ARMED FORCES EX OFFICERS MULTI SERVICES COOPERATIVE SOCIETY LTD. A

v.

RASHTRIYA MAZDOOR SANGH (INTUC)

(Civil Appeal No. 2393 of 2022) B

AUGUST 11, 2022

[B. R. GAVAI AND PAMIDIGHANTAM SRI NARASIMHA, JJ.]

Service Law – Reinstatement of employees – Drivers-members of the respondent Union were employed by appellant-Cooperative society through a settlement for pay and allowances – The settlement expired – Fresh negotiation commenced – In the negotiations, the employees demanded for a pay hike and permanency of employment – The said demand resulted into failure of settlement – Conciliation proceedings invoked – During pendency of conciliation proceedings employees resorted to strike – After a short span of strike, the employees rejoined services – Appellant retrenched the services of employees on the ground of closure of business – Respondent Union raised the concern regarding the same before the Conciliation Officer and demanded reinstatement – The appellant offered re-employment to employees on new terms and conditions, and as fresh employment – Upon failure of conciliation proceedings matter was referred to Industrial Tribunal – Tribunal set aside the termination of employees and directed reinstatement with continuity of service and 75% back wages – Appellant filed writ petition before the High Court – The High Court affirmed the findings of the Tribunal – Before the Supreme Court, the appellant submitted that, (i) it was not the case of closure but a simple case of retrenchment; (ii) it was a case of re-organising business; (iii) Tribunal was not justified in directing continuity of service; and (iv) direction to pay 75% back wages was contrary to the principles laid down by the Supreme Court – Held: The Tribunal as well as the High Court have held that the method and manner by which the workmen were retrenched clearly demonstrates that it is virtually a closure – These findings of facts are confirmed – The bonafide policy decision for reorganising business is within an enterprise's propriety decision – However, in the instant case, the Tribunal has come to the conclusion C D E F G H

A *that the entirety of business was not lost due to the strike and the retrenchment was imposed as retribution against the workmen for going on a strike – Thus, bonafide policy decision for reorganising business will not apply to the facts of the instant case – As far as direction of continuity of service and back wages are concerned,*
B *the order of retrenchment was not bonafide, once the orders of retrenchment are set aside, the workmen will naturally be entitled to continuity of service with backwages – The Tribunal had considered the matter in detail and after appreciating the oral and documentary evidence, the Tribunal directed reinstatement of the employees with only 75% back wages – The said finding was upheld by the High*
C *Court, thus cannot be interfered with by the Supreme Court u/Art.136 of the Constitution.*

Dismissing the appeal, the Court

HELD: 1. With respect to the first submission of appellant,
D **that this is not at all a case of closure but a simple case of retrenchment, the Tribunal as well as the High Court have held that the method and manner by which the workmen were retrenched clearly demonstrates that it is virtually a closure. This Court have no hesitation in confirming these findings of fact. The act of terminating the services of all the drivers at the same time,**
E **coupled with the statement of the Appellant that the entire business is closed down, was sufficient to convey to the workers and the Union that the transport business had come to a standstill and that there was no scope of continuing the business any further. Further, This Court also concur with the findings of fact about the lack of *bona fide* in the Appellant's offers of re-employment**
F **on new terms and conditions, and without continuity of service. [Para 14][1064-E-G]**

2. The second submission of appellant that the management has a right to organise its business based on economic considerations is well taken. There is also no quarrel with the
G **principle of *Parry & Co. Ltd.* v. *P.C. Pal* which laid down the proposition that a *bona fide* policy decision for reorganising the business based on economic considerations is within an enterprise's proprietary decision and retrenchment in this context must be accepted as an inevitable consequence. The answer is**
H **here itself, and pertains to the material requirement of *bona fide***

of the decision. In the present case, the Tribunal has come to the conclusion that the entirety of business is not lost due to the strike and the retrenchment seems to have been imposed as retribution against the workmen for going on a strike. It is for this reason that the decision of this Court in the case of *Parry Company* will not apply to the facts of the present case. [Para 15][1065-B-C]

