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(1978) 08 CAL CK 0025

Calcutta High Court

Case No: None

B.M. Gupta	APPELLANT
Vs	
State of West Bengal and Others	RESPONDENT

Date of Decision: Aug. 21, 1978

Acts Referred:

- Constitution of India, 1950 - Article 226
- Industrial Disputes Act, 1947 - Section 10, 2, 25F, 25G, 2A

Citation: 83 CWN 25 : (1979) 1 LLJ 168

Hon'ble Judges: G.N. Roy, J

Bench: Single Bench

Judgement

G.N. Roy, J.

In this Rule the petitioner challenges the legality and validity of the award dated 4th June, 1976 passed by the learned 4th Industrial Tribunal, West Bengal in Case No. VIII--243/69, G.O. No. 3223-I. R dated 2nd of July, 1976, Messrs. East India Commercial Co. Pvt. Ltd. v. B.M. Gupta. The petitioner''s case is that the petitioner was a clerk of M/s. East India Commercial Co. Pvt. Ltd. and he had been rendering his services as clerk to the said company for long 22 years and sometime in the afternoon of 29th December 1967 the wholetime Director-in-charge of the company told the petitioner that the company intended to close down its Export Department to which the petitioner was then attached and as such his service was no longer required by the company and the company for the said alleged reason terminated the service of the petitioner illegally and wrongfully without giving the petitioner any notice as required in law and without paying the petitioner retrenchment compensation to which the petitioner was entitled u/s 25F of the Industrial Disputes Act. On the basis of the dispute arising out of this termination, the State Government made a reference u/s 10 read with Section 2A of the Industrial Disputes Act, 1947 to the aforesaid Tribunal for adjudication of the following issue:

Whether termination of employment of Shri B.M. Gupta is justified ? To what relief, if any, is he entitled?

2. It was contended by the company before the said Industrial Tribunal that the reference was bad in law and the Tribunal had no jurisdiction to entertain and adjudicate upon such reference as there was no industrial dispute within the meaning of the Industrial Disputes Act. It was also contended that the petitioner Shri B.M. Gupta was not workman within the meaning of Section 2(s) of the said Industrial Disputes Act (hereinafter referred to as the Act) as he worked in administrative and managerial capacity and that Sri Gupta''s service had been terminated by virtue of an agreement with Shri H.P. Lohia, Director-in-charge of the company on 29th of December, 1967 by which Sri Gupta had agreed to receive 50% of his salary for a period of six months as ex-gratia and also to have a good character certificate. The company also contended that as a matter of fact the company paid such ex-gratia amount for five months and also granted a certificate to Shri Gupta on 4th of January, 1968 and after termination of his service Shri Gupta served another firm, viz, M/s. Achhruram Sohanlal for about two months and Shri Gupta had never made any demand for reinstatement or for back wages. The preliminary objection of the company that there was no industrial dispute raised by the employee and as such the reference was incompetent, was answered against the company by the learned Industrial Tribunal and it appears that against the adjudication made in respect of the preliminary issue, a writ application was moved before this Court. But the Rule issued at the instance of the company was ultimately discharged on the finding that the dispute was validly raised writhing the meaning of the Act and as such the reference was quite competent.

3. The learned Tribunal also came to the finding that there was no termination on the basis of the alleged agreement between the parties and the retrenchment in the instant case was invalid and unlawful, and ordinarily Shri Gupta would have been entitled to reinstatement with full back wages. But the learned Tribunal after considering the advanced age of Shri Gupta and his incapacity to write normally and also having regard to the fact that the employer could have dispensed with the services of Shri Gupta in accordance with the provisions of the under order, if any, or by virtue of any stipulation or in commence with the provisions of Section 25F of the Act at any time subsequent to the retrenchment in question, directed that instead of reinstatement with full back wages as claimed by Shri Gupta, the said Shri Gupta would be entitled to one month''s notice pay together with the legal retrenchment compensation, less any amount that might have been received by him already from the employer. For the aforesaid reason, the Tribunal directed that Shri Gupta would get one month''s notice or one month''s pay in lieu thereof and 12 months'' pay as retrenchment, compensation as the employer had not complied with the pre-conditions of Section 25F of the Act minus any amount which Shri B.M. Gunta had received from the employer. Being aggrieved by the aforesaid adjudication and/or/award passed by the learned Industrial Tribunal, the petitioner

moved the constitutional Writ jurisdiction of this Court whereupon the instant Rule was issued.

