

(2010) 04 BOM CK 0011

In the Bombay High Court

Case No : Writ Petition No"s. 360 of 2002 and 4 of 2003

Damodhar and Another

APPELLANT

Vs

Deputy Engineer, GSDA, Buldhana and Others

RESPONDENT

Date of Decision : 15-04-2010

Acts Referred:

Industrial Disputes Act, 1947 — Section 2(s)

Citation : (2010) 126 FLR 852

Hon'ble Judges : R.C. Chavan, J

Bench : Single Bench

Advocate : M.V. Mohokar, for the Appellant; V.G. Wankhede and D.B. Patel, A.G.P., for the Respondent

Final Decision : Allowed

Judgement

R.C. Chavan, J.—These petitions by workmen are directed against judgment rendered by learned Member, Industrial Court, Akola dismissing the complaint of unfair labour practice. The petitioners No. 1 and 2 in Petition No. 360 of 2002 Damodhar (Damu) Gawande and Ramrao Deshmukh were complainant Nos. 1 and 3 in Complaint ULP No. 3/1988 before learned Member Industrial Court and Petitioner Jagdeo Wankhede in Writ Petition No. 4 of 2002 was complainant No. 2 in the said complaint. According to the learned Counsel for the petitioners, complainant Nos. 4 to 9 in the said complaint had been granted permanency and therefore, their grievances were redressed.

The facts, which are material for deciding these petitions, are as under:

The petitioners were in continuous service of the respondents as watchman since 1971 / 1975. They were continued by respondent on daily wages. Though when the complainants filed the complaint, they were on the verge of retirement they have by now attained superannuation. According to the petitioners, respondent refused to pass on benefits of permanency to the petitioners in break of the provisions of Model Standing Order 4(c) which amounted to unfair labour practice

under Item 6 of Schedule IV of the Maharashtra Recognition of Transportations and Prevention of Unfair Labour Practices Act ("MRTU & PULP Act" for it). The petitioners, therefore, approached Industrial Court at Akola, through their recognized union complaining that the respondent had indulged in unfair our practice.

2. The respondent No. 1 employer, filed reply admitting that the petitioners were working as watchmen on daily wages under a Government scheme. Other complainants Nos. 4, 5, 8 and 9 were stated to be working as helpers and Hand Pump Repairers. Complainant No. 6 was stated to have left the job. It was stated that the services of the petitioners in these petitions were terminated by the respondent. The petitioners challenged the said termination before Labour Court and the petitioners were working in terms of the interim orders passed by the said Court.

3. According to respondent No. 1, against whom the complaint had been led, it was only a supervising and implementing agency, and since the petitioners were working as watchmen under the Government scheme, the Government was necessary party. Respondent No. 1 could not make petitioners permanent unless Government approved such an action. Respondent No. 1 Stated that it had already approached Government for providing benefits of permanency to the petitioners, but had not received any clearance from the Government. It was also stated that the petitioners ought to have approached Maharashtra Administrative Tribunal, since they were working under the Government scheme.

4. Thus, the gravamen of defence of respondent No. 1 was that the petitioners were not its employees but had been transferred to it under a Government Scheme. There is no plea that the petitioners had entered service by backdoor or in breach of any rules. No evidence was tendered on the behalf of the respondent before the Industrial Court. After considering the evidence tendered before it, the Industrial Court held that the petitioners are workmen and respondent is an Industry. It held that the complaint was not maintainable for want of necessary party. He also held that the petitioners failed to prove that respondent had engaged in unfair labour practice, holding that the entry of petitioners was not in accordance with rules and the Model Standing Order 4(c) was not applicable to the petitioners. He, therefore, dismissed the complaint by the present petitioners. Aggrieved thereby the petitioners are before this Court.

5. I have heard Shri Mohokar, learned Counsel for the petitioners, Advocate Shri V.G. Wankhede, learned Counsel for respondent No. 1 respondent before the Industrial Court) and respondent No. 3 Zilla Parishad, and learned Assistant Government Pleader for respondents No. 2 and 4 State of Maharashtra.