3. The further submission of the Appellant that the Tribunal is not justified in directing continuity of service, as in the case of retrenchment followed by reemployment, the workmen are not entitled to continuity of service. The Court held that there is no quarrel with the principle of law that reemployment of retrenched workmen does not entitle them to claim continuity of service as held in various cases. However, the principle laid down in these judgments will only apply to cases where the retrenchment is *bona fide*. The Tribunal has held that the retrenchment is not *bona fide*. Once the orders of retrenchment are set aside, the workmen will naturally be entitled to continuity of service with order of back wages as determined by a Tribunal or a Court of law. [Para 16][1065-D-F]

4. As regards the submission of Appellant, about the legality of awarding 75% back wages, it was argued before this court that the workmen were obligated to prove that they were not gainfully employed after the dismissal from service. The Tribunal has considered the matter in detail and after appreciating the oral and documentary evidence, the Tribunal directed reinstatement of the employees with only 75% back wages. Whether a workman was gainfully employed or not is again a question of fact, and the finding of the Tribunal as upheld by the High Court, cannot be interfered with by the Supreme Court in exercising its power under Article 136 of the Constitution of India. [Paras 17, 18][1065-G; 1066-B-C]

De*epali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya (D. Ed.) & Ors.* **(2013) 10 SCC 324 : [2013] 9 SCR 1 – relied on.**

M. L. Singla v. Punjab National Bank **(2018) 18 SCC 21 : [2018] 11 SCR 455.,** *Management of Regional*

A *Chief Engineer, Public Health and Engineering Department, Ranchi v. Their Workmen* **(2019) 18 SCC 814;** *Mackinnon Mackenzie and Company Ltd v. Mackinnon Employees Union,* **(2015) 4 SCC 544 : [2015] 4 SCR 45;** *Workmen of Subong Tea*
B *Estate,Represented by the Indian Tea Employees Union v. Outgoing Management of Subong Tea Estate and Anr.* **(1964) 5 SCR 602,** *Cement Corpn. of India Ltd. v. Presiding Officer Industrial Tribunal-cum-Labour Court and Anr.* **(2010) 15 SCC 754 : 2001 (1) Suppl. JT**
C **619;** *Maruti Udyog Ltd v. Ram Lal and Ors.* **(2005) 2 SCC 638 : [2005] 1 SCR 790 – referred to.**

Parry & Co. Ltd. v. P. C. Pal **(1969) 2 SCR 976 – held inapplicable.**

Case Law Reference

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[2018] 11 SCR 455	**referred to**	**Para 11**
[2013] 9 SCR 1	**relied on**	**Para 11**
[2015] 4 SCR 45	**referred to**	**Para 12**
E **[1969] 2 SCR 976**	**held inapplicable**	**Para 15**
[2005] 1 SCR 790	**referred to**	**Para 16**

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 2393 of 2022.

F From the Judgment and Order dated 17.01.2019 of the High Court of Judicature at Bombay in Writ Petition No. 1240 of 2018.

Chander Uday Singh, Sr. Adv., Pratap Venugopal, Ms. Surekha Raman, Atman Mehta, Anand Pai, Akhil Abraham Roy, Ms. Viddushi, Ms. Bidya Mohanty, M/s K J John and Co., Advs. for the Appellant.

G Nitin A. Kulkarni, Nitin S. Tambwekar, Seshatalpa Sai Bandaru, Advs. for the Respondent.

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The Judgment of the Court was delivered by

PAMIDIGHANTAM SRI NARASIMHA J.

1. The Appellant is a cooperative society run by ex-officers of the three defence forces, engaged in the business of providing support services such as transportation, house-keeping and security services to companies and Government establishments. Respondent is a labour union affiliated with the Indian National Trade Union Congress, representing the drivers formerly employed by the Appellant.

