

(2009) 03 CHH CK 0036
In the Chhattisgarh High Court
Case No : Writ Petition No. 324 of 2005

Chhattisgarh State Electricity Board and Another	APPELLANT
Vs	
Industrial Court and Another	RESPONDENT

Date of Decision : 26-03-2009

Acts Referred:

Constitution of India, 1950 — Article 226
Industrial Disputes Act, 1947 — Section 10, 25, 25B, 25F
Madhya Pradesh Industrial Relations Act, 1960 — Section 110, 25F, 25G, 31(3), 61

Citation : (2009) 2 CGLJ 264

Hon'ble Judges : Satish K. Agnihotri, J

Bench : Division Bench

Advocate : Abhishek Sinha, for the Appellant;

Judgement

Satish K. Agnihotri, J.—By this petition, the Petitioners seek to quash the impugned order dated 4-12-2004 (Annexure P/6) passed by the Industrial Court in Civil Appeal No. 85/MPIR/A/II/2003, whereby the order of the Labour Court was set aside and the Respondent No. 2 was directed to be reinstated in service within a period of thirty days.

2. Despite notice, none appears nor any representation is made on behalf of Respondent No. 2.

3. The brief facts, in nutshell, as projected by the Petitioners are that on 12-7-2001 the Respondent No. 2 made an application (Annexure P/1) u/s 31(3) read with Section 61 of the Madhya Pradesh Industrial Relation Act, 1960 (for short, "the Act, 1960") before the Labour Court, Rajnandgaon stating that the Respondent No. 2 was working as labour on vacant permanent post from 11-11-1986 for digging pits, laying lines and erecting poles etc., under the Assistant Engineer, MPEB Khairagarh. It was also stated that the Respondent No. 2 had worked continuously for six months on that post. His work was satisfactory and as per the standing orders, he was entitled for being regularized as a permanent employee. There was no departmental enquiry or complaint against

him. No notice for retrenchment of wages was given to him. It was also stated that on 3-1-2000 he was intimated about the removal from service by the non-applicants. It is also pleaded that prior to 3-1-2000 he used to go to the non-applicants for work, but they were not taking any work. Accordingly, the Respondent No. 2 was removed from service without any reason and as such, in the application before the Labour Court, he sought for reinstatement with full back wages.

4. Reply was filed by the present Petitioners in which it was specifically stated that the Respondent No. 2 was engaged for temporary casual works depending on the exigency. Casual labours were used for doing the said work. There was no rule regarding appointment or removal of such casual daily wage labours. The Respondent No. 2 was never kept on regular service nor removed from service. He was on daily wages for a period as was mentioned in the reply. The Respondent No. 2 was not on continuous service of 240 days in the preceding year before removal and he was not posted on permanent vacant post. It was also specifically pleaded that the labour did not work in continuation from 1986 till 2000 with the Petitioners/Board. Specific plea was also raised that the application u/s 31(3) of the MPIR Act is barred by limitation as envisaged u/s 62 of the MPIR Act and to overcome this, the labour has suppressed the material fact and concocted a story that he was removed in the year 2000 to bring the case within limitation. Subsequently, by way of amendment, the additional facts were brought on record wherein it was stated that daily wage workers on muster roll were absolutely banned by the Electricity Board by circular dated 8-4-1993 and thereafter no person has been employed on daily wages on muster roll. It was also pleaded that the Government of Madhya Pradesh, Department of Labour, Bhopal vide its order dated 27-3-1994 had referred a dispute to the Labour Court, Raipur for adjudication regarding retrenchment and removal of the employees of the Board working under the erstwhile Electricity Board.

5. I have heard learned Counsel appearing for the Petitioner, perused the pleadings and documents appended thereto. The Labour Court, by order dated 25.02.2003 (Annexure P/5), after having considered all the facts of the matter, dismissed the application of the Respondent No. 2/employer, holding that the Petitioner was worked on daily wages basis before 18.04.91 and application preferred by the Petitioner was earlier dismissed on 30.09.99. It was observed as under:

6. Being aggrieved, the Petitioner preferred a Civil Appeal No. 85/MPIR/MI/2003 before the State Industrial Court, Raipur. The Industrial Court, by order dated 04.12.2004 (Annexure P/6) came to conclusion that the documents produced before the Court below clearly established that the Respondent No. 2/employee had worked for more than 240 days. The employer has failed to produce muster-roll, attendance register and payment register etc. Thus, the statement of the Respondent No. 2 that he has worked for more than 240 days stand established.

7. The findings recorded by the Industrial Court are based on the statement

made by the Respondent No. 2 and particularly for want of documents produced by the employer. The Industrial Court has not dealt with the findings of the labour Court that the Respondent No. 2 had worked prior to 18.04.91 and the Respondent No. 2 had come earlier also in other petition for the same relief which was dismissed on 30.09.99. The Labour Court has dismissed the case of the Petitioner on the ground of maintainability as the second application for the same relief was not maintainable. The Industrial Court, without adverting to the findings with regard to dismissal of earlier case, dealt with entire case afresh. The Industrial Court had held that the employee/Respondent No. 2 had worked for more than 240 days basically on the basis of non production of documents like muster roll, attendance register and payment register etc.

