IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.791 OF 2022

MSL Group India & Anr. .. Petitioners
Versus
Eknath Narayan Shelar .. Respondent

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Mr.Anand Pai i/b Udwadia & Co. for the Petitioners.
None for the Respondent.

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CORAM: RAVINDRA V. GHUGE, J.
DATED : 10th FEBRUARY, 2022

P.C:-

1. By this petition, the petitioner-Management has put forth prayer clause 22(a) and 22(b) as under :-

> "a) That this Hon'ble Court be pleased to issue a writ of certiorari or a writ in the nature of certiorari or any other appropriate writ, order or direction calling for the records and proceedings in Complaint (ULP) No.30 of 2016 and Revision Applications (ULP) Nos.81 of 2018 and 134 of 2017 respectively, and after examining the legality, validity and propriety of the impugned Orders i.e. (i) the Order dated 6th November 2017 passed by the 6th Labour Court, Mumbai in Complaint (ULP) No.30 OF 2016 and (ii) Common Order dated 6th November, 2019 passed in Revision Application (ULP) Nos.81 of 2018 and 134 of 2017 was passed by the Industrial Court, Mumbai being **Exhibits-"B" and "C"** hereto, this Hon'ble Court be pleased to quash and set aside the impugned Orders;

(b) That Pending the hearing and final disposal of this Petition, this Hon'ble Court be pleased to stay the operation, implementation and enforcement of the impugned orders i.e. (i) the Order dated 6th November, 2017 passed by the 6th Labour Court, Mumbai in Complaint(ULP) No.30 of 2016 and (ii) Common Order dated 6th November, 2019 passed in Revision Applications (ULP) Nos.81 of 2018 and 134 of 2017 passed by the Industrial Court, Mumbai and/or direct the Respondent not to take any coercive action in furtherance of the impugned Orders".

2. I have considered the strenuous submission of the learned Advocate for the Management and with his assistance, I have gone through the grounds (A to Z) and (AA to HH).

3. The admitted factors in this case are as under :-

(a) The respondent was appointed by order of appointment dtd. 25/05/2004.

(b) By an order dated 13/12/2015, he has been terminated from service on the ground that the organization is undergoing a major re-structuring and resizing, based on the new business requirements.

(c) The Management has neither averred nor taken a stand that the respondent is not a workman as defined under Section 2(s) of the Industrial Disputes Act, 1947 (for short, "**the ID Act**").

(d) All the 15 employees who were office assistants, have been removed from the service of the petitioner.

(e) The respondent was paid one month salary in lieu of notice period.

(f) A seniority list of the workers/office assistants was not displayed by the employer.

4. It is contended that the employer has a right to terminate an employee as per the appointment order. Mere termination does not render the order illegal. The termination order cannot amount to an unfair labour practice. After the Management has paid one month's salary and five months' wages as ex-gratia amount alongwith leave encashment, the termination cannot be interfered with. Having accepted the amounts, the employee is precluded from challenging his termination.

5. I have gone through the judgments of the Labour Court and the Industrial Court, dtd. 06/11/2017 and 06/11/2019, respectively. After the respondent approached the Labour Court by preferring complaint (ULP) No.30 of 2016, the Management entered a written statement dated August, 2016. There is not a whisper in the written statement that the complainant/worker is not a workman. It is admitted that all the 15 office assistants have been removed from employment. It is further admitted that the petitioner/ Management has not permanently closed down it's business.

6. It is a settled position of law that acceptance of retrenchment compensation, does not amount to any worker

comprising his rights qua his retrenchment. Payment of retrenchment compensation to an employee, who has completed 240 days in 12 consecutive calendar months preceding the date of reference, is provided in Section 25F. The payment of such compensation is a legal obligation on the employer and receiving such compensation amount does not extinguish the right of the worker to question his retrenchment.

