(2004) 04 CAL CK 0005

Calcutta High Court

Case No: A.P.O. No. 464 of 2000, A.P.O.T. No. 670 of 2000 and W.P. No. 1687 of 2000

Statesman Limited and Another		APPELLANT
	Vs	
Eighth Industrial Tribunal and Others		RESPONDENT

Date of Decision: April 16, 2004

Acts Referred:

- Evidence Act, 1872 - Section 106, 114
- Industrial Disputes Act, 1947 - Section 25B, 25F

Citation: (2004) 3 CHN 282 : 108 CWN 1149 : (2004) 3 LLJ 1109

Hon'ble Judges: Ashok Kumar Mathur, C.J; Ashim Kumar Banerjee, J

Bench: Division Bench

Advocate: N.K. Raha and S.R. Saha, for the Appellant;Anirban Kar, for the Respondent

Final Decision: Dismissed

Judgement

Ashim Kumar Banerjee, J.

The respondent No. 2 was a casual employee of the Statesman Limited. He was appointed on July 16, 1982 and was discharged from service on May 1, 1997. According to the workman he completed 240 days work in a calendar year to fulfill the requirement of Section 25B of the Industrial Disputes Act, 1947 (hereinafter referred to as the "said Act, 1947"). According to him since he fulfilled the requirement of Section 25B he was entitled to a notice u/s 25F which was not served upon him. Hence, the discharge from service and/or retrenchment was illegal.

2. The workman raised an industrial dispute. The State Government made a reference to the Industrial Tribunal under the provisions of the said Act, 1947.

3. Before the Tribunal it was the categoric case of the workman that he completed 240 days to make the requirement of Section 25B of the said Act, 1947 and as such he was entitled a notice u/s 25F which was not given.

4. In the written statement the employer did not dispute the period of service rendered by the workman i.e. between 1982 to 1997. With regard to 240 days work there had been a general denial on the part of the employer.

5. When the reference was heard by the Tribunal the workman contended that his juniors in employment as casual workers were made permanent and he was singled out by the employer. In support of his contention that he had worked during the said period for 240 days in a year the concerned workman produced his ESI identity card, the records pertaining to the bonus payment for the year 1995-96, his leave application received by the employer. He also contended that he used to draw salary once a month. He also produced pay slips in support of his contention.

6. On behalf of the employer one Mr. A. Sil and one Mr. A.K. Das and Mr. A. Basu were produced as witness, Mr. A.K. Das admitted that the attendance of the concerned workman was being recorded in the attendance register by "some other entrusted persons". He also admitted that the workman was in service during the said period. Mr. Das, however, contended that the concerned workman did not work for 240 days but he did not bring the relevant records on the date of his examination. The other two witnesses except for contending that the workman was a casual worker neither assisted the Tribunal by giving any cogent evidence nor by producing any records with regard to his attendance.

7. The Tribunal considering the evidence drew adverse interference as against the employer as they withheld the best evidence being attendance register and pay register where from it could be found whether the concerned workman had worked 240 days in a calendar year or not. The Tribunal awarded reinstatement with full back wages. Challenging the award the present writ petition was filed by the employer. The writ petition was heard by the learned Single Judge and was disposed of by his judgment and order dated September 5, 2000 appearing at pages 93 to 99 of the paper book.

8. Before the learned Single Judge it was contended on behalf of the employer that since no formal appointment letter was issued to the workman he could not claim any benefit of Section 25F. It was further contended in the writ petition that assuming he was entitled to notice u/s 25F the Tribunal ought not to have awarded full back wages unless it was held that the workman had a right to continue in service.

9. The learned Judge held that the Tribunal rightly drew adverse interference against the employer for withholding the best evidence. The learned Judge also held that the absence of appointment letter did not lead to a conclusion that the employee was not a workman. The learned Judge lastly held that once the termination was bad full back wages was an usual consequence and there could not be any departure from that. The learned Judge dismissed the writ petition.

