Devender Singh vs Association Of State Road Transport ... on 3 December, 2024

Author: Yashwant Varma

Bench: Yashwant Varma, Dharmesh Sharma

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* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ LPA 355/2014
DEVENDER SINGH
Through:

versus

ASSOCIATION OF STATE ROAD TRANSPORT
UNDERTAKING .....Responde
Through: Mr. Nishant Shokeen, Adv.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE DHARMESH SHARMA
ORDER

% 03.12.2024

1. The appellant seeks to impugn the judgment and order handed down by the learned Single Judge on 11 February 2014 and which has principally modified the directions framed by the Labour Court for reinstatement with full back wages and substituted the same with compensation. It is this which has led the appellant to approach the Court, contending that once the Labour Court had found that the retrenchment had come to be affected in violation of Section 25F of the Industrial Disputes Act, 19471, reinstatement along with full back wages would be a necessary corollary.

2. Learned counsel in support of the aforesaid submission has also drawn our attention and sought to draw sustenance from the following observations as appearing in the decision of the Supreme Court in Deepali Gundu Surwase v. Kranti Junior Adhyapak Act The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 20/12/2024 at 23:18:01 Mahavidyalala (D.Ed) & Ors2. and where it was observed as follows:-

> "38. The propositions which can be culled out from the aforementioned judgments are:
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> 38.1. In cases of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule. 38.2. The aforesaid rule is subject to the

rider that while deciding the issue of back wages, the adjudicating authority or the court may take into consideration the length of service of the employee/workman, the nature of misconduct, if any, found proved against the employee/workman, the financial condition of the employer and similar other factors.

38.3. Ordinarily, an employee or workman whose services are terminated and who is desirous of getting back wages is required to either plead or at least make a statement before the adjudicating authority or the court of first instance that he/she was not gainfully employed or was employed on lesser wages. If the employer wants to avoid payment of full back wages, then it has to plead and also lead cogent evidence to prove that the employee/workman was gainfully employed and was getting wages equal to the wages he/she was drawing prior to the termination of service. This is so because it is settled law that the burden of proof of the existence of a particular fact lies on the person who makes a positive averment about its existence. It is always easier to prove a positive fact than to prove a negative fact. Therefore, once the employee shows that he was not employed, the onus lies on the employer to specifically plead and prove that the employee was gainfully employed and was getting the same or substantially similar emoluments. 38.4. The cases in which the Labour Court/Industrial Tribunal exercises power under Section 11-A of the Industrial Disputes Act, 1947 and finds that even though the enquiry held against the employee/workman is consistent with the rules of natural justice and/or certified standing orders, if any, but holds that the punishment was disproportionate to the misconduct found proved, then it will have the discretion not to award full back wages.

However, if the Labour Court/Industrial Tribunal finds that the employee or workman is not at all guilty of any misconduct or that the employer had foisted a false charge, then there will be ample justification for award of full back wages.

38.5. The cases in which the competent court or tribunal finds that the employer has acted in gross violation of the statutory provisions and/or the principles of natural justice or is guilty of victimising the employee or workman, then the court or tribunal concerned will be fully justified in directing payment of full back (2013) 10 SCC 324 The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 20/12/2024 at 23:18:01 wages. In such cases, the superior courts should not exercise power under Article 226 or 136 of the Constitution and interfere with the award passed by the Labour Court, etc. merely because there is a possibility of forming a different opinion on the entitlement of the employee/workman to get full back wages or the employer's obligation to pay the same. The courts must always keep in view that in the cases of wrongful/illegal termination of service, the wrongdoer is the employer and the sufferer is the employee/workman and there is no justification to give a premium to the employer of his wrongdoings by relieving him of the burden to pay to the employee/workman his dues in the form of full back wages.

