar AIR 1997 SC 3657, Municipal Council, Samrala v. Raj Kumar (2006) 3 SCC 81, Reserve Bank of India v. Gopinath Sharma (2006) 6 SCC 221, Secretary, State of Karnataka v. Uma Devi (2006) 4 SCC 1, U.P. Power Corporation Ltd. v. Bijli Mazdoor Sangh (2007) 5 SCC 755 and Haryana Urban Development Authority v. Om Pal (2007) 5 SCC 745.

7. Shri Brijender Chahar, learned senior counsel for the appellant argued that the finding recorded by the Labour Court on the issue of non- compliance of Section 25-F of the Act was a pure finding of fact based on correct appreciation of the pleadings and evidence of the parties and the High Court committed a jurisdictional error by interfering with the award of reinstatement. Learned counsel submitted that even though the respondent had pleaded before the Labour Court that compensation was offered to the appellant on the date of termination of his service and he refused to accept the same but no evidence was produced to substantiate the same. Learned counsel further argued that the alleged violation of the doctrine of equality enshrined in Articles 14 and 16 of the Constitution has no bearing on the appellant's case because appointment of casual, daily wage and monthly rated employees do not require advertisement of the post or consideration of the competing claims of all eligible persons. Learned counsel pointed out that the respondent had not pleaded either before the Labour Court or the High Court that the appellant's initial engagement/employment was contrary to any statute or Articles 14 and 16 of the Constitution and argued that in the absence of a specific plea having been taken in that regard, High Court was not at all justified in setting aside the award of reinstatement on the specious ground that the appellant's entry in the service was not legal.

8. Ms. Sukhda Pritam, learned counsel for the respondent argued that the High Court did not commit any error by setting aside the award of the Labour Court because the finding recorded by it on the issue of violation of Section 25-F of the Act was perverse. She submitted that before terminating the appellant's service, the respondent had complied with the mandate of Section 25-F of the Act by offering him demand draft of Rs.5,491/- but the Labour Court ignored this stark fact and passed the award for reinstatement of the appellant with back wages.

9. We have considered the respective submissions. At the outset, we deem it necessary to mention that action taken by the respondent to terminate the services of other similarly situated employees, namely, Rakesh Sharma son of Mulkh Raj Sharma, Tejbir Singh, Ram Mehar Singh, Parveen Sharma, Babu Ram, Karan Singh, Baldev Singh, Jaipal Singh, Naresh Kumar, Jagbir, Rakesh Sharma son of Chajju Ram, Jai Singh, Balbir Singh and Ballu Nandwal without complying with Section 25-F of the Act was annulled by the Labour Court vide award dated 8.9.2000 passed in Reference Nos. 1330 to 1338, 1366, 1270, 1273, 1407 and 1525 of 1999 and Civil Writ Petition No. 3970/2001, LPA No. 8/2002 and Special Leave Petition (Civil) No. 11475/2002 filed by the State of Haryana against the award of the Labour Court were dismissed by the High Court and this Court respectively.

10. A reading of the impugned order shows that the Division Bench of the High Court set aside the award of the Labour Court without even adverting to the fact that challenge to similar award passed in the cases of other employees was negatived by the High Court and this Court. We have no doubt

that if the Division Bench had taken the trouble of ascertaining the status of the disputes raised by other employees, then it would have discovered that the award of reinstatement of similarly situated employees has been upheld by the High Court and this Court and in that event, it may not have passed the impugned order. That apart, we find that even though the Division Bench did not come to the conclusion that the finding recorded by the Labour Court on the issue of non-compliance of Section 25-F of the Act is vitiated by an error of law apparent on the face of the record, it allowed the writ petition by assuming that the appellant's initial engagement/employment was not legal and the respondent had complied with the conditions of a valid retrenchment. In our view, the approach adopted by the Division Bench is contrary to the judicially recognised limitations of the High Court's power to issue writ of certiorari under Article 226 of the Constitution - Syed Yakoob v. K.S. Radhakrishnan (1964) 5 SCR 64, Municipal Board, Saharanpur v. Imperial Tobacco of India Ltd. (1999) 1 SCC 566, Lakshmi Precision Screws Ltd. v. Ram Bhagat (2002) 6 SCC 552, Mohd. Shahnawaz Akhtar v. Ist ADJ Varanasi JT 2002 (8) SC 69, Mukand Ltd. v. Mukand Staff and Officers' Association (2004) 10 SCC 460, Dharamraj and others v. Chhitan and others 2006 (11) SCALE 292 and Assistant Commissioner, Income Tax, Rajkot v. Saurashtra Kutch Stock Exchange Ltd. 2008 (12) SCALE 582.