7. Section 25B and 25F of the ID Act read as under :-

> **25-B. Definition of continuous service**.- For the purposes of this Chapter,-
>
> (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;
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> (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-
>
> (a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-
> (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
>
> (ii) two hundred and forty days, in any other case;
>
> (b) for a period of six months, if the workman, during a period of six calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-

(i) ninety-five days, in the case of a workman employed below ground in a mine; and

(ii) one hundred and twenty days, in any other case.
Explanation.-For the purposes of clause (2), the number of days on which a workman has actually worked under an employer shall include the days on which-

(i) he has been laid-off under an agreement or as permitted by standing orders made under the Industrial Employment (Standing Orders) Act, 1946 (20 of 1946), or under this Act or under any other law applicable to the industrial establishment;

(ii) he has been on leave with full wages, earned in the previous years;

(iii) he has been absent due to temporary disablement caused by accident arising out of and in the course of his employment; and

(iv) in the case of a female, she has been on maternity leave; so, however, that the total period of such maternity leave does not exceed twelve weeks.]

25-F. Conditions precedent to retrenchment of workmen.- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-
(a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:

(b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and

(c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette."

8. It is seen from the record that one month's salary in lieu of notice period has been paid. However, retrenchment compensation at the rate of 15 days' wages per year of service put in by the worker, has not been paid. For the sake of assumption, the ex-gratia amount equivalent to five months' salary for the eleven years' and six months' service put in by the worker, may be treated as payment of retrenchment compensation. However, it is an admitted position that no notice was served upon the appropriate Government as required under sub-section (c) of Section 25F. The Andhra Pradesh High Court has held in ***Management of Oasis School, Hyderabad Vs. Labour Court, Himayatnagar, Hyderabad & Ors. 1990 (Vol II) CLR 506*** that it is competent for retrenched workman to challenge the validity of retrenchment even after receiving retrenchment compensation. The three conditions set out below Section 25F are axiomatic and are necessary pre-conditions for retrenchment. In ***Umesh Chandra Pandey & Ors. Vs. State of U.P. & Ors., 1991 Lab IC 1449,*** the Allahabad High Court concluded that the acceptance of the retrenchment compensation offered by the employer under Section 25F is not a bar for the retrenched employee to challenge the retrenchment.

9. It is also an admitted position that the entire strength of 15 office assistants were terminated, including the respondent/complainant. This practically amounts to causing a closure of the establishment. If new workers are to be engaged, such closure has to be lifted. Sections 25H and 25G of the ID Act read with Rule 82 of the Industrial Disputes

(Bombay) Rules, 1957, have to be complied with and the retrenched employees have to be offered re-employment by following their seniority.

10. In my view, re-structuring of the organisation or resizing of the labour force does not give liberty to an employer to dispense with the services of all the employees, the office assistants in this case and recruit fresh hands in their place. Even if they may have been retrenched, if the employer has not closed down the establishment and recruits fresh hands, the retrenched workers have a right to claim reinstatement. In view of the above, the Labour Court was right in coming to a conclusion that the termination of the respondent would be covered by Item 1 of Schedule IV of the MRTU & PULP Act, 1971.

11. The contention of the Management that the appointment order empowers it to terminate the service of an office assistant at any time, is wholly misconceived. The services of a permanent employee, who has completed 240 days in each calendar year and is entitled to the deemed status of a permanent employee in view of Standing Orders 4C and 4D of the MSO provided under the Industrial Employment (Standing Orders) Act, 1946, are protected against arbitrary termination.

12. The last limb of submissions of the Management that the Labour Court did not grant backwages and the Industrial

Court erroneously granted 50% backwages, is unsustainable. It is noteworthy that the employee preferred Revision (ULP) No.81 of 2018 and the Management preferred Revision (ULP) No.134 of 2017, under Section 44 of the State Act, before the Industrial Court. The Industrial Court recorded that the employee had specifically led oral evidence stating that he is not in gainful employment. The onus and burden of stepping into the witness box and stating on oath that he is not gainfully employed, lies on the shoulders of the workman in view of ***J. K. Synthetics Ltd. Vs. K.P.Agrawal & Anr., [(2007) 2 Supreme Court Cases 433]***. Once this burden is discharged, it is for the Management to refute the claim and establish that he is in gainful employment. In my view, the Industrial Court rightly adopted a pragmatic approach after considering the law laid down by the Hon'ble Supreme Court in the case of ***Deepali Gundu Surwase Vs. Kranti Junior Adhyapak Mahavidyalaya (D.Ed.) and others [(2013) 10 SCC 324]*** and granted 50% backwages.

13. As such, this petition, being devoid of merits, is, dismissed.

(RAVINDRA V. GHUGE, J.)

M.M.Salgaonkar