8. It is well settled principle of law that it is for the employee to prove that he has worked for more than 240 days and for want of production of document, it cannot be held that since the employer has failed to produce the relevant document, it must be presumed that the employee has worked for more than 240 days and as such finding of the Industrial Court is bad and perverse.

9. The Supreme Court, in G.M., B.S.N.L. and Others Vs. Mahesh Chand, observed as under:

8. On the question of whether the Respondent had worked continuously for 240 days in a calendar year the Tribunal and the High Court have wrongly placed the onus on the employer to prove the negative. This is clearly contrary to the decision of this Court.

9. 7. In a large number of cases the position of law relating to the onus to be discharged has been delineated. In Range Forest Officer v. S.T. Hadimaniit was held as follows: (SCC p. 26, paras 2-3)

2. In the instant case, dispute was referred to the Labour Court that the Respondent had worked for 240 days and his service had been terminated without paying him any retrenchment compensation. The Appellant herein did not accept this and contended that the Respondent had not worked for 240 days. The Tribunal vide its award dated 10-8-1998 came to the conclusion that the service had been terminated without giving retrenchment compensation. In arriving at the conclusion that the Respondent had worked for 240 days, the Tribunal stated that the burden was on the management to show that there was justification in termination of the service and that the affidavit of the workman was sufficient to prove that he had worked for 240 days in a year.

3. For the view we are taking, it is not necessary to go into the question as to whether the Appellant 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.

The said decision was followed in *Essen Deinki v. Rajiv Kumar*.

8. In *Rajasthan State Ganganagar S. Mills Ltd. v. State of Rajasthan* the position was again reiterated in para 6 as follows: (SCC p. 163)

6. It was the case of the workman that he had worked for more than 240 days in the year concerned. This claim was denied by the Appellant. It was for the claimant to lead evidence to show that he had in fact worked up to 240 days in the year preceding his termination. He has filed an affidavit. It is only his own statement which is in his favour and that cannot be regarded as sufficient evidence for any Court or tribunal to come to the conclusion that in fact the claimant had worked for 240 days in a year. These aspects were highlighted in *Range Forest Officer v. S.T. Hadimani*. No proof of receipt of salary or wages for 240 days or order or record in that regard was produced. Mere non-production of the muster roll for a particular period was not sufficient for the Labour Court to hold that the workman had worked for 240 days as claimed.

9. In *Municipal Corpn., Faridabad v. Siri Niwasit* was held that the burden was on the workman to show that he was working for more than 240 days in the preceding one year prior to his alleged retrenchment. In *M.P. Electricity Board v. Hariram* the position was again reiterated in para 11 as follows: (SCC p. 250)

11. The above burden having not been discharged and the Labour Court having held so, in our opinion, the Industrial Court and the High Court erred in basing an order of reinstatement solely on an adverse inference drawn erroneously. At this stage it may be useful to refer to a judgment of this Court in *Municipal Corpn., Faridabad v. Siri Niwas* wherein this Court disagreed with the High Court's view of drawing an adverse inference in regard to the non-production of certain relevant documents. This is what this Court had to say in that regard: (SCC p. 198, para 15)

15. A Court of law even in a case where provisions of the Indian Evidence Act apply, may presume or may not presume that if a party despite possession of the best evidence had not produced the same, it would have gone against his contentions. The matter, however, would be different where despite direction by a Court the evidence is withheld. Presumption as to adverse inference for non-

production of evidence is always optional and one of the factors which is required to be taken into consideration is the background of facts involved in the lis. The presumption, thus, is not obligatory because notwithstanding the intentional non-production, other circumstances may exist upon which such intentional non-production may be found to be justifiable on some reasonable grounds. In the instant case, the Industrial Tribunal did not draw any adverse inference against the Appellant. It was within its jurisdiction to do so particularly having regard to the nature of the evidence adduced by the Respondent.

10. In *RBI v. S. Maul* a three-Judge Bench of this Court again considered the matter and held that the initial burden of proof was on the workman to show that he had completed 240 days of service. The Tribunal's view that the burden was on the employer was held to be erroneous.

In *Batala Coop. Sugar Mills Ltd. v. Sowaran Singh* it was held as follows: (SCC pp. 484-85, para 13)

13. So far as the question of onus regarding working for more than 240 days is concerned, as observed by this Court in *Range Forest Officer v. S.T. Hadimani* the onus is on the workman.

The position was examined in detail in *Surendranagar District Panchayat v. Dahyabhai Amarsinh* and the view expressed in *Range Forest Officer, Siri Niwas, M.P. Electricity Board* cases was reiterated.