4. Mr. Sengupta the learned Counsel appearing for the petitioner, namely, the dismissed employee Shri B. M, Gupta, contended that the Tribunal having specifically come to the finding that the condition precedent of Section 25F had not been complied with, it was no longer open to the Tribunal to consider the justification and/or otherwise of the order of termination passed by the company and/or to fix the quantum of compensation to be paid to the petitioner Mr. Sengupta contended that as the condition precedent for retrenchment u/s 25F of the Act had not been complied with, there was no order of termination in the eye of law and Shri Gupta continued to be an employee of the petitioner-company and accordingly he had all along remained in service and as such he is entitled in law to receive full back wages from the date of termination. Mr. Sengupta also contended that when in law the termination order was of no effect and the relationship between the employer and the employee was not changed, it was no longer open to the Tribunal to treat the service of Shri Gupta as terminated and on such basis to direct for payment of compensation in the manner indicated hereinbefore. For the said contentions Mr. Sengupta referred to the decision of the Supreme Court made in the case of Workmen of Subong Tea Estate v. Subong Tea Estate, reported in 1964-I L.L.J. 333. In the said decision, retrenchment of the workmen u/s 25F of the Act was taken into consideration by the Supreme Court and it was held by the Supreme Court that there would be little doubt that failure to comply with Section 25F of the Act would make the order of retrenchment invalid. Mr. Sengupta also referred to the decision of the Supreme Court made in the case of State of Bombay v. Hospital Mazdoor Sabha, reported in 1960-I L.L.J 251. It was held in the said case that the condition precedent prescribed by Section 25F was got to be followed and if the said mandatory provisions were not followed, then the order of termination becomes invalid and inoperative in law. Mr. Sengupta in this connection also referred to the decision of the Madras High Court made in the case of Sibanandan v. Press Superintendent, South Eastern Railway reported in 1969-II L.L.J. 373. It was held in the said case that if retrenchment compensation was not paid in accordance with Section 25F, it must be held that the petitioner''s service was not validly retrenched and the petitioner must be deemed to be in service. Mr. Sengupta also referred to a Bench decision of the Gujarat High Court made in the case of Ambalal Shivlal v. D. M. Vin reported in 1964-II L.L.J. 271. In the said decision the Gujarat High Court took into consideration the decisions of the Supreme Court and other Courts on the point and came to the finding that if the condition precedent u/s 25F of the Act was not complied with, the dismissed employee was entitled to receive his wages on the basis that he continued in service all along. It was held by Gujarat High Court that for the failure to comply with the conditions laid down in Section 25F the order of retrenchment becomes void ab-initio. Mr. Sengupta also referred to a decision of the Patna High Court made in the case of Somu Kumar Chatterjee v.

District Signal Tele-Communication Engineer reported in (1970) Labour Industrial Cases page 629. It was held by the Patna High Court that where the Railway had not observed the condition of Section 25F(b) of the Act before making the order of retrenchment and where no retrenchment compensation had been paid, the order of retrenchment was illegal and invalid and any subsequent payment of compensation could not validate the said illegal order. Relying on this decision of the Patna High Court, Mr. Sengupta contended that in the instant case the retrenchment of the petitioner was per se illegal and void and as such the said retrenchment was of no consequence at any point of time. Accordingly the award of the Tribunal for making subsequent payment of retrenchment compensation to the petitioner and thereby validating the void order of retrenchment was completely illegal and unjustified inasmuch a retrenchment which was void ab initio cannot be validated by any subsequent payment of compensation. Mr. Sengupta also referred to the decision of the Rajasthan High Court made in the case of Udaipur Mineral Development Syndicate (P) Ltd., v. M. P. Dove, reported in 1975-II L.L.J. 499. It was held by the Rajasthan High Court that for the failure, to comply with the mandatory provisions of Section 25F the relationship of the employer and the employee continued and the Labour Court committed an error in ignoring the said relationship between the parties. Mr. Sengupta contended on the basis of the said decision that in the instant case also relationship between the employer and the employee continued and there was no escape from the conclusion that the petitioner still continues as an employee under the said company and as such he was entitled to full back wages from the date of the illegal order of retrenchment. Mr. Sengupta also referred to a Bench decision of the Kerala High Court made in the case of Divisional Superintendent, Southern Railway v. Sashidhara, reported in (1978) Labour & Industrial Cases 1042. It was held in the said decision that for non-compliance of Section 25F, the affected employee was entitled to challenge the validity of the illegal order of termination under Article 226 of the Constitution of India without taking any recourse to reference u/s 10 of the Act. Mr. Sengupta contended on the basis of this decision that if the condition precedent u/s 25F is not complied with, the order itself becomes void ab initio and as such the affected employee is entitled to get an order of reinstatement on declaration that he remained in service all along and in such circumstances an award by the Labour Court is also not necessary.

