State Of U.P. And Another vs Mohd. Mustafa on 5 December, 2018

Author: Saral Srivastava

Bench: Saral Srivastava

HIGH COURT OF JUDICATURE AT ALLAHABAD

A.F.R.

Reserved on 04.10.2018

Delivered on 05.12.2018

WRIT - C No. - 61672 of 2009

Petitioner :- State of U.P. and another

Respondent :- Mohd. Mustafa

Counsel for Petitioner :- Hekhar Kumar, S.C.

Counsel for Respondent :- S.C., Adarsh Bhushan, Anil Tiwari, Lavlesh Shukla, Shekhar Kum

Hon'ble Saral Srivastava,J.

1. Heard learned Standing Counsel for the petitioners and Sri Lavlesh Shukla, learned counsel for the respondent.

2. The present writ petition has been preferred by the State of U.P. challenging the award dated 12.01.2009 passed by the Labour Court, Allahabad in adjudication case no. 73 of 2006 published on 03.07.2009.

3. The relevant facts in nutshell for proper appreciation of controversy are that the respondent was appointed on the post of Sweeper for a fixed term w.e.f. 19.01.1990 in the department of Zila Udoyg Kendra. The appointment of the respondent was extended from time to time and was lastly extended up to 31.03.1992.

4. According to the respondent, his service was terminated by the department on 04.02.1992 without giving any notice. It appears that the respondent preferred Writ Petition No.7999 of 1992 challenging the order of termination dated 04.02.1992 in which interim order was granted on 24.02.1992 permitting the respondent to continue to work and the petitioner herein was directed to pay salary or to show cause by filing an affidavit.

5. The respondent was not reinstated. The writ petition no.7999 of 1992 was dismissed on 02.09.1999 of 1992 holding that disengagement of the petitioner (respondent herein) was nothing but retrenchment of the petitioner's (respondent herein) service in violation of Section 6 N of the U.P. Industrial Disputes Act, 1947 (hereinafter referred to as 'Act, 1947') for which the petitioner (respondent herein) has got adequate alternative remedy under the Act, 1947.

6. Thereafter, the respondent raised industrial dispute before the concerned officer and conciliation proceedings having been failed, the conciliation officer referred the case under Section 4 K of the Act, 1947 before the Labour Court, Varanasi which was numbered as Adjudication Case No.73 of 2006 and later on, it was transferred to the Labour Court, Allahabad. The question which was referred to the Labour Court for adjudication was as to 'whether the termination of service of respondent w.e.f. 11.02.1992 is legal and justified and if not, to what relief the respondent is entitled'.

7. The reference was contested by the petitioner contending that the regular Sweeper Mohd. Kasim went on leave and the work of department was suffering, consequently, on the said post, the respondent was appointed as Sweeper on temporary basis in pay scale of Rs.750/- to 940/-. The service of the respondent was terminated on joining of Mohd. Kasim. It was further pleaded that on retirement of Mohd. Kasim on 31.03.1990, the respondent was again appointed for a period from 15.05.1990 to 20.07.1990 which was extended from time to time with break and lastly, it was extended from 30.06.1990 to 31.03.1992. It was further pleaded that a letter was written to the Director, Industries on 13.12.1991 for appointment of respondent but the Director, Industries by letter dated 06.10.1992 informed that several schemes of the department had been finished and, therefore, the regular appointment on any post was not allowed. The petitioners also stated that as per terms and conditions of appointment, nature of appointment of the respondent was purely temporary and his service could be terminated at any point of time without any prior notice. The petitioners also contended that the reference is not maintainable inasmuch as the petitioner is a department of State of U.P. which is governed by rules and regulations of State of U.P. and is not engaged in any job of profit and hence, it is not an industry.

8. The Labour Court answered the reference in favour of the respondent holding that the service of the respondent was terminated illegally and further, directed for reinstatement of the respondent in service with all consequential benefits.

9. Leaned Standing Counsel for the petitioners has raised two fold submissions in challenging the award, firstly, the Labour Court has erred in entertaining the reference inasmuch as the petitioner is not an industry and the judgement of the Apex Court in the case of Bangalore Water Supply and Sewerage Board and others Vs. A. Rajappa and others 1978 (2) SCC 213 has been referred to the larger Bench by the Apex Court in the case of State of Uttar Pradesh Vs. Jai Bir Singh 2017 (3) SCC 311. Thus, the Labour Court has no jurisdiction to entertain the reference.