10. Being aggrieved by and dissatisfied with the decision of the learned Single Judge the employer appellant preferred the instant appeal.

11. Mr. N.K. Raha, learned Counsel appearing for the appellant, contended that the onus of proof to show that the concerned workman worked for 240 days lies with the workman unless and until such onus is discharged there can not be any adverse inference drawn. According to him, the concerned workman before the Tribunal could not discharge his onus by proving that he had worked for 240 days in a calendar year as required u/s 25B. Hence, he was not entitled to any benefit of Section 25F and the adverse interference drawn by the Tribunal was an error of law which should have been quashed by the learned Single Judge.

12. In support of such contention Mr. Raha, learned counsel appearing for the appellant, relied upon three Supreme Court decisions :

(i) Supreme Court Labour Judgment (2001-2002) 2003 Law Publishing House Page 132 (Range Forest Officer v. ST Hardimani)

(ii) Supreme Court Labour Judgment Page 768 of Law Publishing House (2001-2002) (Essen Deinki v. Rajib Kumar);

(iii) 2003(96) FLR 492 (SC) (UP Avas Evam Parishad v. Kana and Ors.)

13. Mr. Anirban Kar, learned Counsel appearing for the workman, opposing this appeal contended that the primary onus on the part of the workman had already been discharged by producing relevant records like pay slip, ESI card, leave application and other necessary documents lying in possession of the concerned workman. Hence it was obligatory on the part of the employer to rebut such evidence by producing the pay register and the attendance register which could clinch the issue. Referring to the evidence laid by Mr. A.K. Das on behalf of the employer Mr. Kar contended that although Mr. Das denied the factum of 240 days attendance in a calendar year by the workman he deliberately did not produce the attendance register or the pay register or records in support of his contention. Mr. Kar also contended that the witness Mr. A. Basu also did not produce such document. Hence, the Tribunal was right in drawing adverse inference in this regard while directing reinstatement with full back wages.

14. Mr. Kar lastly contended that once the factum of 240 days attendance was proved u/s 25F notice was a must and non-compliance of the same would automatically warrant reinstatement with full back wages. In support of his contention Mr. Kar relied upon an Apex Court decision reported in Deep Chandra Vs. State of U.P. and Another,

15. u/s 25B when a workman is in continuous service for a period of 240 days he has to be treated as in continuous service. Once such requirement is fulfilled u/s 25B such workman cannot be retrenched without following the requirement provided u/s 25F i.e. by serving a proper notice under the said provision and/or payment of

wages prescribed thereunder.

16. In the written statement claim for continuous employment of 240 days in a calender year was denied by the employer. However, the period of service being 1982 to 1997 was not disputed. It appears that the workman worked for about 15 years, he was promoted in the post of supervisor. The concerned workman produced relevant records in support of his claim whatever he could. A workman working in casual employment for 15 years, in my view, can only produce papers which are in his possession. The concerned workman produced ESI cards, pay-slips, receipted leave application. In my view, retrenched workman in support of his claim cannot produce any better evidence.

17. Three decision of the Apex Court in this regard are to be carefully considered in the facts and circumstances of the case in which the decisions were given.

18. In the first case i.e. in the case of Range Forest Officer v. ST Hardimani (supra) the Supreme Court came to conclusion that once the factum of 240 days work was disputed by the employer the Tribunal should have considered the evidence laid down on behalf of the parties. In the said case the Tribunal held that it was the primary onus on the part of the employer to dispel the contention of the workman that he did work for 240 days in a calendar year. The Apex Court held without first determining on the basis of the cogent factors that the respondent had worked for more than 240 days the Tribunal was not right in coming to conclusion that the workman had in fact worked for 240 days in a year. It was also observed in the said case that no proof of receipt of salary was produced by the workman. In the instant case the pay slips were produced by the workman for the period when the pay slips were being given. It was not a case that the workman did not produce any evidence in support of his claim. Hence, the ratio decided in the case of Range Officer (supra) can not have any application in the instant case.

