KERALA HIGH COURT

Nanoo Asan Madhavan

Vs

State of Kerala

S.A. No. 1260 of 1965 from A.S. No. 87 of 1964 of Sub Court Quilon from O.S. No. 251 of 1961

(P. Subramonian Poti, J.)

01.07.1969

JUDGMENT

P. Subramonian Poti, J.

1. The plaintiff is the appellant. The suit out of which this appeal arises is one for recovery of salary of the plaintiff from 1 April 1960 till the date of suit and also for direction to reinstate the plaintiff as a storekeeper in the Premo Pipe Factory, Chavara, which was taken over by the Kerala State on 1 September 1959. Consequent on each taking over there was a scheme of retrenchment and the plaintiff was one of those who were given notice of such retrenchment. He was served with a notice on 8 April 1960 intimating him that he would stand retrenched with effect from 24 April 1960. This notice was put up on the notice-board on 25 March 1960. Though attempts were made repeatedly by the plaintiff to continue in service by representations made to Government, he did not succeed and was ultimately relieved on 14 October 1960. According to the plaintiff, such termination of his service was wrongful in that the requirements of Section 25F of the Industrial Disputes Act were not kept in view and he was neither given sufficient notice as required therein nor offered the compensation payable under the said provision. Ha also challenges the order of termination as mala fide.

2. The trial Court found that the suit was maintainable slice there was no provision in the Industrial Disputes Act or the Payment of Wages Act barring a suit by an individual workman for the relief's claimed in the instant suit. It also found that the retrenchment was made on valid, bona fide and reasonable grounds. It further found there was no violation of the provisions of Sections 25G and 25H of the Industrial Disputes Act in the retrenchment of the plaintiff. In this view the relief sought for by the plaintiff for a mandatory injunction to reinstate him was denied to him by the trial Court. He was given a decree for recovery of arrears of pay for the period from 1 to 24 April 1960.

3. The plaintiff filed an appeal before the Subordinate Judge's Court of Quilon. The appellate Court found that notwithstanding the provisions of the Industrial Disputes Act a suit for the relief's prayed for in the present case could be maintained. The appellate Court did not consider it

necessary to consider the validity or otherwise of the order of retrenchment, since, if the plaintiff was not entitled to a decree reinstating him in service for any other reason, the consideration of this question become immaterial. Relying upon Section 21(g) of the Specific Relief Act, 1877, the appellate Court held that the plaintiff could have claimed only a decree for damages and the suit for reinstatement was, under the circumstances, ill conceived. It modified the decree of the trial Court holding that the plaintiff was entitled to arrears of salary for the period from 1 April to 14 October 1960, the date when he was actually relieved from service. The plaintiff has come up in appeal against this decree of the lower appellate Court.

4. It is contended by the learned Counsel for the appellant that the order of retrenchment so far as the plaintiff was concerned was in contravention of the terms of Section 25F of the Industrial Disputes Act and therefore the plaintiff was entitled to a declaration that he continued to be in service notwithstanding the order of retrenchment passed against him. Though the relief prayed for in the plaint was only for reinstatement, the plaintiff would urge that his application for amendment of the plaint moved by him before the lower appellate Court, sacking to amend the prayer, to one for declaration that he continued to be in service, ought to have been allowed. The lower appellate Court after hearing the parties dismissed the application on the ground that the suit cannot be sustained. Whether the plaintiff was entitled to ask for a declaration in the circumstances of the case is a question which I will presently consider. The case of the appellant's counsel is that a suit for the relief's prayed for in the plaint would lie if the retrenchment is of an individual workman since, according to him, any dispute arising out of such retrenchment would not be an industrial dispute within the meaning of Section 2(k) of the Industrial Disputes Act and therefore the machinery under that Act will not be available to him to wrote out his rights. This may not be the position after Section 2A was incorporated in the Industrial Disputes Act by amendment by Central Act 35 of 1965 and it is agreed that this case does not fall within Section 2A because it arose before the amendment. That a suit challenging the order of retrenchment or of termination of service which would come within the scope of industrial dispute would not lie in a civil Court is no longer open to doubt. The position is well settled. I need only refer to the decision of the Madras High Court in *Madurai Mills Company, Ltd. v. Guruvammal*[1], and Anr. and the decision of the High Court of Mysore in *Nippani Electricity Company (Private), Ltd. and Anr. v. Bhimarao Laxman Patil and Ors*[2]., But, Sri E. Subramonla Ayyar, the learned Counsel for the appellant, would contend that these decisions have no application to a case where an individual workman raising an individual dispute will not be able to seek the assistance of the machinery under the Industrial Disputes Act for adjudication of his rights. Therefore, according to him, a civil suit would lie in such a case. I am not called upon to adjudicate on this question since for reasons, which I will presently show, the plaintiff will not be entitled to succeed even assuming that a suit for relief's consequent upon a retrenchment in contravention of Section 25F of the Industrial Disputes Act would lie.

