

(2009) 07 BOM CK 0189

In the Bombay High Court

Case No : Writ Petition No's. 2101 and 2557 of 2008

Dena Bank

APPELLANT

Vs

Ashraf Yunus Shaikh
 Ashraf Yunus Shaikh Vs Dena Bank

RESPONDENT

Date of Decision : 09-07-2009

Acts Referred:

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

Citation : (2009) 6 BomCR 182 : (2009) 123 FLR 626 : (2010) 2 LLJ 91 : (2010) 4 SLR 625

Hon'ble Judges : A.M. Khanwilkar, J

Bench : Single Bench

Advocate : Sudhir Talsania, instructed by, Sanjay Udeshi and Co. in WP/2101/2008 and P.M. Patel, in WP/2557/2008, for the Appellant; Sudhir Talsania, instructed by , Sanjay Udeshi and Co. for Respondent in WP/2557/2008 and P.M. Patel, for Respondent in WP/2101/2008, for the Respondent

Judgement

A.M. Khanwilkar, J.—Both these cross Petitions filed by the Management as well as the workman against the self-same award dated 14th December 2007 in Reference No. CGIT-2/68 of 2001 can be disposed of together.

2. Briefly stated, the case of the workman is that he joined Dena Bank having Branch at Chinchani Village as a Sepoy on 8th September 1986. He was asked to work as a temporary Sepoy employed by the said Chinchani Branch. It is his case that at the relevant time, there were two Sepoys employed at the said Branch. He asserts that he was doing the job sincerely, honestly and diligently to the utmost satisfaction of his superiors till 1998. However, without confirming him in the employment, he was asked not to report on duty from 1998. In this backdrop, the complaint was made, as a result of which, the Government of India, Ministry of Labour by its order No. L-12012/17/2001-IR(B-II) dated 10th May 2001 in exercise of powers conferred by Clause (d) of Sub-section (1) and Sub-section (2)(A) of Section 10 of the Industrial Disputes Act, 1947 referred the dispute to the Central Government Industrial Tribunal. The reference reads thus:

Whether the action of the Management of Dena Bank Mumbai by terminating Shri Ashraf Yunus Shaikh from the services of the Bank w.e.f. 20.04.1999 and refusal to treat him as a permanent employee of the bank w.e.f. 08.09.1986 is justified and proper? If not, then what relief the workman is entitled to?

3. The Management contested the claim of the workman that he worked for more than 240 days continuously in each year between 1986 to 1998. The Management asserted that there was no question of termination of the workman who was working only on temporary basis subject to availability of work. He was never made permanent. Since he was engaged purely on temporary basis, he worked as a casual worker and cannot seek permanency. Even though he was appointed as sub-staff, he was not empaneled nor was taken against sub-staff permanent vacancy. He was not sponsored by Employment Exchange nor he came through the Employment Exchange. In substance, the stand of the Management was that the concerned workman was not entitled for any relief whatsoever. On the basis of stand taken by the respective parties, the Industrial Tribunal framed as many as six issues, which read thus:

4. After considering the pleadings and evidence on record, the Industrial Tribunal by the impugned award dated 14th December 2007 partly allowed the Reference on following terms :

ORDER

a) Reference is partly allowed.

b) 1st Party is directed to take 2nd Party Ashraf Yunus Shaikh in the employment within 90 days from the knowledge of this Order. It is observed that 2nd Party is not entitled for back wages.

c) No order as to costs.

5. It is this decision which is subject matter of challenge in cross Petitions filed by the Management and the workman. According to the Management, the Reference should be answered against the workman in toto. Whereas, according to the workman, the opinion recorded by the Tribunal on merits should not only be upheld but the workman should be awarded with further relief of full back wages for the relevant period.

