IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM

O.A. No. 569/ 1989
~~T.A. No.~~

DATE OF DECISION 18.6.90

P.K Vasu — Applicant (s)

M/s M.R Rajendran Nair & P.V Asha — Advocate for the Applicant (s)

Versus

Union of India represented by Secretary to Govt., Ministry of Communications & 2 others. — Respondent (s)

Mr.N.N.Sugunapalan, SCGSC — Advocate for the Respondent (s)

CORAM:

The Hon'ble Mr. S.P MUKERJI, VICE CHAIRMAN

&

The Hon'ble Mr. N.DHARMADAN, JUDICIAL MEMBER

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

JUDGEMENT

HON'BLE SHRI N.DHARMADAN, JUDICIAL MEMBER

The applicant in this case is a retrenched employee who worked as a temporary Pump Operator under the second respondent, the Assistant Engineer(E), P&T Electrical Sub Division No.1, Cochin-16. In this application he is challenging inter alia Annexure -XVIII termination proceedings under Section 25-F of the Industrial Disputes Act, 1947.

2. This case has a long history. The applicant, who is an Ex-serviceman, was sponsored by the Employment Exchange for the post of Pump Operator under the second respondent, who after satisfying the requirements interviewed him on

10.12.1981 and issued the order at Annexure-VI dated 19.12.1981 requesting him to attend the office on 24.12.1981 at 11 a.m. When he appeared on that day he was put incharge of the two pump houses of the P&T Staff Quarters at Alleppey as if he has been appointed as Pump Operator. While he was working in that post he made repeated requests for regularisation. Annexures VII and VIII are his petitions submitted in this regard.

3. According to the applicant on 17.7.1984 when Shri R.Babu was appointed as Pump Operator in his place his services were orally terminated. The applicant challenged the oral order of termination in OP No. 6258/1984 before the High Court of Kerala as violative of Section 25-F and 25-G of the I.D Act. This was heard and allowed as per the judgment at Annexure-IX dated 24.10.1984. The Court held on the basis of admission made by the Government counsel appearing on behalf of the respondents, that the termination of service was not in accordance with the provisions of Chapter V-A of the Industrial Disputes Act, the petitioner is to be treated as continuing in service until such time the respondents issue valid orders terminating his service. He will also be entitled to all emoluments till such termination . But it will be open to the respondents to take such proceedings, as deemed it proper, for a valid termination of the service of the petitioner "either by retrenchment

or by disciplinary proceedings, if such action is justified in the circumstances of the case".

4. Despite the directions the petitioner was not reinstated. Hence he again approached the High Court by filing O.P(Contempt)No.3969 of 1986, which was finally disposed of by Annexure-XIV judgment, the operative portion of which reads as follows:-

> "This Original Petition does not now survive in view of the fact that the amount as directed by this Court has been deposited by the respondent. The amount so deposited shall be paid to the petitioner.
>
> If there is any claim of the petitioner in regard to the payment of bonus, we make it clear that he is entitled to make a demand for the same and if such a demand is made, the authorities will examine the said claim and pay the same if the petitioner is entitled to the same.
>
> We are now informed that the services of the petitioner have been terminated by issuing a proper notice."

5. Thereafter the applicant again approached this Tribunal by filing OA 173 of 1987 when his services were terminated as per Annexure XV dated 26.6.1986 stating as follows:-

> "a qualified person recruited on regular basis by Executive Engineer(Electrical) was functioning as a Pump Operator in P&T Staff Quarters,Alleppey and therefore his services would be terminated with effect from the date of that notice retrenchment compensation due to him was stated to be sent by M.O No.4386 dated 26.6.1986".

There was also a further order at Annexure XVI dated 10.7.86 supplementing the above order. Both these orders were under challenge in that O.A.

6. This Tribunal by Annexure XVII order allowed the application holding that "we find that the only ground on which the impugned order of termination is invalid is its

failure to comply rigidly with the letter of the mandatory provisions of Section 25-F of the Act. We, therefore, set aside the order dated 26.6.86... We declare that, in the circumstances, the applicant should be treated as still continuing in service". The Tribunal made it very clear that his services can be terminated in accordance with law. The impugned notice dated 21.8.1989 has been issued in terms of the directions of the Tribunal. Along with this notice he was also given a cheque for Rs.38,503/- towards the retrenchment compensation and wages in lieu of one months notice as stated in Annexure XVIII(A) . In the mean while the applicant submitted Annexure XIX representation dated 21.8.1989 and received the aforesaid amount under protest.