2. Fifty-five drivers who are members of the Respondent Union were employed by the Appellant from 1998 through a settlement for pay and allowances. As the settlement expired on 30.06.2004, fresh negotiations between the employer and the employees commenced but did not result in any easy settlement due to claims for pay hike and demands for permanency of casual employees. Conciliation proceedings were invoked on 22.01.2007 and proceedings before the Deputy Commissioner of Labour, Pune were going on.

3. While the next date of conciliatory proceeding was fixed on 05.02.2007, the employees resorted to strike on 23.01.2007. On the same day, the Appellant filed a complaint before the Industrial Court, asserting that the strike was illegal, and the employees should be made liable for unfair labour practices. The Industrial Tribunal by an interim order dated 05.02.2007 directed employees to refrain from obstructing the movement of men, material and vehicles from the parking lots of the Appellant, and holding violent demonstrations within two hundred meters of Appellant's premises.

4. The Industrial Tribunal later directed the Appellant to allow the employees to join duties and the employees in fact joined services on 16.03.2007. We may mention here itself that two years later, i.e. on 27.11.2009, the Industrial Tribunal by its final order declared the strike carried out by the Respondents for the period between 23.01.2007 and 15.03.2007 as illegal in terms of Section 24(1)(a) of the Maharashtra Recognition of Trade Unions And Prevention of Unfair Labour Practices Act, 1971.

5. During the pendency of the above referred proceedings, that is, immediately after 16.03.2007 when employees re-joined services, after the short period of strike, the Appellant through individual letters dated 22.03.2007 'retrenched' the services of all the fifty-five employees, on

A the grounds that Appellant had closed its business. By the said letter, the employees were offered retrenchment compensation as per Section 25F of the Industrial Disputes Act, 1947[1]. The relevant portion of the Termination Letter is:

> *"You are being informed that as the bus services of the society*
> B *have been broken from 23rd January, 2007 the concerned companies have decided to stop their bus services and as per that our transport contracts have expired. In this situation as the business is closed, it is not possible to give you work hence there is no option but to remove you from services*."

C 6. Respondent Union raised concerns with the Conciliation Officer. They demanded reinstatement of all fifty-five workmen with continuity of services and back wages, contending that there was no closure of the transport activities of the Appellant. They claimed that the act of terminating all the employees is a virtual closure, which is completely illegal.

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7. While the matter was being negotiated, the Appellant started offering re-employment to all the employees through individual letters dated 13.09.2007, followed by a public notice. This offer was on new terms and conditions, and as fresh employment. This is an important fact and as the narration of events would witness, it had a direct bearing
E on the decision of the Industrial Tribunal.

8. As the Conciliation Officer submitted a Failure Report, the Government referred the dispute to the Industrial Tribunal, Pune[2] for answering the demand of the workmen for reinstatement of fifty-five drivers with continuity of service and full back wages. Before the Tribunal,
F the parties examined thirty-one witness and marked documents with respect to matters such as strike, salary slips, retrenchment order, re-employment offer, Appellant's communication with its business clients, etc.

9. By its Award dated 07.09.2017, the Tribunal answered the
G reference in the affirmative by setting aside the termination of employees and directing reinstatement. While considering the legality of retrenchment, the Tribunal noted that there was no complete shutdown of the company's transport business, and that retrenchment of all the

[1] hereinafter, referred to as 'the Act'.

H [2] hereinafter, referred to as 'the Tribunal'.

drivers at one go amounted to closure, meted out as a punishment for resorting to strike. The fact that all the retrenched employees were offered re-employment shortly thereafter further evidenced the lack of *bona fide* intention in the act of retrenchment. The Tribunal discarded the re-employment offers as immaterial, as it forced the employees to accept fresh appointment, losing their long-standing service. The orders of termination were set aside and the workmen were directed to be reinstated with continuity of service and 75% back wages, save eight employees who admitted to gainful employment post retrenchment.