5. The learned Counsel for the appellant would say that a retrenchment in

[1](1967) 2 M.L.J. 287
[2]1969 I.L.L.J. 268

contravention of the provisions of Section 25F would be a void order of retrenchment
and that the relief which a plaintiff may seek in a suit challenging such order is really not one of reinstatement but declaration that he continues to be in the service of the employer who has ordered retrenchment. In that view, according to the counsel, the question whether the suit would

he barred by Section 21(g) of the Specific Relief Act may not at all arise. The assumption that an order of retrenchment such as the one in the present case would be void and therefore the person who is so retrenched that a declaration that he continues in service seems to be not correct. The fact that the employee was in fact retrenched from service cannot be ignored. If there is contravention of Section 25F of the Industrial Disputes Act, there will still be a retrenchment; but the retrenchment would be unlawful and the relief that an employee so retrenched can ask for is only to reinstate him in service, if that is possible in the circumstances of the case, or to claim damages if that is permissible in law. He cannot ignore the order of retrenchment. The order is one which requires to be set aside. I am fortified in this view by the decision of this Court in *Melby D'Cruz (J.) and Ors. v. Travancore Minerals, Ltd., Quilon, and Ors*[3]*.,* In that case it was contended that, & workman who was actually retrenched in contravention of the provisions of Section 25F of the Industrial Disputes Act must be deemed to be still in service so that he continues to earn wages notwithstanding termination of his employment. Dealing with this question my learned brother Raman Nayar, J., held:

> "Indeed, by its very wording prohibiting retrenchment unless and until certain conditions are satisfied, the section contemplates that there can, in fact, be a retrenchment without the conditions having been satisfied. Such a retrenchment would be illegal, and therefore, invalid, but that is not to say that it is non est. It would doubtless attract the penalty in Section 31(2) of the Act (which, of course, it would not, if it were non est) and its unlawful nature would justify an order for reinstatement with continuity of service and the right, to back-wages, by competent authority. As I understand it the decision in *Workmen of Subong Tea Estate v. Subong Tea Estate and Anr*says[4] no more than that: it does not say that such, a retrenchment is non est and that the workman concerned must be deemed to be still in service; on the contrary, what it says is that the retrenchment is bad in law. This presupposes that there is factually a retrenchment, and, indeed, the entire decision proceeds on that basis. So also in *State of Bombay and Ors. v. Hospital Mazdoor Sabha and Ors*[5]*.,* which only lays down that such retrenchment is invalid, not that it is non est, although it does casually use the word ' inoperative' with reference to the order of retrenchment, doubtless in the sense that the order is inoperative to effect & valid retrenchment. When a statute prohibits the doing of a thing without certain conditions being satisfied, it necessarily contemplates that the thing can actually be done, though not lawfully done, without the conditions being satisfied. If I drive a motor-car without a driving license in disobedience of a statute that says that no one shall drive a motor-car unless he is in possession of a driving license, I do not suppose it could be said that I have not, in fact, driven the car in which case, of course, I could say that I have not

[3]31967 II L.L.J. 637 [5]1960 I LLJ 251

[4] (1964) I LLJ 333

> disobeyed

the statute for the simple reason that in the eye of the law my driving is non est. The true position is that I have driven the car, but unlawfully. Likewise, in the case of retrenchment in violation of

Section 25F of the Industrial Disputes Act, there is a retrenchment but an unlawful retrenchments. The conditions in the section are conditions precedent to valid retrenchment, not conditions precedent to the act of retrenchment. And, even if it can be said that discharge otherwise than in accordance with Section 25F is not retrenchment within the meaning of the Industrial Disputes Act, I do not suppose a workman so discharged can claim wages for any period subsequent to the discharge until the discharge is set aside by competent authority and reinstatement ordered with a right to back-wages."

