

(2018) 01 BOM CK 0145
In the Bombay High Court
Case No : 132 of 2007

Chandrakant s/o Prabhakar Jadhav

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 24-01-2018

Acts Referred:

Industrial Disputes Act, 1947, Section 10(1), Section 12(5), Section 2(s), Section 2(OO), Section 25-F, Section 25-B, Section 25-D -
Reference of disputes to Boards, Courts or Tribunals - Duties of conciliation officers -
Definitions - Definitions

Citation : (2018) 01 BOM CK 0145

Hon'ble Judges : T.V. Nalawade, Sunil K. Kotwal

Bench : Division Bench

Advocate : Pradeep Shahane, Y.G. Gujarati

Judgement

1. The appeal is filed to challenge the judgment and order Writ Petition No.2579/2000 which is decided by the learned Single Judge of this Court. The writ petition was filed by the present respondent, State Government Department, to challenge the decision of the Labour Court, Ahmednagar delivered in Reference (IDA) No.128 of 1992. The Reference was made by the Deputy Commissioner of Labour Nashik under section 10(1) read with section 12(5) of the Industrial Disputes Act, 1947 on the basis of complaint made by the present appellant. The Labour Court had held that the appellant had worked in a calendar year for 240 days with the respondent and he was illegally terminated, retrenched by the respondent. The learned Judge of the Labour Court had made order of reinstatement but without back wages and continuation of the service was given. This decision is set aside by the learned Single Judge of this Court. Both the sides are heard.

2. It is the case of the appellant that he was appointed by the respondent on 1-7-1984 in Sub Division of Parner on daily wage basis and he was working

continuously with the respondent till 20-6-1987 (at one place it is mentioned as till 31-12-1987). It is the case of the appellant as he worked continuously in one calendar year, for 240 days, it was necessary for the Department to follow necessary procedure before terminating or retrenching him. It is his contention that he was terminated with effect from 1-1-1988. It appears that the appellant approached the aforesaid authority on 30-10- 1992 and then the Reference was made.

3. It is the case of the respondent, Government Department that the appellant voluntarily abandoned the work and prior to that also he had never worked continuously for 240 days in any calendar year. It is the case of the respondent that there was no question of termination or retrenchment in view of the nature of the work given to the appellant.

4. The learned Judge of the Labour Court has held that though the complaint was belated, due to the contentions made by the appellant that he had approached many times to the Government Department to get the work, the delay will not come in his way to get the relief. The learned Judge of the Labour Court has placed reliance on the observations made by the Apex Court in the case reported as 1999 LAB. I.C. 1435 (Ajaib Singh v. Sir Hind Coop. Marketing Processing Service Society Ltd) for holding that the delay cannot come in the way of the appellant to get the relief. The learned Judge of the Labour Court has further held that the appellant was entitled to get wages in respect of the weekly off and also in respect of public holidays but the daily wages in respect of those days was not given. The learned Judge of the Labour Court has placed reliance on some observations made by the Apex Court in the case reported as 1981 (I) LLJ 386 (SC) (Surendra Kumar Verma v. Central Govt. Industrial Tribunal, New Delhi), The Labour Court had further held that the workers who were junior to the appellant were kept but the appellant was retrenched and on that ground also the action of the Department was illegal. The Labour Court had further held that the termination was with effect from 21-6-1987 and continuity in service is given with effect from 21-6- 1987.

5. The learned Single Judge of this Court has held that when in the Award itself it is mentioned by the learned Judge of the Labour Court that the appellant was not continuously engaged, it was not possible for the Labour Court to hold that the appellant had worked for 240 days in any calendar year. The learned Single Judge of this Court has referred to the observations made by the Apex Court in the case reported as AIR 1994 SC 1638 Madhyamik Siksha Parishad U.P. v. Anil Kumar Mishra) and has held that there was no question of giving any relief in favour of the appellant. The learned Single Judge has further held that the burden was on the present appellant to plead and prove his case and it was necessary for him to lead evidence but the learned Judge of the Labour Court has committed error in giving decision only on the basis of oral testimony of the appellant. The learned Single Judge of this Court has held that the appellant was allotted the work whenever the work was available and so there was no question

of issuing order of termination and there was no such order issued.

