

CASE NO.:
Appeal (civil) 2257-2258 of 2005

PETITIONER:
M/s. KEC International Limited

RESPONDENT:
Shankar Lal Sharma

DATE OF JUDGMENT: 30/03/2005

BENCH:
ASHOK BHAN & Dr.AR. LAKSHMANAN

JUDGMENT:
J U D G M E N T

(Arising out of S.L.P. (C) Nos. 9843-9844 OF 2004)

WITH

CIVIL APPEAL NOS.2259-2260 OF 2005
(Arising out of S.L.P (C) Nos.12041-12042 of 2004)

BHAN, J.

Leave granted.

The employer-appellant (for short "the appellant") is aggrieved by the impugned order in judgment by the Division Bench of the High Court of Judicature for Rajasthan at Jaipur Bench in Review Petitions No.2255 and 2275 of 2002 dated 22.01.2004 arising in D.B. Civil Special Appeal Nos. 589 and 591 of 1997 (M/s. KEC International Ltd. Vs. Shankar Lal & others) decided on 08.11.2001 to the limited extent set out hereafter.

According to the appellant, the only issue in these proceedings was regarding the validity of termination of the service of the respondent-workman with effect from 08.08.1981 and other incidental matters. However, while deciding the dispute the Single Judge has also approved the proceedings under Section 33(2)(b) of the Industrial Disputes Act, 1947 (for short "the Act") with respect to the subsequent dismissal with effect from 08.04.1992 arising out of the domestic inquiry and finding of guilt regarding later misconduct of the respondent-workman.

It is the case of the appellant that the approval of the subsequent dismissal was not at all before the Single Judge in the proceedings in question. The learned Single Judge in its judgment dated 20.03.1993 had observed as follows :-

"On the question of the subsequent termination of his service, no formal approval having been taken within the meaning of Sec. 33 (2) (b) of the Act, the net effect is that he continues in service

and the subsequent order of termination of his services would not be deemed to be operative."

The appellant, being aggrieved, filed appeals before the Division Bench. As per case set out in these appeals, the Division Bench has also approved the above observations of the learned Single Judge. The appellant filed review applications which have been dismissed by the impugned order in Civil Appeal Nos.....of 2005 @ S.L.P. (C) Nos.9843-9844 of 2004. The appellant has sought the setting aside of the above quoted observations made by the Single Judge which have been affirmed by the Division Bench. That the Division Bench has erred in dismissing the review applications although there was a mistake apparent on the face of the record.

As the present litigation has acquired chequered history with several proceedings pending, it would be necessary to set out the few relevant facts which are necessary to adjudicate upon the controversy raised in these appeals.

Services of Shri Shankar Lal Sharma, (the respondent herein) who was employed as workman with the appellant company since 19.09.1977 were terminated with effect from 08.08.1981. The respondent raised an industrial dispute against the action of the appellant. The matter was taken up by the Conciliation Officer-cum-Joint Labour Commissioner, Jaipur for conciliation but the parties failed to arrive at a settlement. The Conciliation Officer submitted failure report to the State Government on 23.02.1982. The State Government in exercise of powers conferred upon it under Section 10 (1) of the Act made a reference of the dispute to the Labour Court, Jaipur for adjudication. The respondent filed his statement of claim on 03.12.1982 and challenged the legality of termination of his services on the ground of violation of Section 25-F and 25-G of the Act and also on the ground that fresh hands were employed subsequently without complying with the provisions of Section 25-H of the Act.

Appellant in its reply pleaded that the workman was engaged as a casual labour to do the temporary work after recovery of his accident. He was again recruited on 11.12.1980 on temporary basis and was employed for the last time between 29.05.1981 to 08.08.1981 on temporary basis. After the expiry of the period of temporary employment on 08.08.1981 his services were terminated as no work was available with the employer and that the respondent did not opt to come forward to join when fresh appointments were made by the appellant. It was also pleaded that the respondent had not completed the period of 240 days of service immediately preceding the date of termination of his services i.e. 08.08.1981 and therefore, the provisions of Section 25-F, 25-G and 25-H of the Act were attracted in the case.

