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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.3060 OF 2006

M/s. Colliers International (India)
Property Services Limited

...Petitioner

VS

Thanpal Subhaiysh & Ors.

...Respondents

.....

Mr. A.R. Pai, a/w. Mr. Aditya Bhat and Mr. Netaji Gawde, i/b. Sanjay Udeshi & Co., for the Petitioner.

Ms. Karuna Yadav, i/b. Mr. N.M. Ganguli, for Respondent No.1.

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CORAM : S.C. GUPTE, J.

DATED: JULY 13, 2018

ORAL JUDGMENT :

. Heard learned Counsel for the parties. This petition challenges an order passed by the Labour Court allowing a complaint of unfair labour practice and the revisional order passed by the Industrial Court rejecting a revision application from that order.

2. The Petitioner Company, which is engaged in the business of property valuers and real estate agents, and had its offices initially in Mumbai and Delhi, later started branch offices at Chennai and Bangalore. On 19 February 1996, the first Respondent is claimed to have been appointed by the Petitioner as a driver, though the appointment letter was issued to him on 11 October 1996. He was posted at the Mumbai office of the Petitioner. There were two drivers working with

the Petitioner then, Mr. George D'Souza Lawrence and the first Respondent, the former having been confirmed in employment on 11 September 1995, i.e. before the first Respondent. After displaying a seniority list as of 1 March 2000, on 6 March 2000, the first Respondent, who was a junior driver in accordance with this list and who had become surplus on account of reduction in the number of cars with the Petitioner and thus not required to be engaged, was terminated by way of retrenchment. The Petitioner was paid his dues, including retrenchment compensation. The first Respondent, however, refused to accept the compensation and called upon the Petitioner to withdraw his termination. Upon the Petitioner refusing to do so, the first Respondent filed a complaint of unfair labour practice purportedly invoking Section 25F of the Industrial Disputes Act read with Items 1 (a), (b), (d), (f) and (g) of Schedule IV of the MRTU & PULP Act before the Labour Court at Mumbai. The Labour Court, by its impugned order dated 15 July 2005, allowed it. The Petitioner's revision from that order, being Revision Application No.216 of 2005, was rejected by the Industrial Court at Mumbai. Being aggrieved, the Petitioner has come to this Court by way of the present petition.

3. The chief ground of challenge of the Petitioner against the impugned orders of the courts below is that the courts have not found any complaint of unfair labour practice on the part of the Petitioner, but appear to have proceeded on the footing as if the matter before them were a reference under the Industrial Disputes Act and considered the advisability or propriety of retrenchment under Section 25F of the Industrial Disputes Act. Learned Counsel submits that the courts have

not found either that the discharge of the first Respondent was by way of victimization or amounted to a conduct in bad faith or colourable exercise of the employer's rights or for patently false reason or with disregard of the principles of natural justice in the conduct of a domestic enquiry or with undue haste or for any misconduct of a minor or technical character, without having any regard to the nature of misconduct or past record. Learned Counsel submits that the Petitioner employer had a legitimate case for retrenching the Respondent on the ground of his being rendered surplus and that his retrenchment on that basis was against payment of his dues, including retrenchment compensation.

4. The Petitioner's case for retrenchment of the first Respondent, who was a driver, was expressly on the footing that on account of reduction in the number of cars, he had become surplus. The company was, at the relevant time, holding only one car and employing two drivers, rendering one driver as surplus and, in the premises, the first Respondent, being junior amongst the two drivers, was retrenched against payment of compensation. The Labour Court, in its impugned order passed on the first Respondent's complaint, considered whether the termination of service amounted to retrenchment within the meaning of Section 2(oo) of the Industrial Disputes Act and whether there was violation of Section 25F or 25G of that Act, as if those were the main questions in the complaint. The Court was of the view that though the first Respondent was rendered surplus at the Mumbai office of the employer, the latter failed to make efforts to deploy him at any other station or branch. The Court noticed that the services of the retrenched

employee were transferable as per the terms of the appointment, but the management failed to transfer him instead of retrenching him and there was no plausible explanation for its failure to do so. The Court was of the view that at the time of his termination, other drivers junior to him were working with other branches of the employer. The Court observed that if a joint list of seniority of these drivers were to be prepared, the Petitioner would not have been found to be the junior-most, and accordingly, the provisions of Section 25G were violated in the present case and the retrenchment was illegal. The Industrial Court in revision concurred with the findings of the Labour Court. The Industrial Court held that as discussed by the Labour Court, the drivers at the head office and the branches were appointed by the Chief Executive Officer in its Bombay Office; that there was no separate recruitment by the branches; and that the principle of “last come first go” was not properly applied in the case on the basis of a joint seniority list. In the premises, it rejected the revision application on merits.