5. Mr. Sengupta next contended that even assuming that the order of retrenchment was not per se illegal or void, the petitioner was still then entitled to the order of reinstatement with full back wages because such order of reinstatement is to be passed normally in all cases of illegal termination of service and there was no exceptional circumstances in the instant case which justified that, an order other than re-instatement was really proper. Mr. Sengupta also contended that it will appear from the findings made by the learned Tribunal that there was no closure of export business and as such the alleged termination of service of the petitioner on

the ground of closure of the export business was illegal and unjustified on face of it and on that score also the petitioner was entitled to the order of reinstatement with full back wages. Mr. Sengupta next contended that when there was no compliance with the mandatory provisions of Section 25F of the Act, the order of retrenchment is void ab-initio and the retrenched employee in such circumstances must be deemed to be inservice and as such it was not necessary to consider as to whether there was any justification for the order of retrenchment. For this proposition, Mr. Sengupta referred to the decision of the Supreme Court made in the case of National Iron & Steel Co, v. State of West Bengal, reported in AIR 1967 S.C. page 1206. In the said case, the Supreme Court held that where the mandatory provisions of Section 25F were not complied with, the order itself becomes invalid and inoperative and as such it was not necessary to consider the other points, viz., whether there was justification of the impugned order of retrenchment. Relying on the aforesaid decision of the Supreme Court, Mr. Sengupta contended that in the instant case also the Tribunal having come to the finding that the condition precedent u/s 25F of the Act had not been complied with, it was no longer open to the Tribunal to consider the other aspects, viz. whether there was any justification of the order of retrenchment or as to whether the petitioner was entitled to reinstatement with full back wages or whether the petitioner was entitled to some other compensation.

6. Mr. Dutta Gupta the learned Counsel appearing for the respondent-company, however, contended that it will appear from the facts and circumstances of the case that the retrenchment was made because there was considerable shrinkage of the business of the company so far as the export was concerned although there was no absolute closure of the export business as alleged in the letter of termination of the petitioner''s service. It was evident from the facts disclosed before the Tribunal that the export business considerably dwindled and as such there was justification for retrenchment of the petitioner. Mr. Dutta Gupta also contended that for non-complying with the mandatory provisions of Section 25F of the Act, the order of retrenchment does not ipso facto become void ab-initio. Such order or retrenchment may at best be called an illegal and invalid order and in such circumstances the Tribunal is not precluded from considering the relevant facts and circumstances for the purpose of deciding as to what should be the proper relief to be granted to the dismissed employee. Mr. Dutta Gupta contended that it is not necessary that in all such cases an order or reinstatement is got to be made on the footing that employees continues in service. Mr. Dutta Gupta contended that it will appear from the findings made by the learned Tribunal below, that the petitioner, as a matter of fact entered the service under a different concern after his service was terminated by the company and thereafter he met with an accident and had lost the capacity of writing properly. It was also found by the learned Tribunal that the petitioner had also attained an advanced age and as such it was not proper that the petitioner should be retained in service. After considering all these relevant factors