The Labour Court on the basis of the evidence adduced by the parties and after affording due

opportunity of hearing to them passed its award on 01.08.1985. The Labour Court declared the termination of the services of the respondent as illegal and unjustified and ordered his re-instatement with consequential benefits. This award was challenged by the appellant-company by filing S.B. Civil Writ Petition No.2130 of 1989 which was ultimately allowed on 13.05.1993 and the award of the Labour Court dated 01.08.1985 was set aside and the matter was remitted back to the Labour Court for a fresh decision within a period of six months in the light of the observations made in the judgment.

Since no stay was granted on the order of re-instatement and payment of 50% back wages, the appellant company re-employed the respondent on 19.02.1986 in terms of the award dated 01.08.1985 passed by the Labour Court, Jaipur.

During the pendency of writ petition, on 02.06.1990 the respondent was placed under suspension for subsequent gross misconduct and was charge sheeted for the same. After holding departmental enquiry and giving due opportunity to the respondent, he was ordered to be dismissed from service on 08.04.1992. But as the dispute was pending adjudication before the Labour Court, the appellant made an application under Section 33 (2) (b) of the Act before the industrial tribunal for approval of action of the dismissal of respondent proposed to be taken by the appellant. This application was dismissed on 06.11.1993 as having become infructuous in view of the judgment of the Single Judge dated 13.05.1993 setting aside the award dated 01.08.1985. After the fresh award made by the labour court on 21st April, 1994 in view of the remand of the case by the High Court, the appellant filed an application for revival of its application filed under Section 33 (2)(b) of the Act seeking approval of the subsequent dismissal of the respondent on 8.4.1992. This application was dismissed by the industrial tribunal on 7.4.1997.

In compliance to the directions of the Single Judge in S.B. Civil Writ Petition No.2130 of 1985 the Labour Court after hearing the parties and on the basis of the oral and documentary evidence available on record passed the award on 21.04.1994 declaring the termination of the service of the respondent as illegal and unjustified. This award was challenged by both the parties i.e. the appellant by filing S.B. Civil Writ Petition No.4127 of 1994 and by the respondent by filing S.B. Civil Writ Petition No.2860 of 1995. Both these petitions were heard and decided by a Single Judge. The Single Judge vide its judgment dated 20.03.1997 disposed of the writ petition by observing thus :-

"I am of the considered view that in the facts and circumstances of the case, there was a genuine mis-appreciation on the part of the Judge, Labour Court in not having made a proper computation as regards the period of continuity in service within the meaning of Sec. 25-F of the Act and on

this score, the matter should go back before the Labour Court. Labour Court is further to appreciate whether it went beyond its scope of jurisdiction in deliberating on the question that interviews were taken after 8.8.1981 in respect of juniors to the present workman Shanker Lal, and whether he should be deemed to be a permanent workman within the meaning of law.

As the matter stands now, I am of the considered view that the petitioner should be deemed to be in continuous service. On the question of the subsequent termination of his service, no formal approval having been taken within the meaning of Sec.33 (2) (b) of the Act, the net effect is that he continues in service and the subsequent order of termination of his services would not be deemed to be operative. While the final decision is to be arrived at by the Labour Court again on these two specified questions, I would make it clear that the petitioner Shanker Lal would be deemed to be in continuous service and it would not be construed that the Award as made by the Labour Court as regards directing reinstatement of the workman Shanker Lal Sharma has in any manner been set aside or recalled."

[Emphasis supplied]

Since both the writ petitions were disposed of by the aforesaid common judgment, the appellant filed two special appeals against the aforesaid judgment. The Special Appeal No.589 of 1997 was filed by the appellant against the decision of the Single Judge in S.B. Civil Writ Petition No.4127 of 1994 on the ground that the learned Single Judge had examined the factual aspect of the matter as if it was a court of appeal and the conclusion arrived at with regard to the number of days the workman had worked with the appellant company during 12 months immediately preceding his termination on 08.08.1981 was factually incorrect. It was prayed that the order of the Single Judge be set aside and the writ petition be allowed and the relief be granted in terms of the prayers made in the writ petition.

