HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

LPA No. 163/2022

Reserved On: 3rd of March, 2023
Pronounced On: 10th of March, 2023

India Tourism Development Corporation Limited & Anr.

… Appellant(s)

Through: -
Mr Jahangir Iqbal Ganai, Senior Advocate with
Mr Omais Kawoos, Advocate.

V/s

Fayaz Ahmad Sheikh & Ors.

… Respondent(s)

Through: -
Mr Mohammad Iqbal Dar, Advocate with
Mr Mohammad Yawar, Advocate.

CORAM:

Hon'ble Mr Justice Rajnesh Oswal, Judge
Hon'ble Mr Justice Mohan Lal, Judge

(JUDGMENT)

(Oswal-J):

01. The Respondents, after being retrenched by the Appellant-Corporation under Section 25-F of the Industrial Disputes Act, 1947 (for short 'the Act of 1947') on the ground of closure of the establishment, raised a dispute in terms of Section 2-A of the Act of 1947 before the Conciliation Officer (Deputy Labour Commissioner), Kashmir Division. As the conciliation efforts failed, the Conciliation Officer submitted a report to the then State Government (now Union Territory) under the Act of 1947, which resulted into a reference of the Government under SRO 244 dated 26th of July, 2004 to the Industrial Tribunal-cum-Labour Court, J&K, Srinagar (fort short 'the Tribunal'). The learned Tribunal, after considering the rival contentions of the contesting parties, vide award dated 13th of June, 2016, directed the Appellant-Corporation to reinstate the Respondents with

full back wages on revision basis, along with other consequential benefits with 9% interest on full back wages.

02. The Appellant-Corporation assailed the aforesaid award dated 13th of June, 2016 passed by the Tribunal through the medium of a Writ Petition bearing OWP No. 472/2017, wherein the learned Writ Court, vide its Judgment dated 25th of May, 2022, passed the following directions:

> i. "The impugned award in so far as it holds the retrenchment of the respondents herein illegal by the Petitioner-Corporation is upheld not calling for any interference;
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> ii. The grant of back wages by the Tribunal to the respondents herein and the award of interest thereupon shall stand set aside;
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> iii. The reinstatement of the respondents herein ordered in terms of the impugned award shall be applicable to respondents 2 and 4 only; and
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> iv. The Tribunal shall re-visit and reconsider the case of the respondents 1, 3 and 5 afresh for payment of compensation in lieu of the reinstatement besides the grant of retiral benefits, as such, the matter is remanded back to the Tribunal for re-visiting and reconsidering the said issue expeditiously, preferably, within a period of three months from the date copy of this order is made available to the Tribunal."

03. The Appellant-Corporation, being aggrieved of the aforesaid Judgment dated 25th of May, 2022, has assailed the same through the medium of this *intra* Court appeal with respect to Respondent Nos. 2 and 4 only, *inter alia*, on the ground that the learned Writ Court has wrongly rejected the plea of the Appellants that after accepting the retrenchment amount, the notice amount, gratuity and other terminal dues voluntarily and without any protest, the Respondents could not have raised any dispute about their retrenchment, on the premise that the Appellants had not raised the said plea before the learned Tribunal. It is also stated that the non-compliance of Section 25-F of the Act of 1947 would not result in the issuance of a direction of reinstatement of the retrenched workmen. Further, the Appellants also pleaded that there was no discrimination with the Respondents, as such, in the present facts and circumstances of the case, the

Order of retrenchment could not have been upset consequently leading to the re-instatement of the Respondents.

04. Mr Jahangir Iqbal Ganai, the learned Senior Counsel, appearing for the Appellants, submitted that the learned Writ Court has wrongly rejected the contention of the Appellants that the Appellants cannot raise the plea before the Writ Court that the Respondents cannot raise a dispute after having accepted the retrenchment amount and the other terminal benefits on the ground that the said plea was not raised before the Tribunal. The learned Senior Counsel further argued that in case the retrenchment of the workmen is found to be illegal, then the workmen can be suitably compensated instead of ordering reinstatement of the said workmen. Mr Jahangir, in this behalf, placed reliance upon the Judgment passed by the Hon'ble Apex Court in case titled **'Bharat Sanchar Nigam Limited v. Bhurumal; (2014) 7 Supreme Court Cases 177'**.

05. Per contra, Mr M. I. Dar, the learned Counsel appearing for the Respondents, submitted that the Appellants cannot file the appeal against the Respondent Nos. 2 and 4 only because they have not filed the appeal with regard to the rest of the Respondents, *viz.* Respondent Nos. 1, 3 and 5 as the case of the Respondents was identical in nature. He further submitted that the Appellant No.1 has resorted to discriminatory attitude while passing the Order of retrenchment, therefore, the present appeal is required to be dismissed on that ground alone.