11. In Syed Yakoob v. K.S. Radhakrishnan (supra), the Constitution Bench of this Court considered the scope of the High Court's jurisdiction to issue a writ of certiorari in cases involving challenge to the orders passed by the authorities entrusted with quasi judicial functions under the Motor Vehicles Act, 1939. Speaking for majority of the Constitution Bench, Gajendragadkar, J. observed as under:

> ".....A writ of certiorari can be issued for correcting errors of jurisdiction committed by inferior courts or Tribunals; these are cases where orders are passed by inferior courts or tribunals without jurisdiction, or in excess of it, or as a result of failure to exercise jurisdictions. A writ can similarly be issued where in exercise of jurisdiction conferred on it, the Court or Tribunal acts illegally or improperly, as for instance, it decides a question without giving an opportunity to be heard to the party affected by the order, or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice. There is, however, no doubt that the jurisdiction to issue a writ of certiorari is a supervisory jurisdiction and the Court exercising it is not entitled to act as an appellate Court. This limitation necessarily means that findings of fact reached by the inferior Court or Tribunal as a result of the appreciation of evidence cannot be reopened or questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. In regard to a finding of fact recorded by the Tribunal a writ of certiorari can be issued if it is shown that in recording the said finding, the Tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari. In dealing with this category of cases, however, we must always bear in mind that a finding of fact recorded by the Tribunal cannot be challenged in

> proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the Tribunal was insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of evidence led on a point and the inference of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal, and the said points cannot be agitated before a writ court. It is within these limits that the jurisdiction conferred on the High Courts under Art. 226 to issue a writ of certiorari can be legitimately exercised."

(emphasis supplied)

12. Section 25-B, which defines the term `continuous service' and Section 25-F(a) and (b) of the Act, which mandates giving of one month's notice or pay in lieu thereof and retrenchment compensation to the workman whose service is sought to be terminated otherwise than by way of punishment or in accordance with the express terms incorporated in the order of appointment, read as under:

> 25B. 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 a 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
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> --
>
> (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;
>
> (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 (20 of 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.

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;

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

(c) xxxx xxxx xxxx

13. An analysis of the above reproduced provisions shows that no workman employed in any industry who has been in continuous service for not less than one year under an employer can be retrenched by that employer until the conditions enumerated in Clauses (a) and (b) of Section 25-F of the Act are satisfied. In terms of Clause (a), the employer is required to give to the workman one month's notice in writing indicating the reasons for retrenchment or pay him wages in lieu of the notice. Clause (b) casts a duty upon the employer to pay to the workman at the time of retrenchment, compensation equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months. This Court has repeatedly held that Section 25-F(a) and (b) of the Act is mandatory and non-compliance thereof renders the retrenchment of an employee nullity - State of Bombay v. Hospital Mazdoor Sabha AIR 1960 SC 610, Bombay Union of Journalists v. State of Bombay (1964) 6 SCR 22, State Bank of India v. N. Sundara Money (1976) 1 SCC 822, Santosh Gupta v. State Bank of Patiala (1980) 3 SCC 340, Mohan Lal v. Management of M/s. Bharat Electronics Ltd. (1981) 3 SCC 225, L. Robert D'Souza v. Executive

Engineer, Southern Railway (1982) 1 SCC 645, Surendra Kumar Verma v. Industrial Tribunal (1980) 4 SCC 443, Gammon India Ltd. v. Niranjan Das (1984) 1 SCC 509, Gurmail Singh v. State of Punjab (1991) 1 SCC 189 and Pramod Jha v. State of Bihar (2003) 4 SCC 619. This Court has used different expressions for describing the consequence of terminating a workman's service/employment/ engagement by way of retrenchment without complying with the mandate of Section 25-F of the Act. Sometimes it has been termed as ab initio void, sometimes as illegal per se, sometimes as nullity and sometimes as non est. Leaving aside the legal semantics, we have no hesitation to hold that termination of service of an employee by way of retrenchment without complying with the requirement of giving one month's notice or pay in lieu thereof and compensation in terms of Section 25-F(a) and (b) has the effect of rendering the action of the employer as nullity and the employee is entitled to continue in employment as if his service was not terminated.

14. The question whether the offer to pay wages in lieu of one month's notice and retrenchment compensation in terms of Clauses (a) and (b) of Section 25-F must accompany the letter of termination of service by way of retrenchment or it is sufficient that the employer should make a tangible offer to pay the amount of wages and compensation to the workman before he ask to go was considered in National Iron and Steel Company Ltd. v. State of West Bengal (1967) 2 SCR 391. The facts of that case were that the workman was given notice dated 15.11.1958 for termination of his service with effect from 17.11.1958. In the notice, it was mentioned that the workman would get one month's wages in lieu of notice and he was asked to collect his dues from the cash office on 20.11.1958 or thereafter during the working hours. The argument of the Additional Solicitor General that there was sufficient compliance of Section 25-F was rejected by this Court by making the following observations:

> "The third point raised by the Additional Solicitor-General is also not one of substance. According to him, retrenchment could only be struck down if it was mala fide or if it was shown that there was victimisation of the workman etc. Learned counsel further argued that the Tribunal had gone wrong in holding that the retrenchment was illegal as Section 25-F of the Industrial Disputes Act had not been complied with. Under that section, a workman employed in any industry should not be retrenched until he had been given one month's notice in writing indicating the reasons for retrenchment and the period of notice had expired, or the workman had been paid in lieu of such notice, wages for the period of the notice. The notice in this case bears the date November 15, 1958. It is to the effect that the addressee's services were terminated with effect from 17th November and that he would get one month's wages in lieu of notice of termination of his service. The workman was further asked to collect his dues from the cash office on November 20, 1958 or thereafter during the working hours. Manifestly, Section 25-F, had not been complied with under which it was incumbent on the employer to pay the workman, the wages for the period of the notice in lieu of the notice. That is to say, if he was asked to go forthwith he had to be paid at the time when he was asked to go and could not be asked to collect his dues afterwards. As there was no compliance with Section 25-F, we need not consider the other points raised by the learned counsel."

