(2009) 02 DEL CK 0275

Delhi High Court

Case No: Writ Petition (C) No. 2580 of 1986

Management of Electric Control Switchboards		APPELLANT
	Vs	
Presiding Officer and Another		RESPONDENT

Date of Decision: Feb. 13, 2009

Acts Referred:

- Constitution of India, 1950 - Article 226
- Industrial Disputes (Central) Rules, 1957 - Rule 10B(9)
- Industrial Disputes Act, 1947 - Section 25B, 25F

Citation: (2010) 1 SLR 168

Hon'ble Judges: Sudershan Kumar Misra, J

Bench: Single Bench

Advocate: Manjit Singh, for the Appellant; Nemo, for the Respondent

Judgement

Sudershan Kumar Misra, J.

The petitioner is aggrieved by an award dated 31.3.1986, passed in ID No. 78/80 by the Labour Court No. I, Tis Hazari Courts, Delhi. It is the petitioner''s case that the decision of the Labour Court to the effect that the management has illegally and unjustifiably terminated the services of the workmen and ordering their reinstatement in service with continuity of service and full back wages, is perverse and has occasioned a failure of justice of a nature warranting interference in the exercise of writ jurisdiction under Article 226 of the Constitution of India by this Court.

2. A reference was made by the Secretary (Labour), Delhi Administration, to the Labour Court, for adjudication of a labour dispute in the following terms;

Whether the removal from service of the workmen S/Shri Sushil Kumar and Mallu is legal/ justified and, if not, what directions are necessary in this behalf.

3. In their statement of claim, the workmen, Sh. Sushil Kumar and Sh. Mallu, submitted that they were working with the management as welder and tin smith at Rs. 330/- and 350/- per month respectively. The service of Sh. Sushil Kumar was terminated with effect from 7.8.78 and that of Sh. Mallu from 9.9.78. The petitioner management contested the claim. According to it, the reference made by the Delhi Administration was without jurisdiction as the workmen had already settled their claim in full before the conciliator. Further, the service of Sh. Sushil Kumar was terminated on account of recession in business and compensation in accordance with Section 25-F of the Industrial Disputes Act, 1947 was duly tendered to him. Sh. Mallu''s employment was terminated because he never appeared in the departmental enquiry pending against him, and thus voluntarily abandoned his employment. The petitioner also claimed that its factory has been closed with effect from 15.5.1982, thus the workmen cannot claim relief for the period beyond that date. A rejoinder was filed by the workmen denying all the allegations made in the written statement. The following issues were framed;

1. Whether the appropriate Government made this reference, without considering all the facts and materials before it? If so, its effect?

2. Whether the appropriate Government made this reference mechanically as alleged by the management? If so, its effect?

3. As in terms of reference.

An additional issue framed on 28.11.83, which was;

4. Whether the management has closed its factory w.e.f. 15.5.1982 as is alleged in the written statement? If so, its effect?

4. On 18.5.1984, the Labour Court closed the evidence of the petitioner management because it failed to produce any evidence despite many opportunities. On 30.10.1984, the matter was posted for evidence of the workmen. Since no one appeared on behalf of the petitioner on that day, it was directed that the matter shall proceed ex-parte. However, on 19th February, 1985, on an application moved by the petitioner, the Labour Court set aside the ex parte order. The relevant portion of the order reads;

He further submitted that the management has not adduced any evidence in this case and he would not cross examine the workman who had already been examined and would only advance arguments. In view of the submissions the representative of the workman has submitted that the application may be allowed and the Ld. Representative of the management be permitted to advance arguments. Even otherwise under the law the Ld. Representative of the management can participate during the arguments. Thus the application of the management is allowed without any order as to costs.

5. Ultimately, vide order dated 31.3.1986, termination of the workmen, Sh. Sushil Kumar and Sh. Mallu, was declared illegal and the Labour Court directed their reinstatement along with continuity in service and full back wages.