7. The respondents in their counter affidavit justified the termination on the ground that the applicant was engaged as a Pump Operator on daily wage basis on muster roll and there is no sanctioned post of Pump Operator at Alleppey. While he was working as Pump Operator a complaint, produced as Annexure R3(A) dated 18.10.82 was received alleging misconduct and dereliction of duty on his part. His service was found to be not necessary because the pump operation could be done by engaging a regular Khalasi as part of his duty. The case of the applicant was considered for regularisation, but he could not be regularised as there was no post

of Pump Operator at Alleppey. This fact was upheld by the Tribunal in O.A 173 of 1987 dated 22.5.89. In gist the respondents' case is that the post hitherto held by the applicant became surplus and hence he was orally informed that his services would be terminated in accordance with the rules. Then he approached the High Court by filing O.P 6258/84.

8. The applicant has filed a rejoinder denying the statements in the reply affidavit. He submitted that the respondents considered the applicant as an employee belonging to the category of Pump Operator having a scale of pay. He possesses all the requisite qualifications for performing the work for which he was engaged from 1981. Now since the same work is available and it is being performed by engaging persons junior to him, there is no truth or justification in the statement that the applicant became surplus. Therefore the termination is illegal.

9. The learned counsel for the applicant raised the following contentions before us:-

i) the impugned proceedings of termination cannot be treated as a formal and valid retrenchment in terms of the provisions of Chapter V-A. There is no notice pay and compensation as computed in terms of the scale and salary of the post of Pump Operator in which he was working at the time of termination nor is any valid reason for termination. Hence the provisions of Section 25-F have not been satisfied strictly. The same infirmity pointed out by the Court and the Tribunal is even now existing.

ii) Many of the juniors of the applicant including Shri R.Babu who was appointed on 17.7.84 are even now working. Hence the post of Pump

Operator is available and the termination as such is illegal.

10. Originally when the service of the applicant was terminated in 1984 the Government counsel appearing on behalf of the respondents conceded before the High Court that the termination was not in accordance with law and they are willing to comply with all the provisions of Chapter V-A of the Industrial Disputes Act in terminating the service of the petitioner. Accordingly, the Court quashed the termination and directed the respondents to take appropriate legal steps for terminating the services of the petitioner "either by retrenchment or by disciplinary proceedings". So the respondents should have taken all legal steps for a valid retrenchment if the applicant's service was surplus or disciplinary proceedings against him in case he is not a fit person to be retained in service on account of his indiscipline, if any.

11. It is evident from Annexure R3(A) produced along with the counter affidavit that there was a complaint against the applicant and that also weighed with the termination of his service. But it has not been stated in the counter affidavit that the termination is on the basis of the complaint. On the other hand the specific stand taken by the respondents is that his services were not necessary because the work which was performed by the applicant while in service could be continued by engaging a regular Khalasi as part of his duty and with the posting

of a regular Khalasi whose duties include the operation of pump sets also, the post of casual Pump Operator became surplus and hence his services were terminated.

12. There is no merit in the case of the respondents that the applicant is surplus and hence his services are liable to be terminated under Section 25-F. A retrenchment postulates the termination of the services of a worker in the industry for any reason whatsoever even when it is continuing and the work in which the employee is engaged is available. The work for which the applicant was engaged originally is even now existing in the same manner as admitted by the respondents in the various counter affidavits filed in this case. The earliest statement of the respondents in the counter affidavit filed before the High Court in OP No.6258/1984 is as follows:-

> "with reference to averments contained in para 13 of the O.P it is submitted that the Executive Engineer, Trivandrum vide his order dated 30.6.84 have appointed one Babu.R as Pump House Operator".

