
(2003) 01 BOM CK 0014

In the Bombay High Court

Case No : Writ Petition No. 1021 of 1996

Bharatiya Dak Tar Mazdoor Manch

APPELLANT

Vs

General Manager, Kalyan Telecom District and Another

RESPONDENT

Date of Decision : 17-01-2003

Acts Referred:

Evidence Act, 1872 — Section 101

Industrial Disputes Act, 1947 — Section 10(1), 25B(2), 25F

Citation : (2003) 3 ALLMR 950 : (2003) 4 BomCR 189

Hon'ble Judges : D.B. Bhosale, J

Bench : Single Bench

Advocate : S.M. Dharap, for the Appellant; S.R. Rajguru, for the Respondent

Final Decision : Dismissed

Judgement

Bhosale D.B., J.—The award passed by the Presiding Officer, Central Government Industrial Tribunal, is under challenged in the present writ petition filed by the union registered under the Trade Unions Act, 1926. The impugned award dated 8th September, 1994 arises from the reference made by the Government of India, Ministry of Labour, New Delhi to the Industrial Tribunal for adjudication u/s 10(1)(d) of the Industrial Disputes Act, 1947, (for short, "I.D. Act").

2. The facts leading to the present writ petition, in brief, are as under :

Respondent No. 1 had engaged 246 casual labourers since 1992. Most of them had completed 240 days of continuous service when first respondent terminated their services without any notice and payment of retrenchment compensation. It is, therefore, the case of the petitioner is that their termination was illegal and invalid. According to the petitioner, respondent No. 1 did not maintain any seniority list of the casual labourers (for short, "workmen") and the principle "last come first go" was not followed. Even while reappointing the workmen, who had completed 240 days during the period of 12 calendar months preceding the date of their termination, the seniority was not considered and juniors were appointed

ignoring the claim of seniors. The retrenchment being illegal, the union raised an industrial dispute before the Assistant Labour Commissioner. While the matter was pending before the Conciliation Officer, the department reinstated about 165 workmen out of the said 246 workmen. In the present writ petition, admittedly I am not concerned with those workmen who were reinstated during the pendency of the conciliation proceedings. I am concerned only with remaining 83 workmen. It appears that a Committee, consisting of representatives of the management and union was constituted to look into the problems of the workmen. The said Committee, after examining the record and attendance, gave its report which was the basis for reinstating the 165 workmen during pendency of the conciliation proceedings. It further reveals that the Committee was once again appointed in or about October, 1990, which examined the record and attendance of remaining 83 workmen and submitted a report stating that the attendance of 57 workmen out of 83 during 1990 was continuous and the said workmen made themselves available for the work and, therefore, the department took a lenient view and absorbed/re-employed them on different dates with effect from 1st July, 1990. However, remaining 26 workmen were not re-employed/absorbed. The learned Counsel appearing for the parties are ad idem that in the present writ petition this Court is concerned with the issue of back wages and continuity of service in so far as 57 workmen are concerned and reinstatement/re-employment with back wages in respect of 26 workmen. It appears that since no solution was found in respect of 83 workmen, the Conciliation Officer submitted a failure report on 27th October, 1990 to the Ministry of Labour, Central Government at New Delhi. The Central Government, in turn, referred the dispute pertaining to 83 workmen to the Central Government Industrial Tribunal, Bombay vide order dated 5th December, 1991 for adjudication.

3. The Industrial Tribunal, after considering the evidence produced on record by the parties and oral submissions advanced on their behalf, rejected the claim of the petitioner by its Award dated 8th September, 1994. Feeling aggrieved by the said award dated 8th September, 1994, the petitioner union has approached this Court by way of present writ petition and prayed for quashing and setting aside the impugned award.

4. I heard learned Counsel appearing for the parties at length, perused the writ petition and the documents annexed thereto including the affidavits filed in the present writ petition.

5. Mr. Dharap, learned Counsel appearing for the petitioner, submitted that all 83 workmen actually worked and completed 240 days during the period of 12 calendar months preceding the date of their termination and, in view thereof they were covered u/s 25-F read with section 25-B of the I.D. Act. Their termination was without following due procedure prescribed u/s 25-F of the I.D. Act. According to Mr. Dharap, the Industrial Tribunal erred in placing reliance upon the report of the Committee as a basis for its finding that 83 workmen did not complete 240 days of service within the meaning of section 25B inasmuch as