38.6. In a number of cases, the superior courts have interfered with the award of the primary adjudicatory authority on the premise that finalization of litigation has taken long time ignoring that in majority of cases the parties are not responsible for such delays. Lack of infrastructure and manpower is the principal cause for delay in the disposal of cases. For this the litigants cannot be blamed or penalised. It would amount to grave injustice to an employee or workman if he is denied back wages simply because there is long lapse of time between the termination of his service and finality given to the order of reinstatement. The courts should bear in mind that in most of these cases, the employer is in an advantageous position vis-a-vis the employee or workman. He can avail the services of best legal brain for prolonging the agony of the sufferer i.e. the employee or workman, who can ill-afford the luxury of spending money on a lawyer with certain amount of fame. Therefore, in such cases it would be prudent to adopt the course a suggested in Hindustan Tin Works (P) Ltd. v. Employees. 38.7. The observation made in J.K. Synthetics Ltd. v. K.P. Agrawal that on reinstatement the employee/workman cannot claim continuity of service as of right is contrary to the ratio of the judgments of three-Judge Benches referred to hereinabove and cannot be treated as good law. This part of the judgment is also against the very concept of reinstatement of an employee/workman."

3. Having heard learned counsel at some length, we find that the learned Single Judge had in paragraph 7 observed as follows:

> "7. Mr. J.S. Bhasin, learned counsel appearing for the petitioner would contend that the Labour Court has erred in concluding that the termination of the respondent was bad. According to him, the engagement of the respondent as Driver was contractual and for a period of 3 months. He has drawn my attention to the office order dated April 08, 1997 in this regard. On expiry of period of 3 months on December 31, 2000, the services of the respondent were dispensed with. In view of the office order dated April 08, 1997 The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 20/12/2024 at 23:18:02 and memorandum dated December 26, 2000 the period of engagement having come to an end after a period 3 months, the provision of Section 25(F) of the Act would not be applicable. According to him, the provision of Section 2(oo)(bb) shall be applicable. Further, he would state that the respondent had indulged in rash and negligent driving and was also not regular in his duties. He has also drawn my attention to memorandum dated March 30, 1995 (Annexure P-12), memorandum dated November 16, 1995 (Annexure P-13), office order dated February 28, 1997 (Annexure P-14) and note dated December 19, 2000 (Annexure P-
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> 16). According to him, the last document i.e. note dated December 19, 2000 (Annexure P-17), a note which preceded the issuance of memorandum dated December 26, 2000."

4. The Court had thus found that the engagement of the appellant was on a contractual basis and for a period of three months. If that were so, it would be the provisions of Section 2(oo)(bb) of the Act

which would have stood attracted and thus take the case out of the rigours of Section 25F.

5. However, we find that the learned Single Judge has ultimately, and on this score, held in favour of the appellant, holding that there cannot be a distinction that could be acknowledged to exist between a temporary or a permanent workman when it comes to Section 25F.

6. While we do not propose to render any adverse observation in respect of the aforesaid conclusion or question the correctness thereof, the ultimate framing of relief would have to be examined and evaluated bearing in mind the settled position insofar as the scope of Section 2(oo)(bb) is concerned.

7. We deem it apposite to take note of the following position which had come to be laid down by us in Ramesh Kumar Bawalia v. Uttar Pradesh Samaj Society and Another3:-

> "5. The award passed by the learned Labour Court was assailed by the respondent by filing a writ under Article 226 of the Constitution of India and the learned Single Judge vide the impugned order dated 11-3-2020 held that that termination of a 2023 SCC OnLine Del 5176 The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 20/12/2024 at 23:18:02 probationer during the period of probation does not amount to "retrenchment" within the meaning of Section 2(oo)(bb) of the Act, and therefore, the writ petition was allowed and the impugned order was set aside.
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> 21. Reverting to the case law relied upon by learned counsel for the respondent and the learned amicus, in M. Venugopal v. LIC, the appellant was appointed as a development officer by the respondent on probation. His services were terminated before the end of the probation period. Upholding the termination, it was held that even under general law, the service of a probationer can be terminated after making an overall assessment of his performance during the period of probation and no notice is required to be given before termination of such service and it was not a case of retrenchment within the scope and meaning of Section 2(oo)(bb) of the Act. In Escorts Ltd. v. Industrial Tribunal, an industrial dispute relating to termination of services of Respondent was raised. The Supreme Court set aside the order of the High Court and the Labour Court, holding that "since the termination was in accordance with the terms of the contract though before the expiry of the period of probation it fell within the ambit of Section 2(oo)(bb) of the Act and did not constitute retrenchment. Since the services of the workmen were terminated as per the terms of the contract of employment, it does not amount to retrenchment under Section 2(oo)(bb) of the Act and the Labour Court was in error in holding that it constituted retrenchment and was protected by Section 25-F of the Act"."