10. The second submission raised by learned Standing Counsel is that it was the case of the respondent that he had worked more than 240 days in a calender year and his service was not terminated in accordance with Section 6 N of the Act, 1947 inasmuch as neither any notice nor one month's salary as required under Section 6 N of the Act, 1947 was paid to him before terminating his service and hence, the termination was illegal. He submits that in such a situation, though the Labour Court may be justified in holding the termination illegal but so far as the direction of the Labour Court to reinstate the respondent with all consequential benefits is illegal and in the teeth of the judgement of the Apex Court in the case of Bhavnagar Municipal Corporation and others Vs. Jadeja Govubha Chhanubha and another 2014 (16) SCC 130. Paragraphs 14 and 15 of the judgement relied upon by the learned Standing Counsel is extracted herein-below:-

> "14. To the same effect is the decision of this Court in Incharge Officer v. Shankar Shetty (2010) 9 SCC 126, wherein this Court said:
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> "7. We think that if the principles stated in Jagbir Singh and the decisions of this Court referred to therein are kept in mind, it will be found that the High Court erred in granting relief of reinstatement to the respondent. The respondent was engaged as a daily wager in 1978 and his engagement continued for about 7 years intermittently upto 6.9.1985 i.e. about 25years back. In a case such as the present one, it appears to us that relief of reinstatement cannot be justified and instead monetary compensation would meet the ends of justice. In our considered opinion, the compensation of Rs. 1,00,000/- (Rupees One lac) in lieu of reinstatement shall be appropriate, just and equitable."

15. The case at hand, in our opinion, is one such case where reinstatement must give way to award of compensation. We say so because looking to the totality of the circumstances, the reinstatement of the respondent in service does not appear to be an acceptable option. Monetary compensation, keeping in view the length of service rendered by the respondent, the wages that he was receiving during that period which according to the evidence was around Rs.24.75 per day should sufficiently meet the ends of justice. Keeping in view all the facts and circumstances, we are of the view that award of a sum of Rs.2,50,000/- (Rupees Two Lacs Fifty Thousand only) should meet the ends of justice."

11. Learned counsel for the petitioner has also relied upon the Apex Court in Assistant Engineer, Rajasthan Development Corporation and Another Vs. Gitam Singh (2013) 5 SCC 136. Paragraphs 11, 16 and 28 of the said judgement are extracted herein-below:-

> "11. ...In Municipal Council, Sujanpur v. Surinder Kumar, 2006 (5) SCC 173, this Court after having accepted the finding that there was violation of Section 25-F of the ID Act, set aside the award of reinstatement with back wages and directed the workman to be paid monetary compensation in the sum of Rs. 50,000/-.
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> 16. In Mahboob Deepak Vs. Nagar Panchayat, Gajraula (2008) 1 SCC 575, this Court stated that an order of retrenchment passed in violation of Section 6-N of the U.P. Industrial Disputes Act may be set aside but an order of reinstatement should not however be automatically passed. The Court observed in paras 11 and 12 of the Report as follows:-
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> "11. The High Court, on the other hand, did not consider the effect of non-compliance with the provisions of Section 6-N of the U.P. Industrial Disputes Act, 1947. The appellant was entitled to compensation, notice and notice pay.
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> 12. It is now well settled by a catena of decisions of this Court that in a situation of this nature instead and in place of directing reinstatement with full back wages, the workmen should be granted adequate monetary compensation. "

28. We may also refer to a recent decision of this Court in BSNL v. Man Singh (2012) 1 SCC 558. That was a case where the workmen, who were daily wagers during the year 1984-1985, were terminated without following Section 25-F. The industrial dispute was raised after five years and although the Labour Court had awarded reinstatement of the workmen which was not interfered by the High Court, this Court set aside the award of reinstatement and ordered payment of compensation. In paras 4 and 5 of the Report this Court held as under:

> "4. This Court in a catena of decisions has clearly laid down that although an order of retrenchment passed in violation of Section 25-F of the Industrial Disputes Act may be set aside but an award of reinstatement should not be passed. This Court has distinguished between a daily wager who does not hold a post and a permanent employee.
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> 5. In view of the aforementioned legal position and the fact that the respondent workmen were engaged as 'daily wagers' and they had merely worked for more than 240 days, in our considered view, relief of reinstatement cannot be said to be justified and instead, monetary compensation would meet the ends of justice."