the record was not available before the said Committee. In the alternative, Mr. Dharap submitted that even if it is assumed that 83 workmen did not complete 240 days service, it was not due to any fault on their part. First respondent did not provide them work though they were available all throughout. Mr. Dharap also submitted that during the pendency of the conciliation proceedings, all 83 workmen were reinstated by the first respondent on 1st January, 1990 following the report of the Casual Labour Committee and only 26 workmen were once again terminated with effect from 1st July, 1990 without following the due procedure contemplated u/s 25-F of the I.D. Act. In his submission, prior to their reinstatement on 1st January, 1990 itself all 26 workmen had worked had worked for 240 days during the period of 12 calendar months preceding their termination and that was the reason why they were reinstated on 1st January, 1990, and in view thereof, their termination cannot be sustained and they are entitled for protection u/s 25-F of the I.D. Act. Mr. Dharap also submitted that the onus of proof lies on the management, viz. respondent No. 1, to prove that the workmen did not work for 240 days inasmuch as the workmen are not supposed to have access to the records maintained by respondent No. 1, such as attendance register, pay slip, wage register, etc. In short, Mr. Dharap prayed that 57 workmen who were reinstated are entitled for back wages with continuity of service and remaining 26 employees are entitled for reinstatement with back wages.

6. In opposition, Mr. Rajguru, learned Counsel appearing for the first respondent, at the outset, submitted that even 57 workmen out of 83 had also not completed 240 days of service as contemplated u/s 25-B of the I.D. Act. However, taking their attendance during 1990 which was continuous and that they had made themselves available for work, the first respondent took lenient view and absorbed them in the service. According to first respondent, remaining 26 workmen did not make themselves available for work during 1990 and hence they were not re-employed or absorbed. He further submitted that in the aforesaid backdrop, the question of paying back wages to 57 workmen and to 26 workmen who were not even reinstated does not arise. He submitted that onus was not on the management but was on the workmen to prove that they worked for 240 days in the year preceding their termination. In support, he placed reliance upon the judgment of the Supreme Court in *The Range Forest Officer Vs. S.T. Hadimani*, . The Apex Court has reiterated the view taken in the case of *Range Forest Officer in Essen Deinki Vs. Rajiv Kumar*, . In short, he submitted that it was for the petitioner to lead evidence to show that the 83 workmen, in fact, worked for 240 days in the year preceding their termination. Mere statement cannot be regarded as sufficient evidence to discharge the burden to prove that they had, in fact, worked for 240 days in a year. The findings of the Industrial Tribunal are based on the reports of the Casual Labour Committee consisting of representatives of both the parties which examined the record and attendance of 83 workmen and recommended appointment of 57 workmen with effect from 1st July, 1990 since that they had continuously and

regularly made themselves available for work during and after 1990. In so far as 26 workmen are concerned, he submitted, that the Committee found that they did not make themselves available for work during that period. Mr. Rajguru also submitted that while reinstating the workmen, the principle of "last come first go" was observed by the first respondent and it is not correct that juniors were appointed ignoring the claim of seniors.

7. Keeping in view the arguments advanced by the learned Counsel appearing for the parties, the issues fall for my consideration are that whether 26 workmen worked for 240 days during the period of 12 calendar months preceding the date of their termination and, if not, whether it was due to any fault on their part. In other words, 26 workmen could not work for 240 days during 12 calendar months preceding the date of their termination, as no work was provided, though available, by the first respondent and secondly, whether 56 workmen who were reinstated on 1st January, 1990 are entitled for back wages.

8. Before advertng to the submissions of the learned Counsel appearing for the parties, it would be advantageous to refer the background in which the Tribunal recorded a conclusion that 83 workmen did not work for 240 days. During pendency of conciliation proceedings, a Committee known as Casual Labour Committee consisting of representatives of both the parties was appointed. The Committee was appointed in the background that no record of work of the workmen was made available before conciliator for verification as to whether each of the concerned workmen had worked for 240 days during 12 calendar month preceding the date of their termination. It appears that the Committee from the record available prepared a list of eligible workmen with details, such as, number of working days, date of entry in the department, continuous period of working etc. Two lists were prepared, one of the workmen who were found to have completed 240 days and another of workmen who did not complete 240 days. Though it is a case of the petitioner that the Committee could not verify in respect of 83 workmen as to whether they had completed 240 days since the record was not available, the statement in the affidavit to that effect ha not been substantiated by any evidence that the record in respect of 83 workmen was, in fact, not available for the Committee's scrutiny. The committee, after considering the record and material placed before it, recommended that the workmen who have not completed 240 days in 12 calendar months should be intimated that they were not eligible. It was also decided that such of the employees who were found eligible should be given work as per the seniority and if there was no work available in Kalyan Telecom District, requirement of casual labourer may be ascertained from other Telecom Districts in Maharashtra and the eligible workmen should be diverted to such places. Admittedly the purpose of appointing the committee was only to find out completion of 240 days and finalisation of seniority list of workmen. It is not the case of the petitioner that the record was made available only in respect of 165 workmen and on the basis of which they were found to have completed 240 days continuous service. In the present petition, I need not consider whether 65 workmen had agreed to work in

their original post with continuity of service without backwages since admittedly reference was not made in respect of those workmen. It is also not disputed that the Casual Labour Committee was once again appointed in or about October, 1990 consisting of representatives of both the parties to once again examine the record and attendance of remaining 83 workmen and prepare a report. On scrutiny of record the Committee found that the attendance of 57 workmen out of 83 during 1990 was continuous and they made themselves available for work and hence were recommended to be absorbed. From the reports of the Committee and material placed on record, 83 workmen cannot be said to have completed 240 days continuous service within the meaning of section 25-B(2)(a) (ii) of the I.D. Act.