6. In this case, there is no question of applicability of "Kalelkar Settlement". The learned Counsel for the petitioners clarified that the petitioners had not sought reliefs under the Kalelkar Award. Reference to Kalelkar Award in paragraph 5 of the complaint was only for production of copies of Kalelkar Award before the

Court. Therefore, there was no question of the learned Member, Industrial Court, considering the entitlement of petitioners on the basis of Kalelkar Settlement. A misplaced reference to Kalelkar Settlement in the complaint or petition cannot be used for blocking an examination of petitioner's claim on other grounds.

7. The learned Counsel for the petitioners submitted that the learned Member, Industrial Court seems to have been influenced by the argument that the petitioners had not shown that their initial appointment was in accordance with rules. Overlooking the fact that no such plea of Petitioners having entered the employment by backdoor was taken by the Respondent. Respondent No.1 had categorically taken a stand that the petitioners were working under Government scheme, that the Government was the appointing authority, unless and until the Government passed orders, Respondent No. 1 had no power to give any benefit of permanency to the petitioners. The learned Counsel for petitioners pointed out that the respondent had categorically stated in the revised filed before the Industrial Court that it had made a reference to the Government and that there was no response from the Government. He drew my attention letter Annexure-5, sent on 14th August, 2009 by Chief Executive Officer. Respondent No. 3 Zilla Parishad to the Government, stating that the petitioner were working as daily wagers since 1973 under the Government Scheme and therefore, necessary action at the level of the Government was required to be taken to give Petitioners benefit of permanency. This letter also refers to a letter from the Government where the Government had asked Zilla Parishad to take such action. Even thereafter again on 24.7.2002 the Zilla Parishad wrote to the Government asking the Government to take the petitioners on permanent establishment with retrospective effect.

8. The return filed on behalf of respondent No. 2-State of Maharashtra shows that the Government took a stand that Kalelkar Settlement is no applicable to the Water Supply and Sanitation Department of Government under which Ground Water & Sanitation Development Agency (G.S.D.A.) function Respondent No. 2 categorically stated in the return before this Court that the petitioners were transferred on deputation to execute the scheme and programmes transferred to Zilla Parishad. In the return it is sought to be stated that the appointment of the petitioners on daily wages was without following any procedure and therefore, the petitioners were not entitled to regularization, though such a plea was not taken before the Industrial Court.

9. The learned Counsel for the petitioners thus, submitted that the respondents are trying to shift the responsibility of regularizing the petitioners on each other by taking pleas which had not been raised before the Industrial Court,. The learned Counsel for the petitioners rightly submitted that, a plea that had the petitioners had entered the employment by backdoor been taken before Industrial Court, befitting reply could have been given. He also submitted that the finding of the learned Member, Industrial Court that the complaint was bad for nonjoinder of necessary party, namely the Government, was incorrect since

the petitioners had filed an application on 6.10.2000 before the Industrial Court seeking to join the Chief Secretary, Government of Maharashtra and the Chief Executive Officer, Zilla Parishad as necessary parties. He submitted that if the Court did not pass orders on the application, it could not blame the petitioners.

10. The learned Counsel for the petitioners has submitted that the contention that the petitioners were employees of G.S.D.A. therefore, respondents No. 1 or 3 could not confirm them, was not correct. He pointed out that even the employees of GSDA, who had filed complaints before the Industrial Court had been granted benefits of permanency holding GSDA guilty of unfair labour practice. Those orders of the Industrial Court were challenged by GSDA before this Court by filing Writ Petition Nos. 1075/1991 and 1077/1991 and that these petitions were dismissed by judgment dated 7th February, 1995. He placed for my perusal a copy of the judgment in those cases. In paragraph 6 of the judgment it was specifically observed that the Assistant Government Pleaders appearing for the petitioners had contended that the complainants were engaged as daily wagers on the posts which were not permanent and therefore, the Industrial Court was not justified in directing the employer to make the plainants permanent in their respective posts. The Court held that the corned employees were "workmen" within the meaning of section 2(s) of the Industrial Disputes Act and under 2(i) of the Industrial Employment (Standing Orders) Act. The Court also observed that the employer had not framed any Standing Orders under the Industrial Employment (Standing Orders) Act and before, was governed by the Model Standing Orders under the Standing Orders Act, 1946. The Court observed that the work on which the workmen in those petitions were engaged was of a permanent nature and therefore, held that the Industrial Court was justified in directing the employer to make the workmen permanent employees in Class IV cadre.