10. Aggrieved by the Award, the Appellant preferred Writ Petition No. 1240 of 2018 before the High Court of Bombay. The Respondent Union also filed Writ Petition No. 5075 of 2018 against the Tribunal's decision to the extent of denial of back wages to eight employees. The High Court affirmed the Tribunal's findings on all counts, and concluded that they were well-founded on evidence and were in accordance with law. Thus, it confirmed the reinstatement of employees with 75% back wages and other consequential benefits. It also confirmed the Tribunal's denial of back wages to the eight employees who admitted to being gainfully employed. It is this order of the High Court that the Appellant challenges in the present Civil Appeal.

11. Shri Chander Uday Singh, Senior Advocate assisted by Shri Pratap Venugopal, Ms. Surekha Raman, Shri Atman Mehta, Shri Anand Pai, Shri Akhil Abraham Roy, Ms. Viddushi and Ms. Bidya Mohanty, Advocates appearing for the Appellant, made four-fold submissions before us. They argued that the illegal strike carried out by the Respondent led to the termination of Appellant's transport contracts with its clients, creating a situation of surplus of labour, necessitating the retrenchment. Appellant did not effectuate any closure by the termination letters dated 22.03.2007, but was merely re-organising its business by temporarily shutting down their transport activities. He also challenged the Industrial Tribunal's finding regarding the offer of re-employment being illegal, by arguing that Appellant was only complying with the stipulations of

Section 25H of the Act which grants preference to retrenched employees in re-employment. He would finally submit that the directions of the Tribunal as well as the High Court to pay 75% back wages is contrary to the principles laid down by this Court. He relied on *M.L. Singla* v. *Punjab National Bank*[3], *Deepali Gundu Surwase* v. *Kranti*

[3] (2018) 18 SCC 21.

A *Junior Adhyapak Mahavidyalaya (D. Ed.) & Ors*[4], *Management of Regional Chief Engineer, Public Health and Engineering Department, Ranchi* v. *Their Workmen*[5].

12. Conversely, learned counsels for the Respondent, Shri Nitin A. Kulkarni, assisted by Shri Nitin S. Tambwekar, Advocate and Shri B Seshatalpa Sai Bandaru, AOR, submitted that the retrenchment, effectuated as if there was closure, is illegal as there was no *de facto* closure of Appellant's transport business. Even if such a closure was effected, it is illegal as sixty-days' notice was not given in terms of Section 25FFA of the Act. With respect to the question of back wages, he submitted that the Tribunal correctly relied on the testimonies of C retrenched drivers, admitting to unemployment post retrenchment. He relied on the decisions of this Court in *Mackinnon Mackenzie and Company Ltd* v. *Mackinnon Employees Union*,[6] and *Workmen of Subong Tea Estate, Represented by the Indian Tea Employees Union* v. *Outgoing Management of Subong Tea Estate and Anr*.[7]

D 13. In his rejoinder, Shri C.U. Singh submitted that even as per the Statement of Claim submitted by the Respondent Union before the Tribunal, it was clear that the employees always understood their termination as retrenchment and not in course of a closure.

Analysis:

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14. With respect to the first submission of Shri C. U. Singh, that this is not at all a case of closure but a simple case of retrenchment, the Tribunal as well as the High Court have held that the method and manner by which the workmen were retrenched clearly demonstrates that it is virtually a closure. We have no hesitation in confirming these findings of F fact. The act of terminating the services of all the drivers at the same time, coupled with the statement of the Appellant that the entire business is closed down, was sufficient to convey to the workers and the Union that the transport business had come to a standstill and that there was no scope of continuing the business any further. Further, we also concur G with the findings of fact about the lack of *bona fide* in the Appellant's offers of re-employment on new terms and conditions, and without

[4] (2013) 10 SCC 324.
[5] (2019) 18 SCC 814.
[6] (2015) 4 SCC 544.
H [7] (1964) 5 SCR 602.

continuity of service. It is for these reasons that the Tribunal and the High Court held that it was virtually a case of closure and correctly so.