6. It therefore follows that the plaintiff is not entitled to seek a declaration and therefore I need not consider whether the order dismissing his application for amendment ought to be set aside.

7. I am aware that a slightly different view has been taken by the Judicial Committee of the Privy Council in the decision in *Francis v. Municipal Councillors of Kola Lampur*[6], The view which seems to have been taken in that case appears to be that though the more irregularity in the mode of discharge of an employee may not by itself entitle the employee to seek a declaration to the effect that the contract of service still subsists, especial circumstances may justify such a declaration by Court. As an instance of such special circumstances the case of *Vine v. National Dock Labour Board*[7] is seen cited. In that case the plaintiff was a dock labourer for & number of years. The employment of dock labour was casual. To remove the objection that such employment was merely casual the dock labours were enabled to register themselves as employed by the Natloaal Dook Labour Board. It was not, as if the labourers were actually working for the Board. Under these circumstances the plaintiff in the case above cited was held entitled to a declaration that he was still employed by the National Dock Labour Board. This declaration only meant that the plaintiff would be able to carry on his avocation as a dock labourer, for which purpose the registration as employee of the National Dock Labour Board was necessary. The Privy Council, in the said case of Francis Municipal Councillors of Kola Lampur [(1962) 3 A.E.R. 633] considered the case of *Vine v. National Dock Labour Board (1955) 3 A.E.R. 939* (vide supra) as one in which the circumstances were special to justify the grant of declaration. Lord Morris of Borth-Y-Gest said in that case:

> "In their lordships' view, when there has been a purported termination of a contract of service a declaration to the effect that the contract of service still subsists will rarely be made. This is a consequence of the general principle of law that the Courts will not grant specific performance of contracts of service. Special circumstances will be requited before such a declaration is made and its making will normally be in the discretion of the Court. In their lordships' view there are no circumstances in the present case which would make it either

[6](1962) 3 A.E.R. 633

[7](1956) 3 A.E.R. 939

> just or proper to make such a declaration. In *Vine v. National Dock Labour Board* Ormerod, J., had in his discretion made such a declaration and the House of Lords, adopting the view expressed by Jenkins, L J., in his dissenting judgment in the Court of Appeal were of opinion that the declaration had been rightly made. In that case, however, the circumstances wore very special."

Whether in the light of the decisions of the Privy Council, the principle which I have sought to apply to the present case following the decision of this Court in *Melby D'Crus v. Travancore Minerals, Ltd. Quilon and Ors., 1967 II L.L.J. 637* (vide supra) has to be read as qualified and does not arise for decision by me in this appeal since there are no special circumstances here such as those envisaged in *Francis v. Municipal Councillors of Kola Lampur, (1962) 3 A.E.R. 633* (vide supra) or the one which was noticed in *Vine v. National Dock Labour Board, (1956) 3 A.E.R. D 39* (vide supra).

8. If the plaintiff is not competent to pray for a declaration that he continues in service, then the question naturally arises as to what relief he is entitled to on the basis that his order of termination contravened Section 25F. As held by the lower appellate Court, Section 21(g) of the Specific Relief Act of 1877---it is that Act which applies to the case provides that a contract, the performance of which involves the performance of a continuous duty extending over a longer period than three years from its date cannot be specifically enforced. To direct reinstatement of the plaintiff in the service of the defendant as a storekeeper of the Premo Pipe Factory would amount to directing the performance of a contract which would fall within the scope of Section 21(g). It is not shown by the appellant's counsel that Section 21(g) will not apply to the case. If so, the only relief that the plaintiff can pray for on the footing that the order of retrenchment is wrongful is that for damages. This he has not chosen to do. The relief of reinstatement was rightly refused by the Courts below. I do not think this calls for an interference in second appeal. No other question was argued before me by the appellant's counsel.

9. In the circumstances, I dismiss the second appeal. In the circumstances of the case, there will be no order as to costs.
Dismissed.