12. Per contra, learned counsel for the respondent submits that the petitioner are estopped in law from taking objection that the petitioner is not an industry inasmuch as on the objection raised by the petitioner regarding the maintainability of the writ petition, this Court had dismissed the writ petition directing the respondent to approach the Labour Court for adjudication of his grievances. He submits that this Court treating the petitioner to be an industry had dismissed the writ petition on the ground of alternative remedy holding that the respondent had adequate alternative remedy under the Industrial Disputes Act. He further contends that the petitioner has not filed any written

statement before the Labour Court and further, no such plea was pressed by the petitioner before the Labour Court and hence, the petitioner cannot be permitted to raise the same at this stage as the fact as to whether the petitioner is an industry can be decided only on the basis of evidence and hence, cannot be allowed to be raised in the writ petition.

13. He further contends that the petitioner has not stated in the writ petition that the issue as to whether the petitioner is an industry was raised before the Labour Court and the Labour Court has failed to record any finding on the said issue and hence, the said plea cannot be permitted to be raised by the petitioner in the writ petition.

14. Replying to the second submission of the petitioner, learned counsel for the respondent contends that once, the Labour Court has held that the termination of the respondent was illegal, the Labour Court is justified in passing the award of reinstatement of the respondent in service with full back wages. Learned counsel for the respondent has relied upon the judgement of the Apex Court in Deepali Gundu Surwase Vs. Kranti Junior Adhyapak Mahavidyalaya (D ED) and others 2013 (10) SCC 324. In paragraph 38 of the judgement of the Apex Court in Deepali Gundu Surwase (supra), the Apex Court has laid down the proposition in respect of grant of reinstatement with full back wages which is reproduced herein-below:-

> "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.
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> 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.
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> 38.3. Ordinarily, an employee or workman whose service 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 victimizing the employee or workman, then the Court or Tribunal concerned will be fully justified in directing payment of full back 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 sufferer is the employee/workman and there is no justification to give 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-à-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 suggested in Hindustan Tin Works (P) Ltd. v. Employees (1979) 2 SCC 80.

38.7. The observation made in J.K. J.K. Synthetics Ltd. v. K.P. Agrawal (2007) 2 SCC 433 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."

15. I have considered the rival submission of the parties and perused the record.

16. So far as the contention of the petitioner that the petitioner is not an industry and, therefore, the reference was not maintainable and hence, the labour court has no jurisdiction to hear the reference, the same has no substance for the reasons that earlier writ petition of the respondent was dismissed on the ground that he had adequate alternative remedy under the Act, 1947. The said order was passed after hearing the learned counsel for the petitioner and treating the petitioner to be an industry.

17. The record of the case reveals that the petitioner had not filed any written statement raising the question of jurisdiction and only in reply to the claim of the petitioner, it has pleaded that the petitioner is not an industry. It is also manifest from the record that no such plea was pressed before the labour court and consequently, the labour court had no occasion to return any finding on the said issue. In the writ petition also, the petitioner has nowhere stated that the petitioner pressed the aforesaid plea before the labour court and the labour court has not returned any finding on the said issue.

18. As determination of fact as to whether the petitioner is an industry requires consideration of evidence, the same cannot be allowed to be raised in the writ petition. Thus, the petitioner cannot take any advantage of the reference order of the Apex Court in Jai Bir Singh (supra). Thus, the first contention of the petitioner with respect to jurisdiction of labour court in entertaining the reference is misconceived and is rejected.

19. I would deal with the second contention of the petitioner with regard to award of the labour court directing the reinstatement of the respondent with full back wages.