Special Appeal No.591 of 1997 was filed by the appellant against the decision of the Single Judge in S.B. Civil Writ Petition No.2860 of 1997 on the ground that the learned Single Judge had exceeded in the exercise of its jurisdiction in holding that the order of termination of the respondent's services would be inoperative as formal approval under Section 33 (2) (b) of the Act for subsequent dismissal had not been obtained.

The Division Bench dismissed the Special Appeal No.589 of 1997 by observing that the Single Judge could examine the factual aspect of the matter on the basis of the evidence available and upheld the order of remand passed by the Single Judge to

ascertain as to whether the workman had completed 240 days of service or not. The learned counsel for the appellant does not challenge this finding of the Division Bench.

The Division Bench dismissed the Special Appeal No.591 of 1997 as well and rejected the contention advanced on behalf of the appellant that the Single Judge had exceeded in the exercise of his jurisdiction that the subsequent dismissal of the respondent on 8.4.1992 will be inoperative because of the lack of formal approval under Section 33 (2) (b) of the Act for the subsequent dismissal.

The appellant has filed the present appeals for setting aside the observations made by the Single Judge, reproduced in para 5 of this judgment, and its affirmation by the Division Bench. The counsel appearing for the respondent-workman fairly concedes that the aforesaid observations made by the Single Judge as affirmed by the Division Bench did not arise in the present proceedings and therefore, unwarranted and uncalled for being obiter. He has no objection to the setting aside the above quoted observations made by the Single Judge as affirmed by the Division Bench. Accordingly, the above quoted observations made by the Single Judge in its order which have been later on affirmed by the Division Bench are set aside.

Learned counsel for the appellant prayed that in view of the setting aside of these observations, the tribunal be directed to decide the application filed by the appellant for approval of the subsequent proceeding with regard to the subsequent dismissal afresh, we do not agree with this contention.

The appellant filed an application before the tribunal on 08.01.1999 for fixing the date in application under Section 33 (2) (b) of the Act pursuant to the tribunal's order dated 07.04.1993 on the ground that the order of Single Judge had been stayed by the Division Bench. Tribunal dismissed the application filed by the appellant on the ground that the appellant was indirectly seeking review of its order dated 07.04.1997.

Appellant, being aggrieved, by the aforesaid order of the tribunal filed CWP NO.4618 of 1997. This writ petition was dismissed by the Single Judge on 19.08.2002. Aggrieved against the order passed by the Single Judge in CWP No.4618 of 1997, the appellant has filed DBSAW No.1006 of 2002 which is still pending. The appellant would be at liberty to urge the point regarding the approval under Section 33 (2) (b) of the Act to the subsequent dismissal of the respondent-workman in DBSAW No. 1006 of 2002. We agree in substance with the contention raised by the learned counsel for the appellant that the appellant is entitled to get a decision on merits on the application filed by it under Section 33(2)(b) of the Act seeking approval on the subsequent action taken but for that we cannot send the case back to the industrial tribunal as the tribunal has already decided the said application and the matter is now

pending for adjudication before the High Court in DBSAW No. 1006 of 2002. Remittance of the case to the tribunal would amount to deciding the matter pending before the High Court in DBSAW No. 1006 of 2002 which we refrain ourselves from doing.

The Division Bench shall decide DBSAW No.1006 of 2002 without being influenced by any of the observations made by the Single Judge, the Division Bench or by us regarding the approval to the application filed by the appellant under Section 33 (2) (b) of the Act with regard to the subsequent dismissal of the respondent-workman. All contentions are left open to the parties in this regard.

The Civil Appeals are allowed and the impugned judgment is set aside to the limited extent indicated in the judgment. No costs.