6. After having considered the rival submissions, the first question that I would proceed to address is in the context of finding of fact recorded by the Tribunal. With reference to issue No. 1, the Tribunal has found that the workman worked continuously from 1986 till 20th April 1999. Indeed, the Tribunal discarded the evidence of Jaswantlal Vyas who had deposed to support the case of the workman on the finding that the said witness did not support the claim of the workman that he worked for more than 280 days in each calendar year. The Tribunal also found as of fact that the workman admits that he was not given appointment order, he has not signed any muster roll, he was paid on weekly basis, his name was not recommended by the Employment Exchange and there

was no letter of termination issued by the Bank. The Tribunal, however, then adverted to the evidence of another witness of the workman Mr. Uday D. Parekh who was only customer of the Bank. The Tribunal has then adverted to the evidence of one of the employee working with the same Bank Mr. K.H. Oza, who has deposed that the workman was working with Chinchani Branch from 1986. I agree with the criticism of the Management that evidence of these witnesses would not be sufficient to prove the fact that the workman was working continuously for more than 240 days.

7. That would leave us with the evidence of workman himself. Indeed, the Counsel for the Management has relied on the decision of the Apex Court in the case of Surendranagar Distt. Panchayat and Another Vs. Gangaben Laljibhai and Others, , which takes the view that the onus to prove the fact that the workman had worked up to 240 days in the year preceding his termination is on the workman himself and that in absence of cogent proof to support his case, his mere words cannot be accepted. The Apex Court has expounded that in case of termination of service of daily waged earners, there would be no letter of appointment or termination, . There will also be no receipt or proof of payment. It went on to observe that thus in most cases, the workman (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. Indeed, it went on to observe that drawing of adverse inference ultimately would depend thereafter on the facts of each case. The question is: whether the evidence of workman falls short of establishing the fact that he worked for more than 240 days. The Industrial Court has found that the workman produced number of documents with Exhibit 12 and has given list of his working days from 1986 to 1999, which were not seriously disputed by the Bank. The Tribunal has adverted to, amongst others, documents at pages 6 to 23 of Exhibit 12, which according to the Tribunal would show that the number of days worked by the concerned workman were not seriously disputed by the Management. The documents which are taken into account, amongst others, is the correspondence between the Branch and the Regional Office of the Bank. At page 6 is the communication sent by the Branch Manager dated 27th February 1992 to the Regional Manager which recommends regularisation of services of the concerned workman. Document at page 15 is another communication sent by the Branch Manager dated 14th August 1993 to the Regional Manager of the Bank, once again, requesting to regularise the services of the concerned workman. The document at page 16 is annexure to the said letter, which gives the break up of number of working days during which the concerned workman was offered job by the Branch. The break up is for period between 1986 till July 1993. In the previous year, before termination, the number of working days is mentioned as 297. There is yet another communication at page 17 sent by the Branch Manager dated 9th July 1994 to the Regional Manager recording the fact that the daily-waged Sepoy was engaged for full day and was rendering all types of work. Another letter at page

18 of Exhibit 12 is dated 27th June 1995 sent by the Branch Manager to the Regional Manager of the Bank recommending increase in daily wages to be paid to the concerned workman. Document at page 19 of Exhibit 12 is communication dated 17th August 1996 sent by the Branch Manager to the Regional Authority of the Bank to empanel the concerned workman and take him in regular service. There is yet another communication sent by the Branch Manager on 21st March 1997 at page 21 of Exhibit 12 addressed to the Assistant General Manager strongly recommending regularisation of concerned workman as his services were badly needed to arrange the old record. Document at page 23 is the statement which gives the break up of number of working days between September 1986 till July 1993 including the amount paid to the concerned workman from time to time purportedly issued under the signature of Branch Manager. The concerned workman had entered the box and deposed that right from the date of joining duties and up to the time he was denied work and prevented from attending the Office till the year 1998, every year, he worked continuously and on an average, worked for 280 days every year. In support of the said stand, the concerned workman chose to rely on documents Exhibit 12, in particular, adverted to hitherto. However, there is absolutely no cross in respect of the said fact stated by the concerned workman in his evidence. Significantly, the Management witness Mr. P. Madhusudan Reddy in his examination-in-chief though asserted that the concerned workman Shri Shaikh had not continuously worked on an average for 282 days every year up to 20th April 1999, in his cross-examination, admitted the correctness of the documentary evidence relied upon in support of the claim of the concerned workman. He has admitted that the copy of the communication was exchanged between Chinchani Branch and the Regional Office (Exhibit 12 -pages 15 to 19) while he was working at Chinchani Branch. Indeed, he has deposed that he did not admit document at page 18. However, he has admitted other documents which reveal that the concerned workman had worked for more than 240 days during the previous year. Obviously, in this background, the Tribunal has observed that the fact that the concerned workman had worked for more than 240 days in the previous years has not been seriously disputed by the Bank. That finding is a possible view on the basis of evidence which has come on record. It is not a case of finding in absence of any evidence to support the same. In other words, the finding of fact so recorded by the Tribunal cannot be said to be perverse or manifestly wrong. Going by the said finding, it necessarily follows that the concerned workman had discharged the burden of proof that he worked for more than 240 days in each calendar year. Indeed, Counsel for the Management would contend that the stated documents are not originals nor initialed by any responsible officer and the contents thereof have not been proved. This argument clearly overlooks the admission of the Management witnesses as noted earlier. In the circumstances, it is not possible to overturn the finding of fact reached by the Tribunal in the context of issue No. 1.