8. We also take note of the decision of the Supreme Court in Punjab State Electricity Board v. Darbara Singh4 and which had examined the scope and ambit of Section 2(oo)(bb) and Section 25F as follows:-

> "5. The position of law relating to fixed appointments and the scope and ambit of Section 2(oo)(bb) and Section 25-F were examined by this Court in several cases.
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> 7. We find that the High Court's judgment is unsustainable on more than one count. In Marinda Coop. Sugar Mills Ltd. v. Ram Kishan it was observed as follows: (SCC p. 654, paras 4-5) "4. It would thus be clear that the respondents were not working throughout the season. They worked during crushing seasons only. The respondents were taken into (2006) 1 SCC 121 The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above.

 work for the season and consequent to closure of the season, they ceased to work.

5. The question is whether such a cessation would amount to retrenchment. Since it is only a seasonal work, the respondents cannot be said to have been retrenched in view of what is stated in sub-clause (bb) of Section 2(00) of the Act. Under these circumstances, we are of the opinion that the view taken by the Labour Court and the High Court is illegal. However, the appellant is directed to maintain a register for all workmen engaged during the seasons enumerated hereinbefore and when the new season starts the appellant should make a publication in neighbouring places in which the respondents normally live and if they would report for duty, the appellant would engage them in accordance with seniority and exigency of work."

8. The position was reiterated by a three-Judge Bench of this Court in Anil Bapurao Kanase v. Krishna Sahakari Sakhar Karkhana Ltd. It was noted as follows: (SCC pp. 599-600, para 3).

> "3. The learned counsel for the appellant contends that the judgment of the High Court of Bombay relied on in the impugned order dated 28-3-1995 in Writ Petition No. 488 of 1994 is perhaps not applicable. Since the appellant has worked for more than 180 days, he is to be treated as retrenched employee and if the procedure contemplated under Section 25-F of the Industrial Disputes Act, 1947 is applied, his retrenchment is illegal. We find no force in this contention. In Morinda Coop. Sugar Mills Ltd. v. Ram Kishan in para 3, this Court has dealt with engagement of the seasonal workman in sugarcane crushing; in para 4, it is stated that it was not a case of retrenchment of the workman, but of closure of the factory after the crushing season was over. Accordingly, in para 5, it was held that it is not 'retrenchment' within the meaning of Section 2(oo) of the Act. As a consequence the appellant is not entitled to retrenchment as per sub-clause (bb) of Section 2(oo) of the Act. Since the present work is seasonal business, the principles of the Act have no application.

> However, this Court has directed that the respondent management should maintain a register and engage the workmen when the season starts in the succeeding years in the order of seniority. Until all the employees whose names appear in the list are engaged in addition to the employees who are already working, the management should not go in for fresh engagement of new workmen. It would be incumbent upon the respondent management to adopt such procedure as is enumerated above."

9. Recently the question was examined in Batala Coop. Sugar Mills Ltd. v. Sowaran Singh.

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11. The materials on record clearly establish that the engagement of the workman was for a specific period and conditional. It was clearly indicated that on appointment of a regular employee, his engagement was to come to an end.

12. In view of the position as highlighted in Marinda Coop. Sugar Mills, Anil Bapurao and Batala Coop. cases the relief granted to the workman by the Labour Court and the High Court cannot be maintained."

9. Insofar as the aspect of full back wages and reinstatement is concerned, we take note of the shift in trend and the line of legal precedents which stands duly in encapsulated in the observations as rendered by the Supreme Court in Deepali Gundu Surwase.