11. The learned Counsel for the petitioners also submitted that judgment of this Court (Hon"ble Shri Justice Lodha, as he then was) in Divisional Forest Officer, Cedchiroli v. M.R. Und invade and others 1995 LIC 2141 (Bom.) : 1995 (2) CLR 292, was cited before the learned Member, industrial Court. Yet the learned Member, Industrial Court distinguished the observations in the said judgment by holding that, in that case selection procedure was followed while in the case at hand no such procedure was followed. The earned Counsel for the petitioners submitted that the learned Member, should have seen that it was nobody's case that the petitioners had been appointed without following proper procedure. It was not the pleading of the respondent before the Industrial Court and the respondents had not tendered any evidence to that effect before the Industrial Court. Therefore, the learned Member should not have allowed such an argument to be advanced and should not have accepted such argument which was devoid of any foundation in pleadings or evidence. In my view, this argument of the learned Counsel for the petitioners is unexceptionable. The learned Member, Industrial Court could not at all have invoked a plea which was not taken, for negating the claim of the present petitioners.

12. Even before this Court, the contentions of the learned Assistant Government Pleader for respondents No. 2 and 4 and learned Counsel for respondents No. 1 and 3 are mainly attempts of shifting the burden on each other after the petitioners have superannuated having put in around 30 years of service, which by all standards is thoroughly unjustified. The State, as model employer, could not have indulged in such gimmicks with the workmen from whom it extracted work for thirty years. The very fact that the petitioners served for such a long time shows that the work on which they were engaged was of permanent nature.

13. The learned Assistant Government Pleader relied on a judgment of the Supreme Court in *A. Umarani Vs. Registrar, Cooperative Societies and Others*, , in respect of powers of the State Government for regularization of irregular appointees. This judgment could have been applicable had the respondents laid a foundation for the contention that Petitioner's appointment was irregular. At the cost of repetition, it is to be pointed out that there is no such plea taken before the Industrial Court nor is any evidence tendered. Therefore, the learned Member, Industrial Court could not have allowed such a contention to be raised.

14. As to non-availability of the post it has to be observed that the moment an employee complies 240 days of continuous service and if work of permanent nature is available, whether a post was sanctioned was not in terms of the Model Standing orders, the employee would be entitled to the benefit of permanency. In this context, it may be useful to refer to a recent judgment of the Apex Court in *Maharashtra SRTC v. Casteribe Rajya P.K. Sangliatana* 2009 (123) FLR 136 (SC). Shift in approach of the Court towards temporary workers has to be restricted to those who see protection by invoking writ jurisdiction of the Court, and whose claims do not emanate from rights under the industrial legislation like Model Standing Orders. The petitioners in the present case have shown that they have right to permanency flowing from Model Standing Order 4(c).

15. The learned Counsel for the petitioners also submitted that of late, there is growing tendency to frown upon the rights of workmen which have been sanctified over the years in the name of "LPG" liberalization, privatization, and globalization. He submitted that it would not be permissible for Courts to be swayed by developments outside the statutes for interpreting the statutes differently and for this purpose relied on certain pithy observations of the Supreme Court in *Harjinder Singh v. Punjab State Warehousing Corpn.*.. 2010 (1) SCALE 1613 : 2010 (124) FLR 700 (SC) In paragraph 23 Hon'ble Shri Justice Singhvi observed as under:

23. Of late, there has been a visible shift in the Courts approach in dealing with the cases involving the interpretation of social welfare legislations. The attractive mantras of globalization and liberalization are fast becoming the *raison d'être* of the judicial process and an impression has been created that the constitutional Courts are no longer sympathetic towards the plight of industrial and unorganized workers. In large number of cases like the present one, relief has been denied to the employees falling in the category of workmen, who are

illegally retrenched from service by creating by-lanes and side-lanes in the jurisprudence developed by this Court in three decades. The stock plea raised by the public employer in such cases is that the initial employment/engagement of the workman-employee was contrary to some or the other statute or that reinstatement of the workman will put unbearable burden on the financial health of the establishment. The Courts have readily accepted such plea unmindful of the accountability of the wrong doer and indirectly punished the tiny beneficiary of the wrong ignoring the fact that he may have continued in the employment for years together and that micro wages earned by him may be the only source of his livelihood. It need no emphasis that if a man is deprived of his livelihood, he is deprived of all his fundamental and constitutional rights and for him the goal of social and economic justice, equality of status and of opportunity, the freedoms enshrined in the Constitution remain illusory. Therefore, the approach of the Courts must be compatible with the constitutional philosophy of which the Directive Principles of State Policy constitute an integral part and justice due to the workman should not be denied by entertaining the specious and untenable grounds put forward by the employer-public or private.

Hon"ble Shri Justice Ganguly observed in paragraphs No. 37, 38, 42 to 45 as under:

37. In view of such clear enunciation of the legal principles, I am in clear agreement with Brother J. Singhvi that this Court has a duty to interpret statutes with social welfare benefits in such a way as to further the statutory goal and not to frustrate it. In doing so this Court should make an effort to protect the rights of the weaker sections of the society in view of the clear constitutional mandate discussed above.

38. Thus, social justice, the very signature tune of our Constitution and being deeply embedded in our Constitutional ethos in a way is the arch of the Constitution which ensures rights of the common man to be interpreted in a meaningful way so that life can be lived with human dignity. 39 to 41....

42. I am in entire agreement with the aforesaid view and I share the anxiety of my Lord Brother Justice Singhvi about a disturbing contrary trend which is discernible in recent times and which is sought to be justified in the name of globalisation and liberalisation of economy.

43. I am of the view that any attempt to dilute the constitutional imperatives in order to promote the so-called trends of "Globalisation", may result in precarious consequences. Reports of suicidal deaths of farmers in thousands from all over the country along with escalation of terrorism throw dangerous signal. Here if we may remember Tagore who several decades ago, in a slightly different context spoke of eventualities which may visit us in our mad rush to ape western ways of life. Here if I may quote the immortal words of Tagore:

"We have for over a century been dragged by the prosperous West behind its chariot, choked by the dust, deafened by the noise, humbled by our own

helplessness and overwhelmed by the speed. We agreed to acknowledge that this chariot drive was progress, and the progress was civilization. If we ever ventured to ask "progress toward what and progress for whom", it was considered to be peculiarly and ridiculously oriental to entertain such ideas about the absoluteness of progress. Of late, a voice has come to us to take count not only of the scientific perfection of the chariot but of the depth of the ditches lying in its path.

44. How stunningly relevant are these words and how deep are the ditches created in our society by the so-called advance of globalization.

45. At this critical juncture the judges' duty, to my mind, is to uphold the constitutional focus on social justice without being in any way misled by the glitz and Hare of globalization.

The point could not have been made more clearly and forcefully.

16. To sum up, the petitioners in these cases had completed not just 240 days of continuous work but were employees for a long period of time right from 1970's till they attained superannuation. It was not even alleged by the employers that the petitioners entered the employment by backdoor. On the other hand, the employers, against whom the complaint was filed, claimed that the Petitioner came from the Government's Ground Water Survey and Development Agency, Both the State Government and Zilla Parishad tried to evade the responsibility of providing benefits of permanency to the petitioners, though Chief Executive Officer of the Zilla Parishad in clear terms wrote to the Government that these employees were required to be made permanent. The learned Member, Industrial Court was not justified in distinguishing the judgment of the Hon'ble Shri justice R.M. Lodha, as Judge of this Court, in Divisional Forest Officer v. Madhukar Undirwade. The judgment was applicable and therefore, the learned Member should have held that the petitioners had proved that they were subjected to unfair labour practice in not being made permanent.

17. In view of this, the petitions are allowed. The impugned judgment and order is set aside. Instead, the petitioners' complaint before the Industrial Court is allowed and it is held that the petitioners were entitled to permanency on completion of 240 days of employment with all consequential benefits.