6. The learned counsel for the appellant took this Court through various provisions of the Industrial Disputes Act, 1947 (hereinafter referred to as "the Act") and submitted in the present proceeding that the order of the learned Judge of the Labour Court does not mean that due to the order, the appellant was to get permanent job. On one hand he made this submission and on the other, he produced a copy of Kalelkar Committee Settlement Report which was between the labourers and the respondent, Department of the Government and it was submitted in the year 1967. It can be said that due to nature of the order made by the learned Judge of the Labour Court, the appellant wants to use the aforesaid Settlement.

7. The submissions made for the appellant show that the appellant wants to use the order of the learned Judge of the Labour Court to get reinstatement, to get service continuity and for getting appointment on permanent post, in time scale. The order was made by the learned Judge of the Labour Court on 23-8-1999 and if the contention of the appellant that he started working with effect from 1-7-1984 is considered, it can be said that the appellant would be able to use the Kalelkar Committee Settlement which provided for giving permanent post to a daily rated employee who had continuously worked for 10 years. If one completes such service of 5 years, due to this Settlement, he can get job as regular temporary employee in time scale. These circumstances cannot be ignored by any Court including Labour Court but they are ignored.

8. Due to the aforesaid facts and circumstances, the relevant facts of the present matter need to be first ascertained and then the law needs to be applied to those facts. The appellant has admitted following things :

(i) The appellant was never appointed or given work directly by the Head Office of the respondent-Department and only because he had approached the sub divisions of the Department, he was given work on daily wage basis;

(ii) The appellant did not work in any particular office of the sub division of the respondent- Department. He went to various places wherever the work was available like Shirur, Supa, Nagar and Parner. It is not the case of the appellant that he was transferred from one place to other and so it can be said that he went to the places wherever the work was available and he worked there during the period mentioned in the muster rolls.

(iii) The appellant had no concern with the Head Office and every time the work was given to him by the sub divisional offices of the aforesaid places and so he was never given work by the office which could have given the appointment.

9. Even in the aforesaid Kalelkar Settlement Report a daily rated employee was not entitled to get wages in respect of the weekly holidays. When there is record to show that the appellant started working as daily rated employee from 1-7-1984 and the record shows the last date when he worked was 21-6-1987,

the learned Judge of the Labour Court ought to have considered the periods of calendar year in view of the provision of the Act. That is not done by the learned Judge of the Labour Court. Surprisingly, the first calendar year is held to be completed on 18-11-1984 and from 19-12-1984 the second calendar year period was counted. From 26-12-1985 the third calendar year period was counted. Even after doing this, the appellant had not completed 240 days of work in any calendar year. Further, the long gaps between two periods like the gap between last date of first period like 18-11-1984 and the first day of the second period 19-12-1984 for which he did not work is not considered. There were similar gaps in different periods like 28-1-1985 to 4-3-1985, 30-4-1985 to 22-7-1985 and 31-3-1986 to 6-5-1986. Such gaps could not have been ignored by the Labour Court but those gaps are ignored. The judgment of the learned Judge of the Labour Court does not show that the appellant had any specific case in respect of those gaps. There is specific case of the respondent-Department that he was given work only when the work was available and so there was no question of avoiding to give work. Thus, in any case it was not possible to have one continuous calendar year in the present matter. Further, there is circumstance that the aforesaid work was done at different places, where the work was available and he was never transferred. Thus, on the basis of the data considered by the Labour Court it is not possible for the appellant to prove that he had worked for 240 days in any calendar year. Thus, on facts and in applying the law the Labour Court has committed serious error.