10. This position stands fortified from the following observations which appear in the decision of the Supreme Court in P. Karupaiah (dead) through legal representatives v. General Manager, Thruuvalluvar Transport Corporation Limited5 and where it was held:-

> "10. The law on the question of award of back wages has taken some shift. It is now ruled in cases that when the dismissal/removal order is set aside/withdrawn by the courts or otherwise, as the case may be, directing employee's reinstatement in service, the employee does not become entitled to claim back wages as of right unless the order of reinstatement itself in express terms directs payment of back wages and other benefits. (See M.P. SEB v. Jarina Bee.)
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> 11. Indeed, the employee in order to claim the relief of back wages along with the relief of reinstatement is required to prove with the aid of evidence that from the date of his dismissal order till the date of his rejoining, he was not gainfully employed anywhere. The employer too has a right to adduce evidence to show otherwise that an employee concerned was gainfully employed during the relevant period and hence not entitled to claim any relief of back wages.

> 12. On proving such facts to the satisfaction of the Court, the back wages are accordingly awarded either in full or part or may even be (2018) 12 SCC 663 The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above.

The Order is downloaded from the DHC Server on 20/12/2024 at 23:18:02 declined as the case may be while passing the order of reinstatement. The courts have also applied in appropriate cases the principle of "no work no pay" while declining to award back wages and confining the relief only to the extent of grant of reinstatement along with grant of some consequential reliefs by awarding some benefits notionally, if any, in exercise of discretionary powers depending upon the facts of each case.

13. Having seen the record of the case, we are satisfied that there was no evidence brought on record by the appellant (employee) in his writ petition to claim the back wages for the period in question either in full or part. Moreover, we find that the issue in question was raised in the writ petition and not before the Industrial or Labour Tribunal where the parties could adduce evidence on such question. (See the proviso to Section 17-B of the Industrial Disputes Act, 1947.)

14. Be that as it may, the writ court and the appellate court yet examined the question in its writ jurisdiction and finding no merit therein declined to award any back wages. This Court does not find any good ground to interfere in the discretion exercised by the two courts below and accordingly uphold the orders impugned herein calling no interference.

15. Indeed, the appellant should feel satisfied that he was able to secure reinstatement in service despite his involvement in a murder case. The appellant should be content with what he has got.

16. In view of the foregoing discussion, the appeal fails and is accordingly dismissed."

11. A learned Judge of this Court in the decision of Aiims v. Ashok Kumar6 had observed as follows:-

> "25. Bearing in mind the reasoning afforded by the learned Labour Court, this Court deems it imperative to briefly state the position of law as to in what circumstances may the Court grant the relief of compensation in lieu of reinstatement. The Hon'ble Supreme Court in State of Uttarakhand v. Raj Kumar, (2019) 14 SCC 353, observed as to how and when must the Labour Court/Tribunal grant the relief of compensation in lieu of reinstalment along with back wages. The relevant paragraphs are reproduced herein below:
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> ".....9. In our opinion, the case at hand is covered by the two decisions of this Court rendered in BSNL v. Bhurumal [BSNL v. Bhurumal, (2014) 7 SCC 177 : (2014) 2 SCC (L&S) 373] and Distt. Development Officer v. Satish Kantilal Amrelia [Distt. Development Officer v. Satish Kantilal Amrelia, (2018) 12 SCC 298 : (2018) 2 SCC (L&S) 276].

10. It is apposite to reproduce what this Court has held in BSNL [BSNL v. Bhurumal, (2014) 7 SCC 177 : (2014) 2 SCC (L&S) 373] : (SCC p. 189, paras 33-35) "33. It is clear from the reading of the aforesaid judgments that the ordinary principle of grant of reinstatement with full back wages, when the termination is found to be illegal is not applied mechanically in all cases. While that may be a position where services of a regular/permanent workman are terminated illegally and/or mala fide and/or by way of victimisation, unfair labour practice, etc. However, when it comes to the case of termination of a daily-wage worker and where the termination is found illegal because of a procedural defect, namely, in violation of Section 25-F of the Industrial Disputes Act, this Court is consistent in taking the view that in such cases reinstatement with back wages is not automatic and instead the workman should be given monetary compensation which will meet the ends of justice. Rationale for shifting in this direction is obvious.