6. The petitioner contends that the impugned award is perverse because firstly the workmen failed to discharge the onus placed on them u/s 25-B of the Industrial Disputes Act, 1947 of showing that they were in continuous service for 240 days. Consequently, the directions of the learned Labour Court to the petitioner to lead its evidence without first determining whether the workmen have placed sufficient evidence on the record to prove 240 days of continuous service by them, was contrary to law. In this behalf, Counsel for the petitioner has also relied on the decision of the Supreme Court in Surendranagar District Panchayat Vs. Dahyabhai Amarsinh, holding that where the claim of the workman that he had worked for 240 days in the year preceding his termination is denied by the management, the Labour Court is obliged to first determine this question on the basis of cogent evidence. In that context, the Supreme Court further held that filing of his own affidavit by the workman cannot be regarded sufficient evidence of that fact, and that before the onus is placed on the management, further cogent proof in the form of receipt of salary or wages for that period or other record of appointment or engagement during this period must be produced by the workman. Although the decision of the Supreme Court in Surendernagar District Panchayat''s case (supra) is unexceptionable, to my mind, that authority cannot be of any help to the petitioner because in this case it is the petitioner''s specific case that the respondent, Sh. Sushil Kumar, was retrenched from service with effect from 7.7.1978 on account of the recession in business, and that, "compensation in accordance with Section 25-F of the Industrial Disputes Act was duly tendered to him." This averment of the petitioner places this case on an entirely different footing. In the case of Surendernagar District Panchayat relied upon by the petitioner, apart from a bald statement made by the workmen, no cogent proof was tendered by them to prove that they had, in fact, worked for more than 240 days. Here, in this case, it is the petitioner''s own stand that compensation in terms of Section 25-F of the Industrial Disputes Act was tendered to the workman, Sushil Kumar. To my mind, such an averment is an admission of the fact that the workman was indeed entitled to compensation u/s 25-F. Since the liability to pay compensation u/s 25-F can only arise as on the date of retrenchment where the workman has been in continuous service for not less than one year, or where he was not in continuous service for that period but has rendered 240 days'' service, by tendering the compensation to the workman under that Section, the only presumption can be that the petitioner management itself was of the view that the workman has worked for more than 240 days in the year preceding his termination. Otherwise there was no question of the aforesaid compensation u/s 25-F being tendered by the petitioner to the workman. If this compensation was tendered by the petitioner to the workman on any other consideration, such as compassion, or ex gratia, then nothing prevented it from

saying so specifically. Consequently, once the petitioner itself concedes that the workman was entitled to the protection of Section 25-F, there was no need for the Labour Court to go into the question whether the workman had rendered continuous service for 240 days. Under the circumstances, decision of the Labour court directing the management to lead its evidence cannot be faulted.

7. As regards Sh. Mallu, the petitioner''s case is that he voluntarily abandoned his employment. The Supreme Court in the case of The Buckingham and Carnatic Co.Ltd. Vs. Venkatiah and Another, was of the view that abandonment or relinquishment of service is always a question of intention, and normally, such an intention cannot be attributed to an employee without adequate evidence in that behalf. The law regarding the onus of proving abandonment is no longer res integra. In Nicks (India) Tools Vs. Ram Surat and Another, the Supreme Court held that since the workman was in the service of the management, the burden of proving that the workman voluntarily left the service falls on the management.

8. Similarly a Division Bench of this Court in Shiv Dayal Soin and Ors. v. The Presiding Officer, Labour Court in LPA No. 801/2002 decided on 20.12.2007 held that;

11. However, it is pertinent to note that a mere accusation that the Workers had abandoned their jobs is not enough to accept the said imputation, degree of proof required to establish abandonment of service, is rather strict and the management in this case has failed miserably to discharge the said burden of proof....

In Chandra Prabhu International Ltd. v. Shri Ram Avtar WP(C) No. 949/2008 decided on 21.2.2008, this Court again held that the onus of proving abandonment lies upon the management.

9. In the light of the above authorities the position is clear. It was for the petitioner to prove that Sh. Mallu has voluntarily abandoned his employment. It follows therefore that it was not incumbent upon the workman Sh. Mallu to adduce evidence as to his continuous service with the petitioner. For that reason also, the Labour Court was justified in calling upon the petitioner to lead its evidence first.

10. The next ground of challenge urged by Counsel for the petitioner is that the statements of petitioner''s representative that has been noted by the learned Labour Court in the impugned order on 19th February, 1985 to the effect that, "he would not cross examine the workman who had already been examined and would only advance arguments" were, in fact, never made by Mr. Anup Trehan, Advocate who had appeared for the petitioner before the Labour Court. In support, Mr. Trehan has also filed an affidavit in this Court in support of above averment. In that affidavit, he states as follows;

I did not make any statement before the court nor any submission to give up the right of the management to cross examine the workmen.

It is contended that since the right to cross examine the workmen was, in fact, not given up by the petitioner management before the Labour Court, the Labour Court ought to have given it an opportunity to cross examine the workmen.

11. In addition, learned Counsel for the petitioner has also stated that in fact the petitioner''s establishment was closed on 15th May, 1982. Consequent upon this closure, a settlement was also arrived at between the management and its employees. This is stated to have been entered into in the presence of one Mr. K.R. Sahni, the Conciliation Officer.

12. In terms of this settlement entered into on 3.6.1982, closure compensation in the amounts mentioned against the name of each employee was paid on that date itself. In addition, bonus was also undertaken to be paid by 30.11.1982. A copy of the said settlement has been placed on the record of this Court by the petitioner as annexed to the writ petition. Although this document has not been produced before the Labour Court the same has not been denied by the respondents-workmen in these proceedings.

