Regional Manager, S.B.I vs Rakesh Kumar Tewari on 3 January, 2006

Equivalent citations: AIR 2006 SUPREME COURT 839, 2006 AIR SCW 235, 2006 LAB. I. C. 883, 2006 (2) ALL LJ 32, 2006 (1) SCALE 59, 2006 LAB LR 209, 2006 (1) SCC 530, (2006) 5 ALL WC 4473, 2006 (2) SRJ 478, 2006 (1) UPLBEC 1043, (2006) 2 ESC 108, (2006) 86 DRJ 400, (2006) 1 LAB LN 898, (2006) 1 PAT LJR 436, (2006) 1 SCJ 747, (2006) 1 UPLBEC 1043, (2006) 1 SUPREME 151, (2006) 1 SCALE 59, (2006) 2 JLJR 32, (2006) 1 SCT 451, (2006) 1 LABLJ 748, (2006) 1 CURLR 395, MANU/SC/44/2006

Author: Ruma Pal

Bench: Ruma Pal, Ar.Lakshmanan

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           CASE NO.:
Appeal (civil)  7 of 2006

PETITIONER:
Regional Manager, S.B.I.

RESPONDENT:
Rakesh Kumar Tewari

DATE OF JUDGMENT: 03/01/2006

BENCH:
Ruma Pal & Dr.AR.Lakshmanan

JUDGMENT:
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J U D G E M E N T (Arising out of Special Leave Petition (Civil) No.20653 of 2003) WITH C.A.Nos.8-9 of 2006 (Arising out of SLP (C) Nos.20003-20004 of 2004) RUMA PAL, J.

Leave granted.

The respondent was employed as a messenger on a daily wage in a branch of the appellant Bank. No appointment letter was issued to him but he worked for 87 days in that capacity. The question in this appeal is whether the Labour Court had correctly found that the termination of the respondent's service in 1982 was violative of Section 25G of the Industrial Disputes Act, 1947 (referred to as the 'Act').

After the respondent ceased to serve with the appellant on 5th October, 1982, the respondent raised a demand under Section 33-C (2) of the Act before the Labour Court praying for an amount of Rs.

148.74 towards his wages for 8 days holidays (including Sundays) which occurred during the period of his employment. The appellant accepted the demand and paid an amount of Rs. 155.23 to the respondent which was accepted by the respondent in full and final satisfaction of his claim. About one year later, in 1984, the respondent raised an industrial dispute claiming that his services had been wrongfully terminated by the appellant. The Central Government referred the following disputes to the Industrial Tribunal:

> "Whether the action of the management of State Bank of India, Region-III, Lucknow, in relation to their Gonda Main Branch in terminating the services of Shri Rakesh Kumar Tewari, subordinate staff with effect from 6.10.1982 and not considering him for further employment under Section 25H of the Industrial Disputes Act is justified? If not, to what relief is the concerned workman entitled?"

The respondent filed a statement before the Tribunal in which he claimed that he had been appointed by the appellant as a whole time employee against a vacancy in a permanent post. He said that after his discharge other employees were taken in service against the same post, but he was not given a chance to continue. He challenged the non-issue of appointment and termination letters as being in violation of "service conditions provided in different bank awards as well as bipartite settlement". It was alleged that the bank had violated the provisions of Section 25H of the Act and also paragraph 497 of the Shastri Award which was applicable to the Bank. The appellant filed a written statement opposing the claim of the respondent. A preliminary objection raised was that after recording of full satisfaction of his claim against the appellant, the respondent was barred by the principles of res judicata from raising an industrial dispute. On the merits of the case it was contended that the services of the respondent had been validly terminated upon the payment of all his dues. It was denied that the respondent had been appointed against any vacancy. It was stated that he was engaged against a purely "temporary/ad hoc requirement of the said branch of the bank". The Labour Court found that two employees, namely, Shri Pawan Kumar and Rakesh Kumar Tewari had been appointed as temporary workmen, the first between August, 1982 to December, 1982 and the second from January, 1983 to April, 1983. It was held that therefore the service of Pawan Kumar should have been dispensed with and not the respondent's. Furthermore, according to the Tribunal, there was a clear violation of Sections 25G and 25H of the Act. It was also held that the respondent was not a casual but a temporary workman in terms of paragraph 207 of the bipartite settlement. It was held that in terms of the settlement, the bank should have maintained a register of all temporary employees and a service book and should have issued an appointment and termination letter to the respondent. According to the Tribunal 14 days notice of retrenchment was also required to be given which had not been complied with. Section 25G of the Act and Rule 78 of the Industrial Disputes Act Central Rules was held to have been violated. Circulars issued by the Management being circulars Nos. 168/76 and 69/81 which prohibited the employment of temporary employees beyond 90 days and the termination of service of temporary employees after 89 or 90 days was held to be unfair labour practice. In conclusion it was held that the termination of the services of the respondent was illegal and inoperative and that the respondent was entitled to be reinstated with full back wages.