10. The case of the appellant that he had approached the Department for getting work after 20-6-1987 could not have been believed as there is no record in that regard and further there is no independent corroboration to this contention. When he approached the authority with the grievance, the period of more than four years had lapsed from the last day when he had worked for the Department. These circumstances ought to have been given due weight by the Labour Court but those circumstances are ignored by the learned Judge of the Labour Court.

11. It is true that the appellant falls under the definition of "workman" given in section 2(s) of the Act. The respondent, Department has produced the muster rolls for discharging its liability shown in Section 25-D of the Act. Those muster rolls are considered by the Labour Court and the relevant portions are quoted by this Court.

12. In section 2(oo) of the Act the meaning of "retrenchment" is given as under : "2. (oo) "retrenchment" means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include-

(a) voluntary retirement of the workman; or

(b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; or

(bb) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein; or

(c) termination of the service of a workman on the ground of continued ill-health."

It is already observed that for proving termination or retrenchment there is nothing with the appellant. He could have examined at least one workman who was working with him and who was shown on the muster roll but that is not done.

13. In section 25-B of the Act, the definition of "continuous service" is given and the relevant portion is 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 lockout or a cessation 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.

(b)

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 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."

14. Section 25-F runs as under :- "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."

15. It is already observed that there is no material with the appellant to show that in any calendar year he worked for 240 days. There is no material to explain aforesaid gaps. Even if the period is counted from the date 20-6-1987, in that case also the appellant has no case. Thus, in view of the provisions of the Act and the facts of the present matter, it cannot be said that the appellant was in "continuous service" as mentioned in section 25-B of the Act.

16. The condition precedent for retrenchment of workman which can be found in section 25-F cannot apply to present matter and also the procedure laid down in section 25-G cannot apply in a case like present one.

17. The learned counsel for the appellant placed reliance on the following reported cases.

(i) 1996 I CLR 439 (D.V. Natekar v. Unique Industries & Ors).

(ii) 2015 I CLR 591 (Ajaypal Singh v. Haryana Warehousing Corporation).

(iii) 1995 I CLR 942 (Alexandar Yesudas Maikel v. Perfect Oil Seals and IRP & Ors.

(iv) 1999 I CLR 854 (Samishta Dube v. City Board, Etawah & Anr.).

(v) 2005 III CLR 106 (Jairaj N. Shetty v. Union of India).

(vi) 1985 II C.L.R. 246 (Shri H.D. Singh v. Reserve Bank of India & Ors.).

(vii) 2005 II CLR 1055 (G.M. Haryana Roadways v. Rudhan Singh).

(viii) 2003 (1) Bom. LC 161 (Bom) (State of Maharashtra v. Sayyedlal Gani Sayyed).

(ix) Order dated 11-3-2005 of the Apex Court made in Civil Appeal No.1699 of

2005

(Shahaji v. Executive Engineer, P.W.D.)

(x) 2007 (7) Supreme 629 (Karan Singh v. M/s Executive Engineer Haryana state Marketing Board).

(xi) 2010 AIR SCW 542 (Director, Fisheries Terminal Division v. Bhikubhai Meghajibhai Chavda).

(xii) 2010 (124) FLR 700 (Harjinder Singh v. Punjab State Warehousing Corporation).

(xiii) 2010(2) Bom. LC 231 (SC) Anoop Sharma v. Executive Engineer, Public Health Division).

(xiv) (2010) 3 SCC 637 (Krishan Singh v. Executive Engineer, Haryana state Agricultural Marketing Board, Rohtak (Haryana)).

(xv) 1985 L.L.J. 539 (Workmen of American Express v. Management of American Express).

Facts of each and every case are always different. There cannot be dispute over the propositions made in the aforesaid cases. Relevant facts and circumstances of the present matter and the law applicable to those facts are also considered. For the reasons given above this Court holds that the learned Single Judge of this Court has not committed any error in setting aside the decision given by the learned Judge of the Labour Court in favour of the appellant. In the result, the appeal stands dismissed.