8. The next question that needs to be addressed is: whether the Tribunal

committed any manifest error in answering the Reference partly in favour of the workman so as to require the Management to treat the concerned workman as permanent employee. This question will have to be answered keeping in mind the exposition of the Apex Court in the case of Telecom District Manager and Others Vs. Keshab Deb, . In Paragraph 22 of this decision, the Court has noted that the service of the Respondent therein was terminated on the ground that he committed misconduct, without affording opportunity of being heard. The Apex Court went on to observe that while, however, granting the relief, the superior courts should take into consideration the factors relevant therefore ,such as- recruitment of the respondent was ex-facie illegal as prior thereto neither any advertisement was issued nor the employment exchange was notified in regard to the vacancy. Further, whether the Respondent had even got himself registered with the local employment exchange and thirdly, that being a daily-rated casual employee, did not have any right to continue in service. In paragraph 23, the Apex Court went on to observe as follows:

23. Even in a case where an order of termination is illegal, an automatic direction for reinstatement with full back wages is not contemplated. He was at best entitled to one month's pay in lieu of one month's notice and wages of 15 days of each completed year of service as envisaged u/s 25F of the Industrial Disputes Act. He could not have been directed to be regularised in service or granted any/ given a temporary status.

Such a scheme has been held to be unconstitutional by this Court in A. Umarani v. Registrar, Coop. Societies and Secy., State of Karnataka v. Umadevi.

9. In the present case, as the Tribunal has found that the concerned workman admits that no appointment order was issued nor he had signed any muster roll and that he was not recommended by the Employment Exchange. It necessarily follows that his engagement was not from the regular stream of appointment. Such recruitment would be ex- facie illegal, as no prior advertisement was issued nor the Employment Exchange was notified in regard to the vacancy. More so, being a daily- rated casual employee, the concerned workman would not get any right to continue in service and at best, would be entitled to one month's pay in lieu of one month's notice and wages of 15 days of each completed year, as envisaged in Section 25F of the Industrial Disputes Act. It is not the case of the workman that the Bank has formulated any regularisation scheme. Accordingly, to the extent, the Tribunal partly allowed the Reference in favour of the concerned workman, cannot be sustained, being manifestly wrong and in the teeth of settled legal position.

10. Counsel for the concerned workman, however, relied on another decision of the Apex Court in the case of J.K. Synthetics Ltd. Vs. K.P. Agrawal and Another, . That decision will be of no avail in the fact situation of the present case. Inasmuch as, once it is held that the initial appointment of the concerned workman was ex-facie illegal and not on regular basis but purely as daily-rated casual employee, the question of any right to continue in service and for that

matter, awarding back wages, does not arise.

11. Accordingly, the operative part of the impugned award will stand modified on the following terms :

(1) The Reference is answered in favour of the Management and against the workman.

(2) The first party is directed to pay one month's pay in lieu of one months notice and wages of 15 days of each completed year of service as envisaged in Section 25F of the Industrial Disputes Act to the second party.

(3) No order as to costs.

12. Petitions disposed of on the above terms.