The appellant challenged the award under Article 226 of the Constitution before the High Court. The High Court upheld the view expressed by the Labour Court and said that the Labour Court was right and that the appellant's appointment amounted to unfair labour practice and was against the mandate of Section 25H of the Act.

The appellant challenged the decision of the High Court by way of a Special Leave Petition under Article 136 of the Constitution. While issuing notice on 17th November, 2003, this Court stayed the operation of the High Court's order. In the meantime and during the pendency of the proceedings before the High Court the appellant has paid the respondent a sum of approximately Rs. 3.80 lakhs under Section 17-B of the Act.

Mr. V.A.Bobde, learned counsel appearing on behalf of the appellant, has contended that there was no unfair labour practice indulged in by the appellant as defined in Section 2(ra) read with the 5th Schedule item 10 of the Act. It was also contended that the case for violation under Section 25G had never been pleaded by the respondent in his statement of claim nor was any such alleged violation referred to the Industrial Tribunal for adjudication. It was submitted that Section 25G did not in any event apply as the procedure for retrenchment as defined in section 2(oo) of the Act did not apply to persons on a daily-wage. Reliance has been placed on the decision of Regional Manager, State Bank of India Vs. Raja Ram, (2004) 8 SCC 164, and Himanshu Kumar Vidyarthi & Ors. Vs. State of Bihar & Ors. (1997) 4 SCC 391. It was contended that Section 25H which requires an employer to give re-employment to a retrenched workman in preference over other persons did not for that reason apply. In any event it had been complied with. Three advertisements had been issued by the appellant calling upon retrenched employee to offer themselves for reemployment but the respondent did not apply.

Mr Nagendra Rao appearing in SLP (C) Nos. 20003-20004 of 2004, State Bank of India Vs. Kanhaiya Lal Sahu has also supported the submissions of Mr. Bobde and has adopted his submissions. In his case however, the period of service was 98 days between July,1980 to March, 1981 on daily wages. In that case also the Labour Court had held that the termination of the workman's services was not justified and directed the reinstatement of the workman with full back wages. The application filed by the appellant before the High Court under Article 226 was dismissed on the ground that in compliance with an interim order passed by the High Court the appellant had reinstated the workman and the workman had been continuing in service for the last 16 years. The High Court however allowed the writ petition to the extent that the Labour Court had directed the payment of back wages. It needs to be mentioned here that until the order was passed by the High Court disposing of the writ petition, the respondent had been paid approximately Rs.200902/-on account of salary. The appellant filed a review application stating that the respondent had in fact not been reinstated but had been paid idle wages without taking any work from him in terms of the liberty granted to the appellant by an interim order of the High Court. However, the review petition was dismissed by merely recording that there was no ground for review. Apart from this factual error, Mr. Rao has emphasized that Section 25H could not be said to have been violated. It was further argued that the employees who would be affected by the award of the Labour Court had not been made parties in violation of Rule 3 of the Industrial Dispute (Central) Rules 1957.

Learned counsel appearing on behalf of the respondents in both the appeals has submitted that the definition of retrenchment had undergone an amendment in 1984, whereas both the terminations in question had taken place prior thereto. In terms of the unamended definition, daily wage employees whose services were terminated were also retrenched. Reliance has been placed on the decisions in Central Bank of India Vs. S. Satyam & Ors. (1996) 5 SCC 419 ; Workmen of Subong Tea Estate Vs. The Outgoing Management of Subong Tea Estate & Anr. (1964) 5 SCR 602; Punjab Land Devl. & Reclamation Corpn. Ltd. Vs. Presiding Officer, Labour Court (1990) 3 SCC 682, L.Robert D'Souza Vs. The Executive Engineer, Southern Railway & Anr. (1982) 3 SCR 251 and S.M. Nilajkar & Ors. Vs. Telecom District Manager, Karnataka, (2003) 4 SCC 27, to contend that in the circumstances of the case the finding of the Tribunal that the services of the workmen had been illegally retrenched and that they were entitled to reinstatement and backwages was correct.