06. Heard and perused the records.

07. Perusal of the Judgment of the Writ Court, as mentioned hereinabove, reveals that all the Respondents were retrenched, but three Respondents attained superannuation as a result of which the learned Writ Court directed the Tribunal to re-visit and re-consider their case for the payment of compensation in *lieu* of reinstatement, besides the grant of retiral benefits in their favour. This clearly shows that the Appellants have accepted the fact that the order of retrenchment was bad in law *qua* the

Respondents who had attained superannuation. Furthermore, the perusal of the award dated 13th of June, 2016 passed by the Tribunal reveals that the learned Tribunal has returned a finding that the Appellants could have passed the order for voluntary retirement of the workmen and given them all the retirement benefits or it could have transferred these employees to Delhi for their adjustment in different units like other seven employees who had been already adjusted in its different units at Delhi before the retrenchment of the present applicants/ workmen. Likewise, the Tribunal has also returned a finding that the workmen were promoted and transferred to other units during their service tenure in accordance with Paras 7 and 8 of their appointment orders and also during winter closure of the sound and light show, the workmen were invariably transferred to Delhi to serve in other units of the Corporation every year as per the terms and conditions of their appointment orders. In view of above findings returned by the Tribunal, it is evident that, besides returning a finding that there has not been valid retrenchment of the Respondents in terms of Section 25-F of the Act of 1947, the Tribunal has also found the retrenchment of the Respondents as discriminatory. This is an established fact that the Respondents were not paid retrenchment compensation at the time of retrenchment in terms of Section 25-F of the Act of 1947, but thereafter.

08. The Appellants, by not preferring an appeal against the order passed in favour of the Respondents who attained superannuation, have, in fact, accepted the findings returned by the Tribunal that the order of retrenchment was illegal and discriminatory, as such, the Appellants cannot be heard to say in case of Respondents other than those who superannuated that there was no discrimination on the part of the Appellants. More so, the findings returned by the Tribunal are findings with regard to facts and, therefore, same cannot be assailed in a Writ Petition, unless and until the same are perverse.

09. It is pertinent to note here that although the learned Writ Court has not considered the plea that the Respondents are estopped from

challenging the order of retrenchment, after accepting the retrenchment compensation on the ground that the said plea was not raised before the Tribunal, we find that the learned Tribunal has already considered the said plea of the Appellants but did not accept the same. From the records, it is established that the retrenchment amount was paid to the Respondents in utter disregard of Section 25-F of the Act of 1947 and, therefore, once the employer has not followed the statutory obligation, then the acceptance of the retrenchment amount would not to be an *estoppel* for the workmen to challenge the order of retrenchment. It is trite law that if the manner of doing a particular act is prescribed under any Statute, then the act must be done in that manner only. Once an act prescribed under any Statute is not done in accordance with the conditions prescribed for its performance, then the doer of the said act cannot derive any benefit of that Act. This principle of law is strictly applicable in the instant case as the employer (Appellants) did not proceed in terms of Section 25-F of the Act of 1947.

10. It would be relevant to take note of Paras 33 and 35 of the Judgment of Hon'ble Supreme Court passed in **BSNL v. Bhurumal's** case supra;

> "33. It is clear from the reading of the aforesaid judgments that the ordinary principle of grant of reinstatement with full back wages, when the termination is found to be illegal is not applied mechanically in all cases. While that may be a position where services of a regular/permanent workman are terminated illegally and/or mala fide and/or by way of victimization, unfair labour practice etc. However, when it comes to the case of termination of a daily wage worker and where the termination is found illegal because of procedural defect, namely in violation of Section 25-F of the Industrial Disputes Act, this Court is consistent in taking the view in such cases reinstatement with back wages is not automatic and instead the workman should be given monetary compensation which will meet the ends of justice. Rationale for shifting in this direction is obvious.
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> …..
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> 35. We would, however, like to add a caveat here. There may be cases where termination of a daily wage worker is found to be illegal on the ground it was resorted to as unfair labour practice or in violation of the principle of last come first go viz. while retrenching such a worker daily wage juniors to him were retained. There may

> also be a situation that persons junior to him wee regularized under some policy but the concerned workman terminated. In such circumstances, the terminated worker should not be denied reinstatement unless there are some other weighty reasons for adopting the course of grant of compensation instead of reinstatement. In such cases, reinstatement should be the rule and only in exceptional cases for the reasons stated to be in writing, such a relief can be denied."

As per the law laid down by the Hon'ble Apex Court in the aforesaid Judgment, it is evident that when the termination of the workmen is found to be illegal on account of procedural defect, then, in such cases, the payment of compensation should be the rule and where the termination is on account of unfair labour practice, then the reinstatement should be the rule.

11. From the perusal of the record, it transpires that some error has crept in so far as the superannuated workmen are concerned. The Respondent Nos. 3 and 5 have rightly been mentioned by the Writ Court in its Judgment to have attained superannuation, but so far as the Respondent Nos. 1 and 2 are concerned, i.e., Fayaz Ahmad Sheikh S/o Abdul Jabbar Sheikh R/o Mohalla Doonikhud, Buchwara, Dalgate, Srinagar; and Abdul Rashid Dar S/o Abdul Gani Dar R/o Aramwari Rajbagh, Srinagar, some discrepancy has crept in the Judgment of the Writ Court. The Appellants have assailed the Judgment of the Writ Court *vis-à-vis* Respondent Nos. 2 and 4 only, who are considered to have been in service, but the fact remains that the Respondent No.2 has already superannuated and it is the Respondent No.1 who is yet to attain superannuation. In view of this, we clarify that in so far as the observation of the Writ Court pertaining to the superannuation of the Respondents is concerned, same was pertaining to Respondent Nos.2, 3 and 5, while as the relief of reinstatement shall pertain to Respondent Nos. 1 and 4.

12. Except for the above clarification/ modification, we do not find any reason whatsoever to interfere with the Judgment impugned passed by the Writ Court. Accordingly, the present appeal, along with the connected

CMs, is **dismissed** with the observations made hereinabove. Interim direction(s), if any subsisting as on date, shall stand vacated.

(Mohan Lal)
Judge

(Rajnesh Oswal)
Judge

SRINAGAR
March 10th, 2023
"TAHIR"

i. Whether the Judgment is reportable? Yes.