9. The question raised by Mr. Dharap as to whether the first respondent allowed them to complete 240 days, in fact, was not a subject matter of adjudication in the reference. The reference made to the Industrial Tribunal reads thus :

"Whether the action of the management of District Telecom Engineer, Kalyan in retrenching the workmen as per the list enclosed (Annexure "B") from service and in not maintaining the seniority list is legal and justified? If not, what relief the workmen concerned are entitled to?"

Though prima facie I do not find any error on the part of the Industrial Tribunal in holding that the workmen were not allowed to complete 240 days was not a subject matter of adjudication in the reference, I considered the alternative submission of Mr. Dharap that 83 workmen and 26 out of them in particular, were not allowed to work or provided the work in order to see that they did not complete 240 days. From the written statement filed on behalf of the petitioner and the evidence led in support thereof and also affidavit filed in this Court, it cannot be said that it was a case of the petitioner that 26 workmen worked for 240 days during the period of 12 calendar months preceding the date of their termination. The case made out by the respondent in the evidence of their witness K. Arunan is that 26 workmen did not make themselves available for work during and after 1990 and hence were not considered for reinstatement. In the cross-examination of Arunan, the case put to the witness was that 26 workmen could not complete 240 days since they were not allowed to continue to work. This supports the contention of respondent No. 1 that no case was ever made out by the petitioner that 26 workmen worked for 240 days. Mere statement in the affidavit to the effect that the record was not available, which was expected to be maintained by the first respondent no inference can be drawn that 26 workmen did complete 240 days. Such a statement would not help the petitioner to shift burden on the first respondent. It is for the claimant to lead evidence to show that he had in fact worked for 240 days in the year preceding his termination. The onus cannot be placed on the management without first determining on the basis of cogent evidence that the workmen did work for more than 240 days in a year preceding his termination. In the present writ petition, the petitioner, cannot be said to have produced such evidence on

record to shift the onus on the management. The petitioner has not even made an attempt to bring such evidence on their own or by calling upon the witness of the respondent to produce documents such as wage register, attendance register, pay slip etc. which could have supported the case of the petitioner. The law laid down by the Apex Court in Range Forest officer case (supra) is clear answer to the issue of burden of proof. The relevant observation in paragraph 3 of the judgment reads thus :

"3. For the view we are taking, it is not necessary to go into the question as to whether he appellate is an "industry" or not, though reliance is placed on the decision of this Court in State of Gujarat v. Pratamsingh Narsinh Parmar. In our opinion, the Tribunal was not right in placing the onus on the management without first determining on the basis of cogent evidence that the respondent had worked for more than 240 days in the year preceding his termination. It was the case of the claimant that he had so worked but this claim was denied by the appellant. It was then for the claimant to lead evidence to show that he had in fact worked for 240 days in the year preceding his termination. Filing of an affidavit is only his own statement in his favour and that cannot be regarded as sufficient evidence for any Court or Tribunal to come to the conclusion that a workman had, in fact, worked for 240 days in a year. No proof of receipt of salary or wages for 240 days or order or record of appointment or engagement for this period was produced by the workman. On this ground alone, the award is liable to be set aside. However, Mr. Hegde appearing for the department states that the State is really interested in getting the law settled and the respondent will be given an employment on compassionate grounds on the same terms as he was allegedly engaged prior to his termination, within two months from today."

In M/s. Essen Deinki v. Rajiv Kumar (supra), the Apex Court has reiterated the view expressed in the case of Range Forest Officer and held that the proof of working for 240 days is on the employee in the event of any denial of such a factum.