Both civil appeals arising out SLP(Civil) No. 20653 of 2003 and SLP(Civil) Nos.20003-20004 of 2004 which are referred to respectively as the first and second appeal, are disposed of by this judgment.

Section 25G provides for the procedure for retrenchment of a workman. The respondents have correctly submitted that the provisions of Sections 25G and 25H of the Act do not require that the workman should have been in continuous employment within the meaning of Section 25B before he could said to have been retrenched. The decision in Central Bank of India v. S. Satyam (1996) 5 SCC 419 is clear authority on the issue. We see no reason to take a contrary view. Section 25G requires the employer to "ordinarily retrench the workman who was the last person to be employed in a particular category of workman unless for reasons to be recorded the employer retrenches any other workman". This "last come first go", rule predicates. 1) that the workman retrenched belongs to a particular category; 2) that there was no agreement to the contrary;3) that the employer had not recorded any reasons for not following the principle. These are all questions of fact in respect of which evidence would have to be led, the onus to prove the first requirement being on the workman and the second and third requirements on the employer. Necessarily a fair opportunity of leading such evidence must be available to both parties. This would in turn entail laying of a foundation for the case in the pleadings. If the plea is not put forward such an opportunity is denied, quite apart from the principle that no amount of evidence can be looked into unless such a plea is raised. [See Siddik Mahomed Shah vs. Mt. Saran AIR 1930 PC 57 (1); Bondar Singh & Or. Vs.Nihal Singh and Ors. (2003) 4 SCC 161].

In J.K.Iron and Steel Company Ltd. vs. The Iron and Steel Mazdoor Union Kanpur (1955) 2 SCR 1315, the court noted that even though industrial tribunals are not bound by all technicalities of civil courts:

> " .they must nevertheless follow the same general pattern. Now the only point of requiring pleadings and issues is to ascertain the real dispute between the parties, to narrow the area of conflict and to see just where the two sides differ. It is not open to the Tribunals to fly off at a tangent and disregarding the pleadings, to reach any conclusions that they think are just and proper".

In the first appeal, the respondent had raised no allegation of violation of Section 25G in his statement of claim before the Industrial Tribunal. His only case was that Section 25H of the Act had been violated. Section 25H unlike Section 25G deals with a situation where the retrenchment is assumed to have been validly made. In the circumstances, if the employer wishes to re employ any employee, he must offer to employ retrenched workman first and give them preference over others. The two sections viz 25G and 25H therefore operate in different fields and deal with two contradictory fact situations. The Tribunal ignored the fact that there was no pleading by the respondent in support of an alleged violation of Section 25G. Indeed the order of reference by the Central Government did not also refer to Section 25G but only to Section 25H. In the circumstances it was not open to the Tribunal to "go off on a tangent"

> and conclude that the termination of service of the respondent was invalid because of any violation of Section 25G by the appellant.
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> Besides the Tribunal in both appeals did not consider the plea of the appellant that there was no vacancy against which the respondent had been appointed and that it was merely an ad hoc arrangement. In taking into consideration the names of the two employees who were appointed temporarily after the termination of services of the respondent, the Tribunal did not also consider in what capacity these persons had been appointed namely whether they were actually appointed as messenger in place of the respondent. The respondent's case in the first appeal of violation of paragraph 497 of the Shastri Award was also wholly misconceived. That paragraph deals with the rights of apprentices and has no application to temporary employees like the respondent. Assuming that there was a violation of the Shastri Award by the appellant in both cases either in not issuing appointment letters or not maintaining a seniority list, service book in respect of temporary employees etc., this would not mean that therefore the respondents had been properly appointed and their services wrongly terminated. Admittedly no procedure whether in law or under any award or settlement was followed in appointing either of the respondents in both appeals. No condition of services were agreed to and no letter of appointment was given. The nature of the respondents' employment was entirely ad hoc. They had been appointed without considering any rule. It would be ironical if the person who have benefited by the flouting of the rules of appointment can rely upon those rules when their services are dispensed with. The Tribunal also failed to deal with the issue raised by the appellant in the first appeal that no grievance had been made nor any demand raised by the respondent either in his application under Section 33 C (2) or otherwise that his services had been illegally terminated. It may be that the principles of res judicata may not disqualify the respondent from contending that his termination was invalid, nevertheless non raising of the issue earlier was a factor which the Tribunal should have taken into consideration in weighing the evidence. Significantly the High Court upheld the decision of the Tribunal as if the Tribunal had proceeded under Section 25H. As we have said Section 25H proceeds on the assumption that the retrenchment has been validly made. Therefore, the High Court's view that the termination was invalid under Section 25H cannot in any event be sustained. Section 25H says:

> "25H. Re-employment of retrenched workmen.- Where any workmen are retrenched, and the employer proposes to take into his employ any persons, he shall, in such manner as may be prescribed, give an opportunity to the retrenched workmen who are citizens of India to offer themselves for re-employment, and such retrenched workmen who offer themselves for re- employment shall have preference over other persons".

