NO Termination/C.L. Termination

(12)

CAT/J/12

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
AHMEDABAD BENCH

O.A. No. 665/88
~~T.A. No.~~

DATE OF DECISION 11.10.1991

Shri Bhikhubhai Devabhai Rabari ___ Petitioner

Mr. P.H. Pathak _____ Advocate for the Petitioner(s)

Versus

Union of India & Ors. _____ Respondent

Mr. B.R. Kyada _____ Advocate for the Respondent(s)

CORAM :

The Hon'ble Mr. K.J. Raman : Member (A)

The Hon'ble Mr. R.C. Bhatt : Member (J)

1. Whether Reporters of local papers may be allowed to see the Judgement? Yes
2. To be referred to the Reporter or not? No
3. Whether their Lordships wish to see the fair copy of the Judgement? Yes
4. Whether it needs to be circulated to other Benches of the Tribunal? No

MGIPRRND—12 CAT/86—3-12-86—15,000

(16)

Shri Bhikhubhai Devabhai Rabari
P.O. Bhatiya, Ta.Kalyanpur,
District Jamnagar.
(Advocate: Mr.P.H.Pathak)

Versus

1. Union of India,
Through:
The Executive Engineer(C)
Near Ervin Hospital,
Jamnagar.

2. The Permanent Way Inspector,
C/o. Executive Engineer(C)
Ervin Hospital, Jamnagar.
(Advocate: Mr.B.R.Kyada)

Date: 11/10/1991

J U D G M E N T
O.A.665/88

Per: Hon'ble Mr. R.C.Bhatt — Judicial Member

1. This application under Section 19 of the Administrative Tribunals Act, 1985 is filed by the applicant casual labourer who was working under the respondent No.2, the Permanent Way Inspector, Jamnagar for the following reliefs:

"(a) That the Hon'ble Tribunal may be pleased to declare the impugned action of the respondent No.2 as illegal, invalid and inoperative in law and be pleased to quash and set it aside and further direct the respondents to reinstate the applicant on his original post with continuity of service and full backwages.

(b) Be pleased to direct the respondents to regularise the services of the applicant in light of the judgment of the Hon'ble Supreme Court of India in Indrapal Yadav's case.

(c) Be pleased to direct the respondents to pay the backwages and other dues of the applicant, temporary status etc. with 12% interest as the applicant has suffered a lot due to the arbitrary exercise of powers of terminating the service of the applicant.

(d) Any other relief to which this Hon'ble Tribunal deems fit and proper in the interest of justice together with costs".

..3..

2. The first and foremost question to be decided is whether casual labourer is liable to transfer and if so under what condition? On this point, the learned advocate for the applicant has cited the decision in Jivi Chaku vs. Union of India & Ors (1987) 3 Administrative Tribunals Cases 413 in which it is held that as long as the person is a casual labourer, transfer does not become an incident or condition of his services and the railway is not entitled to force such transfer on the casual labourer. The reliance is also placed on the decision in Robert D'Souza case and Rule 2501 of Indian Railway Establishment Manual. In the instant case, the applicant joined the service with effect from 9.7.1983 with the respondents and since then he has worked continuously without any actual break in the services till his alleged verbal termination with effect from 18.9.1986. It is alleged by the applicant that the respondents transferred the applicant to work under PWIC, Phulera but no written order for transfer was given to the applicant. The respondents have contended in the reply that the applicant had been relieved on transfer on 17.7.1986 to work under Permanent Way Inspector (Construction), Western Railway, Phulera. The applicant was working with meter gauge conversion project from Veramgam to Okha and from Sikka-Kanalus to Porbandar. The respondents have contended that the gauge conversion project was completed in April, 1984 but the residual works arising out of this gigentic project were however in progress and the applicant was utilised and continued for these works and continued on the project. It is contended that after completion of the residual works on the project, there was contraction of the cadre and the applicant was likely to come under termination of service. However work was available at Phulera on Phulera-Kishangarh doubling project and hence

the applicant by an order bearing No.VOP/JAM/12/G/Misc/7 dated 2nd September, 1986 was transferred to work under Permanent Way Inspector (Construction), Western Railway, Phulera, and the applicant was accordingly relieved on transfer on 17.9.1986. The applicant has reiterated in his application and rejoinder that [illegible] no written order for transfer was given to him. The respondents have produced at Annexure R/1 which they term it as the transfer order. However, having perused the document Annexure R/1 dated 2.9.1986 it is clear that it is a correspondence from one department to another department of the railway in which it is mentioned that as per the directive by the Dy.CE(C) VOP/ADI, the casual labourers as per list attached there with, were required to be directed to XEN(C) JP under PWI(C) FL and PWI(C) Sakun i.e. casual labourers at Sr.No.1 to 100 are to be directed to PWI(C) FL and remaining labourers are to be directed to PWI(C)/Sukun. It further shows that all the artisan staff were required to be directed to PWI(C) FL. This is a letter from one department to another department of railway to ensure that all the labourers are shifted immediately without any further delay. No documentary evidence is produced by the respondents to show that a transfer order was served on applicant. Annexure R/1 produced by the respondents is not a transfer order at all. The name of applicant is shown at Sr.No.72 in the list annexed to Annexure R/1. We therefore, accept this submission of the learned advocate for the applicant that there was no written order for transfer served on the applicant. Learned advocate for the respondents had submitted that in the relief para 7(a), the applicant not mentioned impugned order in detail

(19)

nor the date is given. In the instant case, when the respondents have not served the written transfer order on the applicant, naturally no impugned order could have been annexed by the applicant and we see no fault on the part of the applicant not to mention the impugned order with date in para 7(a) of the relief clause. But that by itself does not make the relief clause redundant.