5. The approach of both courts below discloses a misdirection in law in the matter of approaching the subject matter of the complaint. The complaint was of an unfair labour practice within the meaning of clauses (a), (b), (d), (f) and (g) of Item 1 of Schedule IV of the MRTU and PULP Act. Clause (a) deals with discharge or dismissal by way of victimisation, whereas clause (b) deals with discharge or dismissal, which is not in good faith, but in the colourable exercise of the employer's right. Clause (d) deals with discharge or dismissal for patently false reasons. Clause (f) includes discharge or dismissal in utter disregard of principles of natural justice in the conduct of domestic

enquiry or with undue haste, whilst clause (g) deals with a case, where the employee's discharge or dismissal is for mis-conduct of a minor or technical character, without having any regard to the nature of the particular misconduct or the past record of service of the employee, so as to amount to a shockingly disproportionate punishment. None of these ingredients is found by either of the courts below. There is no case here of any victimization or lack of good faith or colourable exercise of rights on the part of the employer or, for that matter, any patently false reasons. So also, there is no whisper of any case of dismissal for misconduct or *sans* domestic enquiry or in haste. The matter was treated by the courts below as a simple exercise of considering the legality of the retrenchment. The Courts below appeared to have concurred with the employer's case that at its establishment in Bombay, the first Respondent had been rendered surplus. The Courts, however, found fault with the order of retrenchment on the basis that the employee ought to have been transferred to the other branches of the employer in other cities and, secondly, that there was no joint list of seniority drawn up by the employer of drivers engaged at its various branches. At the same time, what is striking, and what must be noted at the outset, is that there is no finding by any of the Courts below that there was in fact any need of a driver at any of the employer's branches or that if a joint list had in fact been drawn up, the respondent employee would not have been found to be the juniormost. The Courts appear to have set aside the order of retrenchment only on the basis that the transfer was not considered or that joint seniority list was not drawn up. None of these objections suggests any victimization or lack of good faith or colourable exercise or patently false reason in the matter of retrenchment. Indeed none has

been found by either of the courts below.

6. The judgment of **Raman Rao P.V. vs. J.K. Corporation Ltd.**¹ relied upon by learned Counsel for the first Respondent, which involved the question of failure to transfer employees who were transferable, was in respect of an award on a reference of an industrial dispute challenging the transfer orders. The judgments in cases of **Trade-Wings Limited vs. Prabhakar Dattararam Phodkar**², **Mackinnon Mackenzie and Company Limited vs. Mackinnon Employees Union**³ and **Nav Bharat Hindi Daily, Nagpur vs. Nav Bharat Shramik Sangha**⁴, relied upon by learned Counsel are, again, on merits of retrenchment resting on the principle of “last come first go” and have, for the reasons discussed above, no direct application to our case. The case of **Colour-chem Ltd. vs. Alaspurkar A.L.**⁵ states that a shockingly disproportionate punishment is an instance of victimization. This case has no significance from the point of view of the facts of our case.

7. Both courts below, thus, appear to have misdirected themselves in approaching the subject matter of the complaint and the impugned orders cannot be sustained. Considering, however, the facts of the case in a broader light and also considering the fact that the Petitioner has in terms of an interim order deposited a sum of Rs.1,50,000/- towards back wages and which has since been withdrawn by the first Respondent along with accrued interest against furnishing of

1 (1998), ILLJ, 1084

2 (1992) ICLR, 480

3 (2015) 4 SCC 544

4 1985 ILLJ, 474

5 (1998) 1 LLJ, 694

security, this Court is of the view that the amount invested along with accrued interest may be paid to the first Respondent by way of ex-gratia payment. Learned Counsel for the Petitioner has no objection to this amount being paid as ex-gratia benefit.

8. Accordingly, Rule is made absolute and the petition is allowed by quashing and setting aside the impugned orders of the Labour Court and the Industrial Court dated 15 July 2005 and 6 May 2006, respectively. The Petitioner's complaint, being Complaint (ULP) No.328 of 2000, is rejected. The withdrawal of the amount deposited by the Petitioner in terms of the order dated 7 July 2008 along with accrued interest by the first Respondent shall, however, not be disturbed. The security furnished by the first Respondent for this withdrawal shall stand discharged and be dispensed with.

(S.C. GUPTE, J.)

Smita
Johnson
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