the Tribunal below passed the impugned award and the quantum of Compensation was fixed justly and as such no interference is called for by the writ Court under Article 226 of the Constitution. Mr. Dutta Gupta also contended that having regard to the issue referred to the Tribunal, the Tribunal was under an obligation to consider the question of the justification of the order of retrenchment and also to decide the nature of relief to which the petitioner was entitled to in the facts and circumstances of the case. He further submitted that if the Tribunal had not taken into consideration the said relevant facts and circumstances for deciding the quantum of compensation to be paid to the petitioner, the Tribunal would have gone wrong and would have failed to give adjudication on the dispute referred to it. For this proposition, he referred to a decision of this Court made in the case of Oil India v. G. N. Bora, reported in (1977) Labour and Industrial Cases 1610. It was held in the said case that from the provisions contained in Sections 7A and 10 of the Act it will be clear that the Tribunal is under a Statutory obligation to adjudicate the dispute referred to it by the appropriate Government. The Tribunal is also under a statutory obligation, on adjudication of the dispute, to grant relief as it may think fit and proper and in a given case the Tribunal may hold that even if the dismissal of the workmen was not justified, the workmen are not entitled to any relief in view of their conduct. The learned Counsel further submitted that consideration of the appropriate relief was required to be made by the Tribunal in view of the issue referred to it and no exception can be taken if the Tribunal had made such consideration and had passed the impugned award for cogent reasons. Mr. Dutta Gupta also contended that the enactment of Section 25F merely standardises the payment of retrenchment compensation, but it cannot preclude the Tribunal to decide as to whether in the particular facts and circumstances of the case, any relief other than the order of reinstatement was justified and proper. Mr. Dutta Gupta also contended that it was found by the Tribunal at the time of adjudication that the petitioner attained the age of superannuation and as such the Tribunal was justified in not passing the order for reinstatement. The learned Counsel contended that although no age of superannuation was fixed so far as the employees of the said company were concerned, but the Supreme Court has decided in a number of cases that the age of superannuation for the factory workers including clerical staff in the country should be between 58 and 60 years. For this contention, the learned Counsel referred to the decision made in the case of British Paints {India) Ltd. v. Their Workmen, reported in 1966-I L.L.J. 407. It was held by the Supreme Court that the age of retirement of clerical and subordinate staff should be fixed at 60 years. He also referred to another decision of the Supreme Court made in the case of Workmen of Jessop & Co. Ltd. v. Jossop and Co., Ltd. reported in 1964-I L.L.J. 746. In the said case also a dispute arose as to what should be the age of retirement of the clerical and industrial staff. The supreme Court after taking into consideration the average longevity and improvement of the condition of health in recent times, held that the age of superannuation in the case of clerical and subordinate staff of the said concern should be increased from 55 years to 58 years. Similar view was

expressed by the Supreme Court in another decision made in the case of Workmen of Balmer Lawrie & Co., Ltd. v. Balmer Lawrie & Co. Ltd. reported in 1964-I L.L.J. 380. Relying on the aforesaid decisions Mr. Dutta Gupta contended when admittedly the petitioner was more than 65 years of age at the time of adjudication by the learned Tribunal and when the petitioner could not write properly because of an accident, it cannot but be held that the Tribunal was quite justified in holding that the order of reinstatement could not be passed in the special facts and circumstances of the case and the petitioner was only entitled to the retrenchment compensation as fixed by the Tribunal.

7. Mr. Dutta Gupta also contended that non-compliance with the conditions laid down in Section 25F of the Act does not make the order void ab initio and for such non-compliance the order may be held as illegal and invalid. But the retrenched workman cannot proceed on the footing that in the eye of law there was no order of retrenchment simply because the conditions u/s 25F of the Act were not complied with. For this proposition, Mr. Dutta Gupta referred to the decision made in the case of National Insurance Co. v. Biswanath and another, reported in (1977) Labour & Industrial Cases page 242. The Andhra Pradesh High Court took into consideration of the decision made in the case of State of Bombay v. Hospital Mazdoor Sabha (supra) and another decision of the Supreme Court in the case of State Bank of India v. N. S. Money, reported in 1076-I L.L.J. 478. The Andhra Pradesh High Court held in the said decision that it was not laid down by Supreme Court that non-compliance with the provisions of Section 25F makes the order of retrenchment void ab initio. This Andhra Pradesh High Court also disagreed with the view expressed by the Gujarat High Court in the aforesaid decision made in the case of Ambalal v. D. N. Vin (supra) and the view expressed by the Patna High Court in the case of Somu Kumar Chatterjee v. District Signal Tele.Com. Engineer (supra). Relying on the said decision of the Andhra Pradesh High Court Mr. Dutta Gupta contended that the order of retrenchment could not be held to be void ab initio so that the petitioner should be deemed to be in service all through and as such the Tribunal was quite competent to take into consideration the question of justification of the order of retrenchment and to decide the quantum of compensation after taking into consideration the relevant facts and circumstances of the case. In this connection Mr. Dutta Gupta also referred to another decision of the Supreme Court made in the case of Punjab Beverage (P) Ltd. v. Suresh Chand, reported in (1978) Labour and Industrial cases page 693. The aforesaid decision, however, does not consider the effect of non-compliance of the condition precedents for an order of retrenchment u/s 25F of the Act. But an order of dismissal passed by the employer in contravention of Section 33(2)(b) of the Act was considered by the Supreme Court and it was held by the Supreme Court in the said decision that contravention of Section 33(2)(b) does not ipso facto render the order void ab Initio and for such contravention the workman can proceed only after the Tribunal had adjudicated on a complaint u/s 33A or on a reference u/s 10 that the order of discharge or dismissal was not