34. The reasons for denying the relief of reinstatement in such cases are obvious. It is trite law that when the termination is found to be illegal because of non-payment of retrenchment compensation and notice pay as mandatorily required under Section 25-F of the Industrial Disputes Act, even after reinstatement, it is always open to the management to terminate the services of that employee by paying him the retrenchment compensation. Since such a workman was working on daily-wage basis and even after he is reinstated, he has no right to seek regularisation [see State of Karnataka v. Umadevi (3) [State of Karnataka v. Umadevi (3), (2006) 4 SCC 1 : 2006 SCC (L&S) 753]]. Thus when he cannot claim regularisation and he has no right to continue even as a daily-wage worker, no useful purpose is going to be served in reinstating such a workman and he can be given monetary compensation by the Court itself inasmuch as if he is terminated again after reinstatement, he would receive monetary compensation only in the form of retrenchment compensation and notice pay. In such a situation, giving the relief of reinstatement, that too after a long gap, would not serve any purpose.

35. We would, however, like to add a caveat here. There may be cases where termination of a daily-

 wage worker is found to be illegal on the ground that it was resorted to as unfair labour practice or in violation of the principle of last come first go viz. while retrenching such a worker daily wage juniors to him were retained. There may also be a situation that persons junior to him were regularised under some policy but the workman concerned terminated. In such circumstances,

> the terminated worker should not be denied reinstatement unless there are some other weighty reasons for adopting the course of grant of compensation instead of reinstatement. In such cases, reinstatement should be the rule and only in exceptional cases for the reasons stated to be in writing, such a relief can be denied...."

26. Upon perusal of the aforementioned judicial dictum, it is inferred that ordinarily when the termination is found to be illegal, the principle of grant of reinstatement with full back wages has to be applied as per the facts and circumstances of each case and shall not be awarded mechanically. It is further observed that termination of a daily-wage worker where, found illegal on account of procedural defects, reinstatement with back wages is not to be construed automatically rather, in the interest of justice, the workman shall be granted a relief in the form of a lump sum monetary compensation as it is more appropriate.

27. In the above backdrop, this Court is of the considered view that in certain instances compensation serves as a remedy for unjustified and premature termination of employment, especially in cases such as the present matter, wherein, the respondent workman's services were terminated on account of being falsely implicated in a case for theft of bedsheets and was later on acquitted by the learned Court.

28. Another aspect that has bearing on the present matter is that the respondent workman was acquitted in a criminal case of theft for which his services were terminated by the petitioner entity. Although it is an admitted position that the respondent workman was employed as a daily wager but the fact that his similarly situated co-workers have been regularised, hence, it is in the interest of justice to treat him at par and grant an appropriate relief.

29. This Court, bearing in mind the findings of the learned Labour Court i.e., the respondent workman being falsely charged with theft and services of his fellow workers being regularized, is of the similar view as observed by the learned Labour Court that since both the parties have lost faith in each other, reinstatement is not a viable option and rather providing a one-time compensation is a more suitable solution.

30. This Court, after having perused the findings in the impugned Award, is of the considered view that, the learned Labour Court The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 20/12/2024 at 23:18:03 has dealt with each of the issues thereby, affording a detailed reasoning after having appraised the evidence placed on record, the cross examination as well as the settled position of law.

31. Thus, in view of the above discussions of law and fact, this Court observes that the learned Labour Court has rightly arrived at the finding that since both the parties have lost faith in each other and in the interest of justice, it is appropriate to grant a lump sum compensation of Rs. 90,000/- in lieu of reinstatement, to the respondent workman."

12. We consequently find no ground to interfere with the relief as ultimately framed by the learned Judge in the exercise of the discretion inhering in the writ court and which has the requisite jurisdiction to mould the relief if the ends of justice so warrant.

13. The appeal fails and shall stand dismissed.

YASHWANT VARMA, J.

DHARMESH SHARMA, J.

DECEMBER 03, 2024/DR