It is after this appointment the applicant's services were terminated. So there is an admission by respondents that the post of Pump House Operator is in existence. This Tribunal also in the earlier case OA 173/87 held that the work which was carried on by the applicant is existing and this work is being looked after by R.Babu, a Khalasi who was admittedly appointed in 1984 displacing the applicant. He is junior to the applicant. The finding of this Tribunal about the appointment of R.Babu in Annexure XVII judgment is as follows:-

> "R.Babu is regularly appointed as Khalasi. He and the applicant belong to different categories, even if R.Babu looks after the pump. We, therefore, find that there has been no violation of section 25G".

The Court or the Tribunal never examined the question of appointment of Sri R.Babu with reference to the provisions of Section 25-F and the contention of the applicant that the works which were carried on by the applicant is even now existing and Shri R.Babu who was engaged in his place for doing the same works is discharging the duties of Pump Operator at Alleppey though he is appointed as a Khalasi. So in this case, according to the learned counsel, Shri M.R Rajendran Nair, the provisions of Section 25-F cannot be invoked for terminating the services of the applicant. There is considerable force in this argument on the facts of this case.

13. Shri N.N.Sugunapalan, the learned counsel for the respondents answered all the points raised by the applicant's counsel relying on the plea of constructive res judicata in the light of the judgments at Annexure-IX, XIV and XVII. His submission is that after the above judgments the only question that survives for consideration is the validity of the notice issued as a prelude for termination. All other questions and facts are concluded by the earlier judgments. He relied on AIR 1977 SC 1680 and contended that the present plea of the applicant is barred by the principles of constructive res judicata. This case deals with a case of termination

order which was once challenged before the High Court, was again challenged in a civil suit. Considering the facts of the case the Supreme Court held that the legality of the self same order which was already decided by the High Court cannot over again be considered and decided by the civil court on the same set of facts.

14. In the instant case the facts are entirely different. When the applicant's services were terminated in 1984 he filed Original Petition No.6258/84. That termination order was quashed leaving freedom of the respondents to take appropriate legal action for fresh termination. Accordingly the respondents issued another order of termination in 1986 which was challenged in O.A 173/87. That was also quashed by the Tribunal holding that the strict compliance of the formalities of Section 25-F of the I.D Act have not been satisfied in passing the order of termination dated 26.6.86. The Tribunal quashed this order. Now a fresh termination order of the applicant has been passed. According to the respondents the impugned order of termination has been issued purporting to be in compliance of the directions of the Tribunal and in terms of the provisions of Section 25-F. It is the validity of this order that has come up for consideration before us. It is coming up for the first time, perhaps the facts leading to the same may be identical. But the issue with reference to the present order has not been considered and decided by any other Court or the Tribunal. Hence it is doubtful

whether the principles of constructive res judicata can be relied on by the respondents under the above circumstances. However the decision relied on by the learned counsel is distinguishable and would not apply to the facts of this case.

15. Doctrine of constructive res judicata "in reality is an aspect or amplification of the general principles". We get a clear statement of this doctrine at page 152 of Spencer Bower & Turner on "Res judicata", 2nd Edn. "Where the decision set up as a res judicata necessarily involves a judicial determination of some question of law or issue of fact, in the sense that the decision could not have legitimately or rationally pronounced by the Tribunal without at the same time, and in the same breath, so to speak, determining that question on issue in a particular way, such determination even though not declared on the face of the recorded decision, is deemed to constitute an integral part of it as effectively as if it had been made so in express terms, but, beyond these limits, there can be no such thing as a res judicata by implication." (emphasis supplied) Gagendragadkar,J, as he then was, said in Daryao vs. State of U.P and others, AIR 1961 SC 1457,"it is in the interest of public at large that a finality should attach to the binding decisions pronounced by the Courts of competent jurisdiction, and it is also in the public interest that

individuals should not be vexed twice over with the same kind of litigation". This is again reiterated in Gulam Abbas vs. State of U.P and others, 1982(1) SCC 71, by Justice Tulzapurkar.