13. Learned Counsel for the petitioner has further contended that in terms of interim order of this Court dated 3rd December, 1986, the petitioner has deposited back wages due to the workmen calculated with effect from 1st August, 1978 upto the date of closure of the establishment on 15th May, 1982. It is the petitioner''s case that there could be no claim against the management for any payment after the date of closure of the establishment itself. He submits that even in the event that the workmen are found to have been illegally retrenched at the highest, the Labour Court could have directed payment of back wages upto the date on which the factory was closed along with any retrenchment compensation that would have become payable as on the date of the closure of the factory. Counsel for the respondent has not been able to produce any authority for the proposition that in case the establishment is closed and the workman is retrenched illegally, the management would be liable to continue to pay the last drawn wages to the workman forever.

14. The Labour Court can proceed ex parte against any party and also has power to recall any such order. This power has been conferred on the Labour Court by virtue of Rule 10-B.(9) of The Industrial Disputes (Central) Rules, 1957. The said rule reads as follows;

10B.(9). In case any party defaults or fails to appear at any stage the Labour Court, Tribunal or National Tribunal, as the case may be, may proceed with the reference ex parte and decide the reference application in the absence of the defaulting party.

Provided that the Labour Court, Tribunal or National Tribunal, as the case may be, may on the application of the either party filed before the submission of the award revoke the order that the case shall proceed ex parte, it is satisfied that absence of the party was on justifiable grounds.

15. In the case at hand, in its order setting aside the ex parte order, whilst noting that the order is made in view of the submission of the representative of the management that he would not cross examine the workmen, the Labour Court also noted;

Even otherwise under the law the Ld. Representative of the management can participate during the arguments.

It is difficult to presume that the petitioner''s representative would have taken a position before the Labour Court which would result in nullifying the relief sought. It is apparent that the application for setting aside the ex parte order was moved by the petitioner with a view to be relegated to the position as they were on the date from which they were proceeded ex parte. If the petitioner was satisfied with exercising the limited rights of appearing and advancing arguments before the Tribunal, then there was no need for it to move this application at all. The effect of the order is that although the application is stated to have been allowed in terms of the so-called statement of the petitioner''s representative, the same has in effect been dismissed since no relief has in fact been granted. Looked at in another way, once the application is allowed, the ex parte order dated 30.10.1984 is set aside, but strangely, despite this, the management was precluded from proceeding further from that stage. The so-called concession by the respondent recorded in that order is in fact no concession at all. This is because by it the petitioner has secured no benefit and the respondent''s position has not changed at all. In addition, the crucial facts, inter alia, demonstrating the fact that the petitioner establishment itself was closed on 15.5.1982, and that consequent upon its closure, a settlement was also arrived at between the management and its employees in the presence of a conciliation officer whereby compensation was paid to all the employees, could only have been proved by the evidence of the petitioner and by cross-examining the respondents-workmen. It is inconceivable for the petitioner management to have decided to give up the only plea that could have enabled it to successfully prove its case. Also, once the learned Labour Court allowed the application of the management on 19.2.1985, the automatic effect would be that the order dated 30.10.1984 directing that the matter shall proceed ex parte was recalled, and it relegated the petitioner to the position it was on 30.10.1984. Furthermore, an affidavit by Mr. Trehan, Advocate, who represented the petitioner on that date, stating that no such submissions or concessions were made by him on 19.5.1985, has been placed on record. To my mind, there is no reason to disbelieve the same.

16. During the course of arguments, learned Counsel for the petitioner submitted that at best the Tribunal could have directed payment of back wages upto the date of closure of the factory along with retrenchment compensation that would have become payable due to such closure. He had also submitted that if the court thinks fit, it might direct some compensation to be paid in a lump-sum to meet the ends of justice keeping in mind the circumstances of the case. Looking at the totality of

circumstances and specially in view of the fact that services of the workmen in question were terminated in the year 1978 i.e., more than 30 years ago, and the fact that the establishment was also closed in the year 1982 i.e., nearly 27 years ago; and also in view of the fact that consequent upon its closure, a settlement was also arrived at between the Management and its employees in the presence of a Conciliation Officer, which included an undertaking to pay bonus, all of which has not been controverted by the workmen before this Court; to my mind, at this belated stage, no useful purpose would be served in remanding the matter once again to the labour court after setting aside the impugned order with a view to enable the Tribunal to record further evidence of the parties in support of their claims. The interest of justice would be served if the workman is permitted to withdraw the amount towards back wages calculated from 1st August, 1978 to the date of closure of the establishment on 15th May, 1982 that has been deposited by the petitioner in terms of this interim order of this Court dated 3rd December, 1986 along with any interest that may have accrued thereon. It is ordered accordingly.

17. The impugned award dated 31st March, 1986 in I.D. No. 78 of 1980 is, therefore, set aside and the writ petition is disposed off on the above terms.