justified and had also set aside the order and reinstated the workmen. Mr. Dutta Gupta also in this connection referred to another decision of the Madras High Court made in the case of industrial Chemical v. Labour Court reported in 1977-II L.L.J. 137. In the said decision the Madras High Court took into consideration the order of illegal retrenchment in violation of Section 25G of the Act. In Section 25G of the Act the procedure for retrenchment was provided for and under the said provision, if an order of retrenchment is to be passed, ordinarily the junior most should be retrenched first. In the said case it was held by the Tribunal that the provisions of Section 25G were not complied with but even in spite of such finding the Tribunal did not pass an order of reinstatement. The said adjudication of the Industrial Court was challenged in the writ proceeding and the adjudication was set aside by the single Bench on the footing that when the provisions of Section 25G were not complied with, the order of reinstatement should have been passed. On appeal, however, the Division Bench of the Madras High Court held that where the Labour Court found retrenchment as bad, it was for the Labour Court to decide as to what relief the retrenched workmen were entitled to and there was discretion of the Labour Court on considering the facts and circumstances of the case to order either reinstatement or compensation. Relying on the said decision Mr. Dutta Gupta contended that it is thus quite apparent and evident that for mere noncompliance with the statutory provisions, the order of reinstatement cannot be passed automatically. But it is the duty of the Labour Court to take into consideration all the relevant facts and circumstances of the case for the purpose of deciding as to whether the order of retrenchment was justified or not and further to decide the nature of relief to be given to the concerned employee. Mr. Dutta Gupta contended that in the aforesaid facts the Tribunal was amply justified in not passing the order of reinstatement but awarding the said compensation in favour of the petitioner and the Rule should therefore be discharged.

8. After considering the respective submissions of the learned Counsels appearing for the parties it appears to me that if the conditions precedent for an order of retrenchment u/s 25F of the Act are not fulfilled, the order of retrenchment is not effective at all but the same is void ab-initio and the relationship between the employer and the employee is not affected by such void retrenchment order and the employee continues in service despite the purported order of retrenchment. I respectfully agree with the views expressed by the Gujarat High Court, Patna High Court and Punjab High Court in this regard as discussed hereinbefore and with all respects I cannot subscribe to the view expressed by the Andhra Pradesh High Court in the said decision made in the case of National Insurance Co. v. Biswanath and Ors. (supra). It appears to me that the Supreme Court in the case of State of Bombay v. Hospital Majdoor Sabha has specifically laid down the principle by Section 25F of the Act are mandatory requirements and failure to comply with the said condition precedent makes the order of retrenchment invalid and inoperative in law. If an order is invalid and inoperative in law, then it cannot be made operative