10. Section 25-F of the I.D. Act is plainly intended to give relief to retrenched workmen. The condition for the relief u/s 25-F is that he should be a workman employed in an industry and has been in continuous service for not less than 240 days in a year, preceding their termination, under an employer. What is continuous service has been defined and explained in section 25-B of the I.D. Act. The expression in sub-section (1) of section 25-B that a cessation of work which is not due to any fault on the part of workmen requires to be considered while determining whether workmen could be said to be in continuous service as contemplated u/s 25-B(2)(a) and (ii). Relevant provision reads thus :-

"25-B. Defining of continuous service-For the purpose 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 cession of work which is not due to any fault on the part

of the workman;

(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;"

Under section 25-F of the I.D. Act, no workman employed in any industry who is in continuous service for not less than one year under an employer shall be retrenched by that employer until he complies with three conditions contemplated under that provision and if those three conditions are not complied with, the workman will be deemed to be in employment and is entitled for reinstatement with backwages except in a case where the employee was gainfully employed during that period. The Clauses (a) and (b) of section 25-F are mandatory in nature whereas Clause (c) is directory which could be complied with even subsequently. Section 25-F reads thus :-

"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."

11. Keeping in view of provision of sections 25-B and 25-F and the law laid down by the Supreme Court in the case of Range Forest Officer and in *M/s. Essen Deinki v. Rajiv Kumar*, I have no hesitation in holding that the burden was on the petitioner to prove that the workmen did work for 240 days during the period of 12 calendar months preceding the date of their termination. The petitioner has not shifted the burden on the respondent by placing any material on record. The petitioner has also failed to bring any material on record in support of their case that for no fault of theirs the work was not provided for a period of 240 days during 12 calendar months preceding the date of their termination. I do not find

any reason to disturb the finding recorded by the Tribunal based on the reports of the Casual Labour Committee, signed by the representatives of the petitioner union. It is clear that in so far as 57 workmen out of 83 are concerned, they made themselves available for work and, therefore, the department took lenient view and absorbed them on different dates with effect from 1st July, 1990. The petitioner union has filed affidavit in the writ petition. In the affidavit they have categorically admitted appointment of Casual Labour Committee consisting of representatives of both the parties. The categoric statement made in paragraph 6 is to the following effect.

"From the records available, a list of eligible casual labours was prepared with details such as number of working days, date of entry in the department, continuous period of working etc. Another list was prepared of such casual labours in whose respect, record was not available showing the completion of 240 days. After considering everything, a Committee recommended that such of the casual labours who have not worked for 240 days in twelve calendar months as per the available record should be intimated that they were not eligible. It was also decided to issue identity cards having details of working days etc. in order to avoid further complication. It was also decided that such of the employees who were found eligible should be given work as per the seniority and if there was no work available in Kalyan Telecom District, requirement of casual labour may be ascertained from other Telecom Districts in Maharashtra and the eligible casual labour should be diverted to such places accordingly."

It is further stated that "the purpose of appointing committee was only to find out completion of 240 days and finalisation of seniority list of casual labour. It is also correct that from the said record available, it was found that 165 employees had completed 240 days continuous service. The Casual Labour Committee was once again appointed in or about October, 1990 consisting of representatives of both the parties which examined the record and attendance of remaining 83 employees and prepared a report". The categoric statement to that effect has also been made in the affidavit filed by the first respondent. The petitioner has not disputed the statement made in the affidavit of the first respondent either in their affidavit or during oral submission. Nowhere in the affidavit, any grievance or allegations have been made in respect of the report submitted by the Casual Labour Committee at any stage. I find absolutely no reason to discard the reports of the said Committee. In view of this, I find no fault with the Industrial Tribunal in placing reliance on the reports of the Committee. Taking overall facts and circumstances of the case into consideration, in my view, the impugned Award cannot be faulted and deserves to be confirmed.

12. It appears that during the pendency of the present writ petition, the Circular has been issued by the Department of Telecommunications, Office of the Chief General Manager, Telecom, Maharashtra Circle, Mumbai, on 6th October, 2000 which is placed on record by the petitioner, by which the General Manager, HO. o/ o CGMT MH-Circle, Mumbai was to make the recruitment of regular Majdoor from

open market under following conditions:

1. All TSM/s, Casual Labours, Part-time Labourers, any Court CAT cases are to be considered for the recruitment.
2. candidates (TSms, CLs, Part time Labours and Court CAT/Cases) of other SSA area also to be considered by each SSA.
3. A certificate should be given that no eligible TSM Casual Labour, part time labour are left out in the SSA or in the other SSA or Maharashtra Circle.
4. The recruitment should be done from open market only after getting approval from this office.
5. The recruitment in the cadre of Regular Mazdoor from open market will be done strictly in accordance with the relevant recruitment rules after considering all the above points (DOT letter No. 269-26/90-STN dated 22-6-95 etc.).

In view thereof, I observe that if there are any vacancies available as of today, the 26 workmen involved in the present writ petition be considered by the first respondent on priority. In the event of their appointments made pursuant to the Circular dated 6th October, 2000, such appointments shall be treated as fresh appointment and the workmen in the present petition shall not be entitled to claim any benefit of their past service as casual workmen.

13. In the result, the writ petition is dismissed.

Rule discharged. No costs.

Authenticated copy of this order may be made available to the parties.