15. In State Bank of India v. N. Sundara Money (supra), the Court emphasised that the workman cannot be retrenched without payment, at the time of retrenchment, compensation computed in terms of Section 25-F(b).

16. The legal position has been beautifully summed up in Pramod Jha v. State of Bihar (supra) in the following words:

> "The underlying object of Section 25-F is twofold. Firstly, a retrenched employee must have one month's time available at his disposal to search for alternate employment, and so, either he should be given one month's notice of the proposed termination or he should be paid wages for the notice period. Secondly, the workman must be paid retrenchment compensation at the time of retrenchment, or before, so that once having been retrenched there should be no need for him to go to his employer demanding retrenchment compensation and the compensation so paid is not only a reward earned for his previous services rendered to the employer but is also a sustenance to the worker for the period which may be spent in searching for another employment. Section 25-F nowhere speaks of the retrenchment compensation being paid or tendered to the worker along with one month's notice; on the contrary, clause (b) expressly provides for the payment of compensation being made at the time of retrenchment and by implication it would be permissible to pay the same before retrenchment. Payment or tender of compensation after the time when the retrenchment has taken effect would vitiate the retrenchment and non-compliance with the mandatory provision which has a beneficial purpose and a public policy behind it would result in nullifying the retrenchment."

17. If the workman is retrenched by an oral order or communication or he is simply asked not to come for duty, the employer will be required to lead tangible and substantive evidence to prove compliance of Clauses (a) and (b) of Section 25-F of the Act.

18. The stage is now set for considering whether the respondent had offered compensation to the appellant before discontinuing his engagement/employment, which amounts to retrenchment within the meaning of Section 2(oo) of the Act. In his statement, the appellant categorically stated that before discontinuing his service, the respondent did not give him notice pay and retrenchment compensation. Shri Ram Chander, who appeared as the sole witness on behalf of the respondent stated that the compensation amounting to Rs.5,491/- was offered to the appellant along with letter Ext. M-1, but he refused to accept the same. The respondent did not examine any other witness to corroborate the testimony of Ram Chander and no contemporaneous document was produced to prove that the compensation was offered to the appellant on 25.4.1998. Not only this, the respondent did not explain as to why the demand draft was sent to the appellant after more than three months of his alleged refusal to accept the compensation on 25.4.1998. If there was any grain of truth in the respondent's assertion that the compensation was offered to the appellant on 25.4.1998 and he refused to accept the same, there could be no justification for not sending the demand draft by post immediately after the appellant's refusal to accept the offer of compensation. The minimum which the respondent ought to have done was to produce the letter with which draft

was sent at the appellant's residence. The contents of that letter would have shown whether the offer of compensation was made to the appellant on 25.4.1998 and he refused to accept the same. However, the fact of the matter is that no such document was produced. Therefore, we are convinced that the finding recorded by the Labour Court on the issue of non- compliance of Section 25-F of the Act was based on correct appreciation of the pleadings and evidence of the parties and the High Court committed serious error by setting aside the award of reinstatement.

19. The judgment of the Constitution Bench in Secretary, State of Karnataka vs. Uma Devi (supra) and other decisions in which this Court considered the right of casual, daily wage, temporary and ad hoc employees to be regularised/continued in service or paid salary in the regular time scale, appears to have unduly influenced the High Court's approach in dealing with the appellant's challenge to the award of the Labour Court. In our view, none of those judgments has any bearing on the interpretation of Section 25- F of the Act and employer's obligation to comply with the conditions enumerated in that section.

20. At the cost of repetition, we consider it necessary to mention that it was not the pleaded case of the respondent before the Labour Court and even before the High Court that the appellant was engaged/employed without following the statutory rules or Articles 14 and 16 of the Constitution and that was the basis for discontinuing his engagement. Therefore, the High Court was not justified in relying upon the alleged illegality of the engagement/employment of the appellant for upsetting the award of reinstatement.

21. In the result, the appeal is allowed. The impugned order of the Division Bench of High Court is set aside and the award passed by the Labour Court is restored. If the appellant has not already been reinstated, the respondent shall do so within one month from the date of receipt/production of copy of this order. The respondent shall also pay the back wages to the appellant within a maximum period of three months, failing which the appellant shall be entitled to interest at the rate of 9% per annum from the effective date of reinstatement i.e., 21.3.2000. The parties to bear their own costs.

.....J. (G.S. Singhvi) .....J. (Asok Kumar Ganguly) New Delhi, April 9, 2010.