3. Now coming to the main point about the ratio of the decision in Jivi Chaku's case (supra) it is clear that so far the applicant is a casual labour , transfer does not become an incident or condition of his services and the respondents are not entitled to force such transfer on the applicant. It is also observed in para 10 of the said judgment that in order to render the casual labour liable to transfer, casual labour should not only acquire temporary status by passage of time of 120 days or 180 days in a project but should have been screened and empanelled and given regular employment. While the passage of time might entitle the casual labour to the benefits of temporary status, there is nothing to show that such casual labour is rendered liable to transfer merely on this account. It is contended by the respondents that the applicant has, in fact, been transferred at Phulera by the respondents just to save him from the agony of facing retrenchment in these hard days. It is contended that the applicant had already taken the necessary railway duty pass for the rail journey from Jamnagar to Phulera but the applicant did not join at Phulera deliberately and kept quiet for more than 2 years and has now filed the present application. In view of the decision in Jivi Chaku's case (supra), the respondents not were/

(20)

entitled to force transfer on the applicant. The applicant in his rejoinder has categorically denied that any journey pass was given to him by the respondents. The respondents have not produced any reliable evidence to show that the journey pass was given by them to the applicant. Thus, so far as the first question is concerned, we hold that the action on the part of the respondents to transfer the applicant from Jamnagar to Phulera was arbitrary and illegal and cannot be enforced.

4. The applicant has further mentioned in his application that he has worked continuously from 9.7.1983 till 18.9.1986. It is not disputed by the learned advocate for the respondents. The endorsement at the back of the service card of the applicant produced at Annexure/A shows that on 17.9.1986 the applicant was shifted to Phulera. The applicant has mentioned in his application that he had time and again requested the respondent No.2 to reinstate the applicant. He has stated that he had refused to go to Phulera. The learned advocate for the applicant invited our attention to para-6 of the application where the applicant has averred that he is belonging to village Bhatiya and transferring him to work under the PWI, Phulera in Jaipur division amounts to termination of services. He has averred in that paragraph that he was not willing to go on transfer. It is also averred in that paragraph that the respondent No.2 on the very next day i.e. 19.9.1986 refused to allow the applicant to work and has verbally stated that the services were terminated as the applicant had not accepted the transfer to Phulera. The applicant has alleged that this action on the part of the respondents was illegal, invalid and in violation of Articles 14 and 16 of the Constitution of India, and in violation of provisions of Section 25 F of the I.D.Act and 77 of the Industrial Disputes Rules. The respondents

..7..

(21)

on the other hand, in their reply, have contended that the services of the applicant were never sought to be terminated either in writing or verbally and the statement made by the applicant that his service was terminated verbally was totally false. The respondents in para-8 of the reply also reiterated that since there has been no termination of the services of the applicant, the question of following the provisions of Industrial Disputes Act, 1947 did not arise. Therefore, according to the respondents the services of the applicant has never been terminated but the contention of the respondents has found in para-8 of the reply is that since the applicant did not join at Phulera he is deemed to have left the service of his own accord and therefore, no benefits are admissible to him and the applicant would not be granted temporary status. The learned advocate for the respondents submitted that the applicant absconded from duty. He submitted that the applicant has not produced any documentary evidence to show that he reported for duty. The learned advocate for the applicant submitted that in para-6 of the application the applicant has categorically stated that respondent No. 2 on 18.9-1986 i.e. on the next day of the relieving orders dated 17.9.1986 refused to allow the applicant to work and verbally stated that the services were terminated as applicant had not accepted the transfer to Phulera. This allegation is not controverted in the reply. We, therefore, have no reason to doubt the averment of the applicant that he had reported for duty on 18.9.1986 but the respondents No.2 refused to allow the applicant to work. The respondents in our opinion, cannot pick and choose the casual labour to be terminated or transferred.

