Writ Petition No.20024/2011

27.07.2016

Shri Girish Kekre, Govt. Advocate for petitioners.

Shri Rajesh Kumar Soni, learned counsel for respondent.

Heard on admission.

Award dated 5.5.2011 passed by Labour Court Jabalpur is being assailed vide this petition under Article 227 of the Constitution of India.

The Labour Court was in seisin with the industrial dispute as to whether termination of services of respondent-workman is just and proper and if not, what relief he is entitled for and what directions should be given to employer.

After dwelling on the material evidence on record, Labour Court returned a finding that respondent-workman who was initially engaged on 13.5.1982 having continuously worked till 31.12.1982 and from 1.1.1983 to 31.1.1983 i.e. 258 days and his services being terminated without adhering to the stipulations contained under Section 25F of the Industrial Dispute Act, 1947, directed for his reinstatement, however, without back-wages.

Assailing the Award, it is contended on behalf of petitioners that Labour Court committed patent error by construing that between the period from 13.5.1982 to 31.1.1983 the respondent-workman has worked for 258 days. It is urged,

that Labour Court ought to have taken into consideration the work rendered by respondent-workman in one calendar year; instead, it is urged, that Labour Court having taken into consideration the period rendered in two calendar year i.e. 1982 and 1983, has committed grave error.

Section 25-F of the Industrial Disputes Act envisages -

> "**25F. Conditions precedent to retrenchment of workmen**.- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until–
>
> (a) the workman has been given one month' s notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:
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> (b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and
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> (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette."

The expression "continuous service" has been defined in Section 25B of the Industrial Disputes Act, 1947 which is in the following terms -

> "**25-B. Definition of continuous service**. - For the

purpose of this chapter.-

(1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessaion of, work which is not due to any fault on the part of the workman;

(2) Where as workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer.

(a) for a period of one year, if the workman, during a period of twelve calender months proceeding the date with reference to which calculation is to be made, has actually worked under the employer for not less than.

(i) one hundred and ninety days in the case of a workman employed below ground in a mine; and

(ii) two hundred and forty days, in any other case;

(b) for a period of six months, if the workman, during a period of six calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-

(i) ninety-five days, in the case of a workman employed below ground in a mine; and

(ii) one hundred and twenty days in any other case.

Explanation.--For the purposes of Clause (2), the number of days on which a workman has actually worked under an employer shall include the days on which.

(i) he has been laid off under an agreement as permitted by standing orders made under the Industrial Employment (Standing Orders) Act, 1946 (20 of

> 1946), or under this Act or under any other law applicable to the industrial establishment;
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> (ii) he has been on leave with full wages, earned in the previous year;
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> (iii) he has been absent due to temporary disablement caused by accident arising out of and in the course of his employment; and
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> (iv) in the case of a female, she has been on maternity leave; so however, that the total period of such maternity leave does not exceed twelve weeks."

Thus, for a period of one year, if the workman, during a period of twelve calender months preceding the date with reference of which calculation is to be made, has actually worked under the employer for not less than 190 days in the case of a workman employed below ground in a mine; and 240 days in any other case, is said to be in 'continuous service'. Therefore, it is not the calender year but it is twelve calender months preceding the date with reference to which calculation is to be made, is the criteria. The findings arrived at by Labour Court that respondent-workman has worked for 258 days from 13.5.1982 to 31.1.1983 when tested on the touchstone of provisions contained under Section 25B of 1947 Act cannot be faulted with. The contentions made on behalf of petitioner therefore, fail.

Learned counsel for the petitioners has further placed reliance on the following decisions -

(i) **Bharat Sanchar Nigam Limited vs Man**

Singh (2012) 1 SCC 558

(ii) **Assistant Engineer, Rajasthan Development Corporation vs Gitam Singh (2013) 5 SCC 136**

(iii) **BSNL vs Bhurumal, (2014) 7 SCC 177**

(iv) **Hari Nandan Prasad vs Food Corporation of India, (2014) 7 SCC 190**

However, in view of the decisions in **Deepali Gundu Surwase vs Kranti Junior Adhyapad Mahavidyalaya (2013) 10 SCC 324** and **Tapash Kumar Paul vs BSNL (2014) 4 SCR 875,** the petitioner is not benefited by the pronouncement cited above.

In **Deepali Gundu Surwase** (supra), it is observed -

> "38. The propositions which can be culled out from the aforementioned judgments are:
> 38.1. In cases of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule.
> 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.
> 38.3. Ordinarily, an employee or workman whose services 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 averments 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 fullback 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 concerned Court or Tribunal 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 be kept 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 Private Limited v. Employees of Hindustan Tin Works Private Limited (supra).

38.7. The observation made in J.K. Synthetics Ltd. v. K.P. Agrawal (supra)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."

In **Tapash Kumar Paul** (supra), wherein it is held :-

> "Therefore, in the light of the decision of this Court in Deepali Gundu's case (supra) which has correctly relied upon higher bench decisions of this Court in Surendra Kumar Verma's case (supra) and Hindustan Tin Works Pvt. Ltd. (supra), I am of the opinion that the appellant herein is entitled to reinstatement with full back wages since in the absence of full back wages, the employee will be distressed and will suffer punishment for no fault of his own."

The impugned Award, when tested on the anvil of law laid down in **Deepali Gundu Surwase** (supra) and **Tapash Kumar Paul** (supra) and the fact that before retrenching the respondent-workman from service, provision of Section 25F of 1947 Act was not adhered to, cannot be faulted with, as would warrant any indulgence.

Consequently, petition fails and is **dismissed**. No costs.

(SANJAY YADAV)
JUDGE

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