20. In this regard it would be apposite to notice undisputed facts in the case at this stage. It is admitted by the respondent that his appointment was for a short period on temporary basis. The appointment of the respondent was on a post which had fallen vacant due to medical leave taken by regular employee Mohd. Kasim and the service of the respondent was terminated after Mohd. Kasim joined the service.

21. The respondent was again appointed for a short term on temporary basis on account of vacancy which came into existence due to retirement of Mohd. Kasim, the appointment of the respondent was for a fixed term as it is manifest from the record that the respondent could not be appointed on permanent basis as the Director, Industries had written a letter banning any fresh appointment. In this view of these facts though the respondent had completed 240 days in a calender year and the termination of service of the respondent without complying with Section 6 N of the Act, 1947 may be illegal, but whether in the facts of the present case, the labour court was justified in directing the reinstatement of the respondent with full back wages is a question which needs to be considered on the basis of the principles laid down by the Apex Court in various pronouncements relied upon by the counsel for both the parties.

22. From reading of the judgement of Apex Court in Bhavnagar Municipal Corporation and others (supra) and Asst. Engineer, Rajasthan Dev. Corp. (supra), a clear proposition comes out that in case of wrongful termination of daily wager who had worked for a short period, the award of reinstatement cannot be said to be a proper remedy as different other factors will have to be considered by the labour court namely mode and manner of appointment, nature of appointment, length of service etc. while awarding reinstatement with back wages. Thus, in such a case, the justice could be met if the compensation be awarded in place of reinstatement of workman with full back wages.

23. The parameters to decide the nature of relief which the workman is entitled on account of illegal termination in case of permanent employee and daily wager are totally different. The Apex Court has distinguished the cases where the termination of a permanent employee was without falling the procedure and termination of daily wager who does not hold the post.

24. It is admitted that the respondent had worked only for a short period of about two years and it is the case of the respondent that his nature of appointment was temporary and not permanent. In such a situation, considering the mode and manner of appointment and further, the period of service rendered by the respondent being short, in the opinion of the Court the direction of the labour court for reinstatement of respondent with full back wages cannot be said to be appropriate.

25. Further, one more fact is also relevant to be considered that the Apex Court in the aforesaid cases has held that the workman has to plead that he was not in a gainful employment, but in the instant case, there was no pleading by the respondent in the written statement. So far as the judgement of the Apex Court relied upon by the respondent in Deepali Gundu Surwase (supra) is concerned, it was a case of illegal termination of a teacher employed on permanent basis whose termination was held to be illegal on the ground that she had refused to submit illegal demand of the management of the college. In that situation, the Apex Court held that the employee was entitled for full back wages.

26. A reading of paragraph 33 (iii) of the judgement of the Apex Court in Deepali Gundu Surwase (supra) makes it clear that in deciding the issue of back wages, the Court has to keep in mind the length of service of the employee/workman, nature and misconduct etc. and further the workman, who is desirous of getting back wages must plead or at least make a statement before the adjudicating authority or the court of first instance that the workman was not gainfully employed or was employed on lesser wages.

27. In the instant case at the cost of repetition, it is mentioned that no such pleadings has been made by the respondent before the adjudicating authority. Thus, even applying the ratio of judgement relied upon by learned counsel for the respondent, it is manifest that the direction of the labour court for reinstatement of respondent with full back wages is not in consonance with the judgement of the Apex Court.

28. Thus, in the opinion of the Court considering the length of service of about two years rendered by the respondent with the department and nature of his employment being purely temporary,

justice would be met if the respondent is awarded compensation. The award of the Tribunal is set aside to the extent it directs the petitioner to reinstate the respondent with full back wages and it is provided that the justice would be met if the monetary compensation is paid to the respondent.

29. In the instant case, the record reveals that this Court in passing the interim order on 09.05.2011 directed the petitioner to deposit half of the amount as per award before the Presiding Officer, Labour Court and in compliance of the interim order, an affidavit of compliance has been filed by the petitioner stating therein that it has deposited Rs.4,79,168/-.

30. Considering the fact of the present case, the respondent is allowed to withdraw the entire amount deposited by the petitioner in compliance of the order of this Court towards full and final satisfaction of his claim.

31. The writ petition is partly allowed. There shall be no order as to costs.

Order Date :- 05.12.2018 S.Sharma