(92)

5. The applicant in his application has stated that there is violation of Section 25 F of I.D.Act and Rules 77 of the Industrial Disputes (Central) Rules but in view of the contention of the respondents that the services of the applicant were never terminated in writing or verbally, the question of application of the provisions of the I.D. Act would not apply as there is no termination or retrenchment of the applicant. Now the question is whether the respondent's contention in the reply that the applicant did not join at Phulera and hence he is deemed to have left the service of his own accord can be accepted. In view of our finding that the respondents cannot force the applicant the transfer, as transfer does not become an incident or condition of his services, it cannot be said that the applicant did not join at Phulera and hence he is deemed to have left the service of his own accord. It is open to the respondents to terminate the service of the applicant as per the law applicable to the applicant. It is open to the casual labour to accept the employment offered in any division but the respondent cannot force the transfer to the applicant, and in view of the decision in Jivi Chaku's case (supra), the alleged action of the respondents to transferring the applicant requires to be quashed and set aside. Moreover, the learned advocate for the applicant has also relied on the decision in G. Krishnamurthy vs. Union of India & Ors (1989) 9 Administrative Tribunals Cases 158 and Beer Singh vs. Union of India & Ors. (1990) 14 Administrative Tribunals Cases page 279. It is held that even in case of abandonment of service, the employer is bound to give notice to the employee calling upon him to resume his duty and also to hold an inquiry before terminating his service on that ground. It is held that the employer is bound to give notice to the employee in such cases calling upon him to resume his duty. In case the employer intends to terminate his services on

(23)

the ground of abandonment of service, he should hold an inquiry before doing so. In the instant case, before us the respondents have not produced any documentary evidence to show that they had taken any such steps against the applicant nor is there averment to that effect in the reply filed by the respondents. Therefore, in view of above two decisions, we do not accept the contention of the respondents that as the applicant did not join at Phulera, he is deemed to have left his service of his own accord and therefore, no benefits are admissible to him.

6. The applicant has also relied on the decision in Shri Keswala Lakhaman Ranamal vs. Union of India & Ors O.A./88/1988 decided by this Tribunal on 27.2.1991 in which no documentary evidence was produced by the respondents in support of their contention that the applicant did not turn of his own to resume the duty. The Tribunal held that such a contention of the respondents cannot be accepted as the respondents would be naturally in possession of the documentary evidence but had not produced the same. However, this decision is not on the point directly at issue before us.

7. In view of our finding, that the action of the respondents in transferring the applicant to Phulera was unauthorised and illegal and in view of our finding that the applicant could not be said to have left service of his own accord and in view of our finding that the applicant had gone to resume the duty on 18.9.1986 but the respondent No.2 refused to allow him to work, the respondents are bound to reinstate the applicant in service.

8. The applicant has also alleged that he should be considered in continuous service. Learned advocate for the respondents submitted that how can the applicant's seniority be considered as continuous in preference to those who have been continuously working and how can others be

..10..

(24)

deprived of their seniority at the cost of the applicant. He submitted that all persons named in the list produced at Annexure R/1 accepted the transfer but the applicant did not accept the transfer. We find no substance in this submission of the learned advocate for the respondents because of our finding that the respondents' action of transferring the applicant was illegal and unauthorised and is required to be quashed and set aside. The respondents could have taken the proceedings according to law against the applicant but the respondents cannot refuse the applicant to resume duty. There is no documentary evidence to show that the respondents have taken any proceedings against the applicant. In these circumstances the applicant would be entitled to claim his seniority on the basis of continuity of his service till his reinstatement.

9. So far as the question of claim of backwages is concerned, generally we give the backwages when we find that there is illegal termination made by the employer but in the instant case the respondents have contended that the services of the applicant were not terminated by them. The applicant did not take any action against the respondents after 18.9.1986 till the date of filing of this application as late as on 12.10.1988. There is no evidence to show that at any time he made grievance in writing to the respondents not allowing him to resume duty. No doubut this application was admitted after the delay was condoned but we find inaction also on the part of the applicant for sufficient long time in not taking steps against the respondents. In view of these facts, we do not think it just and proper to allow the applicant to have backwages till his reinstatement. Moreover, in the decision in Jivi Chaku's case (supra) we also find at page 422 the observation of the Tribunal as under:

(95)

"In TA/185/86, 25 petitioners who have been relieved on 4.2.1982 before interim relief granted on 9.2.1982 would be affected. In that case therefore there has been no interim relief. The petitioners will have a claim to be reabsorbed and protect their seniority and will not be terminated except on last come first go basis, but they will not have any claim on backwages."

In the instant case the applicant who ought to have rushed to this Tribunal by filing this application under Section 19 of the Administrative Tribunals Act, 1985 immediately after 18.9.1986 when the respondent No.2 refused to resume duty but as observed above the applicant did not approach this Tribunal for a long period till 12th October, 1988. In view of all facts of this matter, we hold that the applicant would not be entitled to backwages.

10. In view of our above finding, the application is allowed to the following extent:

(1) The action on the part of the respondents transferring the applicant to Phulera is hereby illegal and unauthorised and the same is quashed and set aside.

(2) The respondents are directed to reinstate the applicant within one month from the date of receipt of this judgment in his original division and he should be reabsorbed with the benefit of seniority treating him in continuous service. But he is not entitled for the back wages. The respondents also may consider the case of the applicant for regularisation having regard to the seniority and in case the vacancy arises as per the rules of Railway.

(3) Having regard to the facts of the case, we pass no order as to costs.

(R.C.Bhatt)
Member (J)

(K.J.Raman)
Member (A)