A statutory obligation is thus cast on the employer to give an opportunity to the retrenched workman to offer himself for re-employment. In fact pursuant to settlements entered into between the appellant and the employees' union, several advertisements had been issued by the appellant offering re-employment to retrenched workers. It may be that these facts were not raised by the appellant either before the Tribunal or the High Court, but as was said in Regional Manager SBI vs. Raja Ram (2004) 8 SCC 164 at p. 168:

> "However the respondent's counsel is incorrect in his submission that the benefit of the Scheme could not have been availed of by the respondent because no offer was made to the respondent by the appellant. The settlements were advertised and it was for the respondent to have taken advantage of the Scheme.
>
> Although the settlements are, strictly speaking, not relevant to the question of the correctness of award, nevertheless their terms are necessary to be considered for the purpose of deciding whether, assuming everything in favour of the respondent and against the appellant, the respondent should be reinstated as a casual employee since the Scheme had been propounded by the employer with workmen with a view to granting benefit to persons whose services had been terminated as casual employees".

Neither of the respondents in the appeals had offered themselves for re-employment. The conclusion of the Tribunal in both appeals that the circulars endorsed an unfair labour practice being followed by the appellant or that the appellant had indulged in unfair labour practice was also incorrect. Unfair labour practice has been defined in Clause (ra) of Section 2 of the Act as a meaning any of the practices specified in the Fifth Schedule. The Fifth Schedule to the Act contains several items of unfair labour practices on the part of the employer on the one hand and on the part of workmen on the other. The relevant item is Item 10 which reads as follows:

> "To employ workmen as 'badlis', casuals or temporaries and to continue them as such for years, with the object of depriving them of the status and privileges of permanent workmen".

We have already dealt with this issue in Raja Ram's case (supra) where we had said:

> "before an action can be termed as an unfair labour practice it would be necessary for the Labour Court to come to a conclusion that the badlis, casuals and temporary workmen had been continued for years, as badlis, casuals or temporary workmen,

> with the object of depriving them of the status and privileges of permanent workmen. To this has been added the judicial gloss that artificial breaks in the service of such workmen would not allow the employer to avoid a charge of unfair labour practice. However, it is the continuity of service of workmen over a period of years which is frowned upon. Besides, it needs to be emphasized that for the practice to amount to unfair labour practice it must be found that the workman had been retained on a casual or temporary basis with the object of depriving the workman of the status and privileges of a permanent workman. There is no such finding in this case. Therefore, Item 10 in List I of the Fifth Schedule to the Act cannot be said to apply at all to the respondent's case and the Labour Court erred in coming to the conclusion that the respondent was in the circumstances, likely to acquire the status of a permanent employee".

We see no reason to take a contrary view particularly when the facts in Raja Ram's case are materially indistinguishable from those in the appeals now before us.

In directing reinstatement, neither the High Court nor the Tribunal had considered that the order might affect the interest of those others who were employed after the respondent. As was said in Central Bank of India vs. S. Satyam (supra):

> "The other persons employed in the industry during the intervening period of several years have not been impleaded. Third party interests have arisen during the interregnum. These third parties are also workmen employed in the industry during the intervening period of several years. Grant of relief to the writ petitioners (respondent herein) may result in displacement of those other workmen who have not been impleaded in these proceedings, if the respondents have any claim for re-employment".

Besides in the second appeal admittedly several persons had been appointed prior to the respondent on a temporary basis. They would have prior rights to reemployment over the respondent on the basis of the principles contained in Sections 25G or 25H.

In the circumstances, the award of the Tribunal and the decision of the High Court holding that the respondent's services were wrongfully terminated were both incorrect. They are accordingly set aside. There is as such no question of payment of any back wages. Additionally the only other reason given by the High Court for directing reinstatement of the respondent in the second appeal was based on an equitable consideration of the respondent having allegedly been reinstated. The factual basis for this conclusion was erroneous. Both appeals are accordingly allowed. However the appellant has paid sums to the respondents in both the cases which sums shall not be recoverable from the respondents by reason of the allowing of these appeals. There will be no order as to costs.