19. In the second case being Essen Deinki v. Rajib Kumar (supra) the Apex Court considered a case where the workman worked during the period 1st July, 1990 to 26th February, 1991 i.e. about 8 months. It was contended on behalf of the workman that he just completed 240 days by taking into account the Sundays and holidays and in fact the workman also contended in one of the pleadings that he did not work for 240 days. In the light of such facts the Apex Court rejected the plea of non-compliance of Section 25F.

20. The third case in the case of U.P. Avas Evam Parishad v. Kana and Ors. (supra) the Apex Court considered the fact that it had been the definite case of the workman concerned while at the stage of evidence that he had not worked for 240 days. Considering such fact the Apex Court rejected the plea of the workman.

21. Considering the aforesaid three Apex Court decisions and considering the provisions of law relating to evidence specially Section 106 of the Indian Evidence Act, 1972, I am of the view that the decision of the learned Single Judge can not be

assailed. To adjudicate and find out whether the workman completed 240 days work in a calendar year one has to look into his service records. In the instant case the workman produced all records in his possession whatever he can being ESI card, pay slips, receipted leave application etc. It was also not in dispute that the workman worked for 15 years as would appear from the evidence laid by the employer. Hence, in my view, the primary onus on the part of the workman had already been discharged. u/s 106 of the Indian Evidence Act, 1872 when any fact is specially within the knowledge of any person the burden of proving that fact is upon him. The attendance register, pay register and other service records pertaining to the concerned workman were with the employer. Hence, there was no cogent reason why they should withhold such evidence which was considered to be the best evidence to adjudicate the subject issue. For withholding such best evidence within the special knowledge of the employer the Tribunal was right in drawing an adverse inference and the decision of the learned Judge on that score is, in my view, accurate.

22. Once it is found that the workman complied with the requisitions u/s 25B non-compliance of Section 25F would warrant reinstatement with full back wages as only consequence. The Apex Court decision cited by Mr. Kar in this regard in the case of Deep Ckandra (supra) being relevant herein is quoted below:--

"1. This appeal is directed against an order made by the High Court quashing the award made by the Labour Court. A dispute was missed by the appellant on the ground that though he had put in more than 240 days in each year of service from the year 1982 to 1988, he had been retrenched without following the procedure prescribed u/s 25F of the Industrial Disputes Act. The Tribunal, therefore, on adjudication came to the conclusion that termination of services of the appellant is bad and in particular noticed that persons who had been employed subsequent to the appellant have been continuing in service, whereas the services of the appellant had been put an end to. In the circumstances the Labour Court made an award granting the reinstatement with back wages and other consequential benefits that may flow from it. A writ petition was filed against the order before the High Court.

2. The High Court approached the matter rather strangely as it went at a tangent to consider not only whether the casual worker''s services could be put an end to but if the award made by the Labour Court would make him a permanent employee, so on and so forth. The High Court lost sight of the point in issue that when an employee had put in service for more than 240 days in each year for several years whether his services can be put to an end without following the procedure prescribed u/s 25F of the Industrial Disputes Act. If there has been violation thereof such an employee will have to be reinstated in his original service on the same terms and conditions in which he was working earlier. If this is the position in law, we fail to understand as to how the High Court could have interfered with the award made by the Labour Court. We set aside the order make by the High Court and restore the award made

by the Labour Court. The appeal is allowed accordingly."

23. In view of the Apex Court decision in the case of Deep Chandra (supra) I do not find any reason to interfere with the decision of the learned Single Judge.

24. In the result the appeal fails and is hereby dismissed.

25. There would be no order as to costs.

26. Urgent xerox certified copy would be given to the parties, if applied for.

Ashok Kumar Mathur, C.J.

27. I agree.