11. In... *R.M. Yellatti v. Asstt. Executive Engineer* the decisions referred to above were noted and it was held as follows: (SCC p. 116, para 17)

17. Analysing the above decisions of this Court, it is clear that the provisions of the Evidence Act in terms do not apply to the proceedings u/s 10 of the Industrial Disputes Act. However, applying general principles and on reading the aforesaid judgments, we find that this Court has repeatedly taken the view that the burden of proof is on the claimant to show that he had worked for 240 days in a given year. This burden is discharged only upon the workman stepping in the witness box. This burden is discharged upon the workman adducing cogent evidence, both oral and documentary. In cases of termination of services of daily-wage earners, there will be no letter of appointment or termination. There will also be no receipt or proof of payment. Thus in most cases, the workman (the claimant) can only call upon the employer to produce before the Court the nominal muster roll for the given period, the letter of appointment or termination, if any, the wage register, the attendance register, etc. Drawing of adverse inference ultimately would depend thereafter on the facts of each case. The above decisions however make it clear that mere affidavits or self-serving statements made by the claimant workman will not suffice in the matter of discharge of the burden placed by law on the workman to prove that he had worked for 240 days in a given year. The above judgments further lay down that mere non-production of muster rolls per se without any plea of suppression by the claimant workman will not be the ground for the Tribunal to draw an adverse

inference against the management. Lastly, the above judgments lay down the basic principle, namely, that the High Court under Article 226 of the Constitution will not interfere with the concurrent findings of fact recorded by the Labour Court unless they are perverse. This exercise will depend upon the facts of each case.

10. The Supreme Court, in *Sita Ram and Others Vs. Moti Lal Nehru Farmers Training Institute*, observed as under:

14. The question as to whether the burden of proof was on the employer or on the workman is no longer *res integra*. It would be on the workman to prove that he had worked for two hundred and forty days in a year. However, where both the parties have adduced evidences, in most of the cases, the question would be academic.

15. In *ONGC Ltd. v. Ilias Abdulrehmanit* was held:

8. A perusal of the evidence adduced by the workman himself shows that he went in search of employment to different places and whenever there was a temporary employment available in different departments of the Appellant Corporation, be it field work or the work in the Chemistry Department, he accepted the employment and worked in these departments not in one place alone but at different places like Baroda and Mehsana. It has come on record that the management did try to accommodate the Appellant in a permanent job but could not do so because of lack of qualifications. In such circumstances we think that the Industrial Tribunal was justified in coming to the conclusion that the number of days of work put in by the Respondent in broken periods, cannot be taken as a continuous employment for the purpose of Section 25F of the Act, as has been held by this Court in *Indian Cable Co. Ltd.* We are aware that the judgment of this Court in *Indian Cable Co. Ltd.* was rendered in the context of Section 25G of the Act, still we are of the opinion that the law for the purpose of counting the days of work in different departments controlled by an apex corporation will be governed by the principles laid down in *Indian Cable Co. Ltd.* and the Industrial Tribunal was justified in dismissing the reference.

(See also *Range Forest Officer v. S.T. Hadimani*, *R.M. Yellatti v. Asstt. Executive Engineer, State of Maharashtra v. Dattatraya Digamber Birajdar* (SCC para 8: Scale para 6) and *Ganga Kisan Sahkari Chini Mills Ltd. v. Jaiveer Singh*.)

16. Although at one point of time, the burden of proof used to be placed on the employer, in view of a catena of recent decisions, it must be held that the burden of proof is on the workman to show that he has completed 240 days in a year.

11. Section 25F of the IDA provides for condition precedent for retrenchment of a workman wherein condition is continuous service for not less than one year under the employer, which shall entitle workman to the benefits of retrenchment compensation or one month's notice in writing and retrenchment compensation payable before retrenchment. Continuous service for not less than one year

under provisions of Section 25 read with Section 25B of the IDA means 240 days in the preceding year. The Labour Court has not calculated the working of 240 days in the preceding year but for the total period from 1981 to 1988 and came to the conclusion that the Respondent has worked for more than 240 days. This is contrary to well established principles of law. Thus, holding retrenchment as illegal, being not in accordance with the provisions of Section 25F of the IDA is not proper and deserves to be set aside.

12. Section 110 of the Industrial Relations Act, 1960, provides for saving of certain provisions of Industrial Disputes Act. Chapter V-A dealing with lay off and retrenchment, under the Industrial Disputes Act, is applicable to those cases, wherein for other purposes provisions of Industrial Relations Act are applicable.

13. Applying the above well settled principle of law to the facts of the present case, it cannot be held that it is a case of retrenchment covered u/s 25F of the Industrial Disputes Act, 1947 as the Respondent No. 2/employee has failed to prove that he has worked for more than 240 days in a preceding year. Secondly, the identical issue raised before the Court which was dismissed earlier by order dated 30.09.99, again the same issue cannot be raised.

14. Even otherwise, the Petitioner was a daily-wager, not appointed through open competition, not in accordance with law and as such, the appointment was de hors the constitutional scheme of public employment. It is well settled principle of law that an employment i.e. daily-wager, temporary, ad hoc etc. made de hors the constitutional scheme of employment is illegal, null and void. Thus, the Petitioner has no right to reinstatement, continuation or regularization in service (See Secretary, State of Karnataka and Others Vs. Umadevi and Others, and Official Liquidator Vs. Dayanand and Others,

15. Accordingly, the impugned order dated 04.12.2004 (Annexure P/6) is set aside and the petition is allowed. No order as to costs.

16. Interim relief granted earlier stands vacated. M(W)P No. 1483/05, also stands disposed of.