15. The second submission of Shri C.U. Singh that the management has a right to organise its business based on economic considerations is well taken. There is also no quarrel with the principle of *Parry & Co. Ltd.* v. *P.C. Pal*[8], which laid down the proposition that a *bona fide* policy decision for reorganising the business based on economic considerations is within an enterprise's proprietary decision and retrenchment in this context must be accepted as an inevitable consequence. The answer is here itself, and pertains to the material requirement of *bona fide* of the decision. In the present case, the Tribunal has come to the conclusion that the entirety of business is not lost due to the strike and the retrenchment seems to have been imposed as retribution against the workmen for going on a strike. It is for this reason that the decision of this Court in the case of *Parry Company* (supra) will not apply to the facts of the present case.

16. The further submission of the Appellant that the Tribunal is not justified in directing continuity of service, as in the case of retrenchment followed by re-employment, the workmen are not entitled to continuity of service needs to be answered. Even here, there is no quarrel with the principle of law that re-employment of retrenched workmen does not entitle them to claim continuity of service as held in *Cement Corpn. of India Ltd.* v. *Presiding Officer Industrial Tribunal-cum-Labour Court and Anr.*[9], as well as the *Maruti Udyog Ltd* v. *Ram Lal and Ors.*[10]. However, the principle laid down in these judgments will only apply to cases where the retrenchment is *bona fide*. The Tribunal has held that the retrenchment of all the drivers followed by an offer of re-employment on new terms and conditions is not *bona fide*. Once the orders of retrenchment are set aside, the workmen will naturally be entitled to continuity of service with order of back wages as determined by a Tribunal or a Court of law.

17. As regards the last submission by Shri C.U. Singh, about the legality of awarding 75% back wages, it was argued before us that the workmen were obligated to prove that they were not gainfully employed after the dismissal from service. It was also submitted that they must at

[8] (1969) 2 SCR 976.
[9] (2010) 15 SCC 754.
[10] (2005) 2 SCC 638.

A least plead on oath that they were unemployed. Shri C.U. Singh took us through the evidence and on the basis of statements made therein has submitted that the parties have admitted to have worked at some place or the other through the pendency of the litigation.

18. The Tribunal has considered the matter in detail and after
B appreciating the oral and documentary evidence, the Tribunal directed reinstatement of the employees with only 75% back wages. Whether a workman was gainfully employed or not is again a question of fact, and the finding of the Tribunal as upheld by the High Court, cannot be interfered with by the Supreme Court in exercising its power under Article
C 136 of the Constitution of India. The following findings of the Tribunal are conclusive:

> "*In so far as back wages to be paid to the workers are concerned, it is a matter of record that 27 workers have stepped into the witness box. Even the President of the Second Party union is also examined. All the workers and President of the*
D *Union have consistently stated in their examination in chief that they have remained unemployed after their termination and they failed to procure alternate employment also.*"

19. In *Deepali Gundu Surwase* v. *Kranti Junior Adhyapak Mahavidyalaya* (supra), this Court held:

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> "38.3 ……*If the employer wants to avoid payment of full back wages, then it has to plead and also lead cogent evidence to prove that the employee/workman was gainfully employed and was getting wages equal to the wages he/she was drawing prior to the termination of service*……..."

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(emphasis added)

With respect to the obligation of the Appellant, the finding of the Tribunal is simple that:

> "*On the contrary, in the entire evidence filed by the First Party,*
G *the First Party has not brought an iota of evidence to show that all the workers were employed elsewhere and were earning for their livelihood*."

20. Having considered the matter in detail we uphold and affirm the judgment of the High Court of Judicature at Bombay in W.P. No.

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1240 of 2018 dated 17.01.2019, and dismiss the Civil Appeal No. 2393 of 2022. Parties shall bear their own costs. A

Ankit Gyan Appeal dismissed.