16. Recently the Supreme Court in Supreme Court Employees Welfare Association vs. Union of India and another, AIR 1990 SC 334 laid down in clear terms "a decision on an abstract question of law unrelated to facts which give rise to a right cannot operate as res judicata. Nor also can a decision on the question of jurisdiction be res judicata in a subsequent suit or proceeding. But, if the question of law is related to the fact in issue, an erroneous decision on such a question of law may operate as res judicata between the parties in a subsequent suit or proceeding, if the cause of action is the same." The parties will not be permitted to set at naught or even reopen the issues and connected facts considered and concluded between the parties on the basis of earlier decision between them. If as a matter of fact new proceedings are allowed in respect of them it would be an abuse of the process of the Court and against the finality of litigations and securing justice, which is one of the objectives of our Constitution.

17. In the instant case the impugned order of termination was never the subject matter of any litigation between the parties in this case and the doctrine of

constructive res judicata or "might and ought" would never apply on the facts of this case because before getting an order of termination of this nature, it would be impossible for the applicant to visualise or contemplate such a situation and urge the contentions in an earlier proceeding so as to bar him from raising the present contentions which he has raised in this case on the basis of the impugned order. Moreover, it is admitted by the learned counsel for the respondents that the applicant had not raised this plea in the pleadings. The Privy Council in Jagadish Chandra Deo Dhabal Deb vs. Gour Hari Mahato and others(AIR 1936 SC 258) observed "a party raising a plea of res judicata is not entitled to go into the question of res judicata when it has not been properly raised by the pleadings or in the issues particularly in the issues". On that ground also the respondents contention fails.

18. The only prayer which is strongly pressed before this Tribunal is prayer No.1 viz: the legality of the termination order Annexure XVIII and the request for reinstatement in service with back wages and interest. The specific allegation of the applicant in Ground 'O' of the application is that the post of Pump Operator at Alleppey is available even now and the same is being manned by a workman who is junior to him. One Mr.Babu who has been engaged by replacing the applicant is even now working. As indicated above, this is in fact admitted

by the respondents also before this Tribunal even in earlier O.A No.173/87. If this is correct, the provisions of retrenchment is not applicable. The law, however, requires that in effecting retrenchment "for any reason whatsoever", the employer must be acting bona fide and the termination of service of the employee should not be for a purpose other than the one which is legally permissible under Section 2(00) of the I.D Act. Gagendragadkar,J, as he then was, held in Marcopollo & Co (P) Ltd vs. The Employees' Union and others,1958,(11)LLJ 492,"The resulting discharge and retrenchment would have to be considered as an inevitable, though very unfortunate, consequence of the recognised scheme, which the employer, acting bona fide, was entitled to adopt". An inconvenient worker who have put in statutory minimum period of service, cannot be sent out from a running industry without conducting an enquiry and other follow up steps for a disciplinary action, merely under Section 25-F of the I.D Act. Such a termination of service would be a malafide action resulting in victimisation or unfair labour practice. For appreciating the actual state of affairs the Tribunal or the Court can lift the veil and see the real position prevailing. In Workmen of Subong Tea Estate vs. Subong Tea Estate (1964(1)LLJ 333, while laying down the propositions for the guidance of industrial adjudicators,the SC stated "the right of employer to effect retrenchment cannot

/(2)SC 489) as explained in Punjab Land Dev.Corp's case(JT 1990/

normally be challenged, but when there is a dispute in regard to the validity of the retrenchment, it would be necessary for the Tribunal to consider whether the impugned retrenchment was justified for proper reason and it would not be open to the employer either capriciously or without any reason at all to say that it proposes to reduce its labour force for no rhyme or reason". If there is justifiable reason the right of the employer to retrench the economic dead weight or surplusage of labour is inherent in his right to manage his business subject of course to the conditions prescribed by Section 25-F of the I.D Act. But in this case as indicated above it appears that the employer had not exercised his powers under Section 25-F in fair and bonafide manner.

19. Having considered the matter in detail in the light of the aforesaid decisions, it is to be found that there is considerable force in the argument of the learned counsel for the applicant that the retrenchment under Section 25-F is unsustainable for the reasons stated by the applicant. His contentions are to be accepted and the O.A is to be allowed.

20. According the O.A is allowed and the impugned

order at Annexure XVIII is quashed. The respondents shall treat the applicant as still continuing in service. There will be no order as to costs.

18.6.90

(N.DHARMADAN)
JUDICIAL MEMBER

18.6.90

(S.P MUKERJI)
VICE CHAIRMAN

n.j.j.