by awarding some compensation later on. Section 25F of the Act lays down the conditions precedent for retrenchment of an employee and if the conditions precedent are not complied with the order of retrenchment becomes only a purported order but not a valid order in the eye of law. Accordingly the petitioner must be deemed to be in service and it must be held that there was no cessation of the relationship of employer and employee. In such circumstances there was no occasion for the Tribunal to go into the question as to whether the order of retrenchment could have been passed with justification in the facts of the case and to decide as to whether some relief other than reinstatement is warranted. It appears to me that such circumstance was also considered by the Supreme Court in the said case of National Iron & Steel Co. v. State of West Bengal (supra) when the Supreme Court specifically held that where there was no compliance with Section 25F, it was not necessary to consider the other point namely, justification of the order or retrenchment. Mr. Dutta Gupta, however, contended in this connection that although the Supreme Court held that in the absence of compliance with the provisions of S 25F, the order of retrenchment becomes invalid and there was no justification to consider the other points, the Supreme Court as a matter of fact took into consideration of the relevant facts for the purpose of coming to the finding as to whether the order was justified or not. Mr. Dutta Gupta contended that although the Supreme Court incidentally took into consideration the facts relating to justification of the order, it must be held that the Courts of law should also consider the relevant facts for deciding as to whether the order itself was justified or not. I am, however, unable to accept this contention of Mr. Dutta Gupta. The Supreme Court specifically laid down the principle of law that when there was no compliance with the mandatory provision of Section 25F, the order itself was illegal and invalid and it was not necessary to consider the other points. In the said case the Supreme Court only incidentally considered it, but simply for such incidental consideration by the Supreme Court, it cannot be contended that all Courts are also bound to consider incidentally the factors relating to the justification of the order of retrenchment.

9. In my view non-compliance of the procedure laid down in Section 25G of the Act cannot be put at par with non-compliance with the conditions precedents u/s 25F of the Act, In the former case the order of retrenchment is not void ab-initio as in the later case but an order of retrenchment though otherwise valid is liable to be struck down if proper justification for such retrenchment is not established. From the marginal notes also it will appear that Section 25F lays down certain conditions required to be complied with before passing an order of retrenchment but Section 25G only lays down the procedure to be followed even when a retrenchment order is passed after complying with the conditions precedent for passing an order of retrenchment.

10. I am also not inclined to accept the contentions of Mr. Datta Gupta that as the petitioner had attained the age of superannuation at the time of adjudication by the

learned Tribunal and as the petitioner was also not physically capable of rendering service, he was not entitled to the order of re-instatement, It does not appear that there is any age of superannuation of the employees of the respondent-company fixed either under any agreement or under any service rule framed under the standing order. Hence it cannot be contended that by attaining the age of 63 years or so, the petitioner automatically stood superannuated and as such there was no scope to direct for re-instatement even if the retrenchment order was void ab-initio. In my view there is no legal bar which precludes the company to retain the service of the petitioner after his attaining the age of 65 years and if there is no bar for the employer to retain the service of the petitioner, there cannot also be any legal bar for the Tribunal to direct re-instatement of the petitioner. It may be noted in this connection that in the aforesaid decisions, the Supreme Court determined the age of superannuation of the employees of the concerned companies because disputes were raised as to what should be the proper age of superannuation of the employees of the said companies and adjudication was called for on such dispute. No such dispute was raised by the respondent-company in the instant case and there was no reference for such adjudication by the Tribunal. If there is any reference of such dispute in future the appropriate authority will obviously adjudicate on such reference and observation of the Supreme Court made in the said cases is likely to have bearing on such adjudication. So far as the physical handicapness of the employee is concerned, it appears to me that it was for the employer to decide as to whether for the alleged physical incapability it was proper and/or desirable to terminate the service of an employee and so long the employer does not terminate the service of the employee on the ground of physical incapability, the employee is bound to make payment of all wages to his employee. Further in some cases even despite physical incapability of an employee of an employer may choose to retain the service of the said handicapped employee either in consideration of his valuable past services or to get good advice on account of his long experience. Hence it cannot be contended that as the petitioner could not write properly due to an accident after the impugned retrenchment, his service automatically stood terminated and as such he cannot claim retention although admittedly no order of termination was passed against him by the employer-company on the alleged ground of physical inability to write properly.

11. Accordingly this Rule is made absolute and the impugned order is set aside. It is directed that the petitioner be re-instated forthwith and be paid full back wages from the date of impugned retrenchment till reinstatement minus any sura paid to the petitioner under proper receipt in the meantime.

12. There will be no order as to costs.

On the prayer of the learned Counsel appearing for the respondent-company, the operation of this order is stayed for a period of three weeks from today.