

(2015) 08 BOM CK 0106

In the Bombay High Court

Case No : Writ Petition No. 6085 of 2014

Deogiri Nagari Sahakari Bank Ltd. and Others

APPELLANT

Vs

Ravindra Balakrishna Deshpande

RESPONDENT

Date of Decision : 14-08-2015

Acts Referred:

Constitution of India, 1950 — Article 226
Industrial Disputes Act, 1947 — Section 2(s)
Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 — Section 3(5)

Citation : (2015) 08 BOM CK 0106

Hon'ble Judges : R.V. Ghuge, J

Bench : Single Bench

Advocate : Vidwauns Sagar S. and Rohit Sarvadyna, for the Appellant; A.S. Deshpande, Advocates for the Respondent

Final Decision : Partly Allowed

Judgement

R.V. Ghuge, J—The learned Advocates for the respective sides have stated that they have no objection if this Court hears this matter.

2. Rule. Rule made returnable forthwith and heard finally by the consent of the parties.

3. The Petitioners are aggrieved by the impugned judgment and order dated 12.02.2014 delivered by the Industrial Court in Complaint (ULP) No. 100/2008 filed by the Respondent herein. By the impugned judgment, the complaint was allowed and the punishment imposed upon the Respondent was held to be in breach of the Service Rules and without holding a domestic enquiry. Consequential reliefs were, therefore, granted by the Industrial Court.

4. While hearing this petition, both the learned Advocates for the respective sides have strenuously canvassed a host of factors. However, in the light of the order that I propose to pass, I am not required to deal with their entire submissions,

lest this order may result into certain observations which are likely to obstruct the respective cases of the litigating sides.

5. In the Written Statement filed by the Petitioner, it has been specifically stated in paragraph 7 that the Respondent/ original Complainant is a Manager working with the Bank and is not a workman under Section 2(s) of the Industrial Disputes Act, 1947. It is, therefore, canvassed that despite this pleading, the Industrial Court did not frame an issue though the said issue pertains to the jurisdictional aspect of the Industrial Court.

6. It is further submitted that the Advocate for the Petitioner remained absent due to illness from the proceedings and did not intimate the Petitioner about it's progress. Owing to his continued absence, the impugned judgment was virtually delivered ex-parte as the contentions of the Respondent had gone uncontroverted.

7. It is, therefore, stated that if the Respondent is not held to be a workman under Section 2(s) of the Industrial Disputes Act, 1947 and Section 3(5) of the MRTU & PULP Act, 1971, the complaint would be rendered untenable and the Industrial Court would not have any jurisdiction to be exercised in the said proceedings. If this be the conclusion, the impugned judgment would result in miscarriage of justice, if sustained.

8. Shri A.S. Deshpande, learned Advocate for the sole Respondent, has vehemently opposed the petition. He submits that the case before the Industrial Court was pending for 05 years, 06 months and 02 days. An appearance was entered into by the learned Advocate on behalf of the Petitioners, who are the Respondents in the complaint. The Written Statement was filed. Despite this position, the learned Advocate did not appear before the Industrial Court ever since the filing of the Written Statement.

9. It is specifically stated in this petition that due to his health condition, he could not pursue the matter and the counsel stopped appearing in the matter before the Industrial Court at Aurangabad.

10. Shri Deshpande, therefore, submits that it is not the case of the Petitioner that the concerned Lawyer was suffering from any such ailment that compelled him to quit practice and he stopped appearing in all Courts.

11. Having considered the submissions of the learned Advocates, it cannot be overlooked that the Industrial Court was practically compelled to proceed ex-parte due to the continued absence of the Petitioner. The complaint could not be kept pending so as to enable the Petitioners to appear before the Industrial Court as per their own convenience. Every stage procedurally prescribed in law was followed in deciding the complaint. Nevertheless, the impugned judgment could be said to be an ex-parte judgment. This issue becomes more significant and decisive in the light of the objections raised by the Petitioner that the Respondent/ Complainant was not a workman and the complaint was untenable.

12. It is settled law that the status of an Employee, whether, a workman or not, is not based on his designation or his salary structuring. It is purely a matter of his duties/job profile and the work actually performed by him continuously. The Division Bench of this Court in the matter of Chandrashekhar Chintaman Vaidya Vs. National Organic Chemical Industries Ltd., (2010) 4 BomCR 31 : (2010) 126 FLR 289 : (2011) 1 LLJ 200 : (2010) 3 MhLj 434 has laid down the tests for deciding the status of an employee. It would be apposite to reproduce paragraphs 11 and 36 of the said judgment as under:-

"11. Learned Advocates for the parties have placed reliance on various citations. The Judgments along with purpose for which those are relied are as follows:-

[A] Appellant's citations and propositions :-

[1] Hussan Mithu Mhasvadkar Vs. Bombay Iron and Steel Labour Board and Another, (2001) 7 AD 456 : AIR 2001 SC 3290 : (2001) 91 FLR 232 : (2001) 7 JT 466 : (2001) LabIC 3330 : (2001) 2 LLJ 1520 : (2001) 6 SCALE 156 : (2001) 7 SCC 394 : (2001) SCC(L&S) 1190 : (2001) 4 SCT 413 : (2002) 1 UJ 8 : (2001) AIRSCW 3398 : (2001) 6 Supreme 779 .

Proposition :-

Primary duties of an employee, purpose, aim and object of the employment, i.e., predominant nature of duties performed by person claiming to be a workman under Section 2(s) of the Industrial Disputes Act, will be the true test to find out the status as a workman.

[2] Mukand Ltd. Vs. Mukand Staff and Officers' Association, AIR 2004 SC 3905 : (2004) 2 CTC 430 : (2004) 101 FLR 219 : (2004) 3 JT 474 : (2004) 2 LLJ 327 : (2004) 3 SCALE 116 : (2004) 10 SCC 460 : (2004) SCC(L&S) 798 : (2004) 2 SCR 951 : (2004) 3 SLJ 204 : (2004) 2 UJ 1164 : (2004) AIRSCW 3731 : (2004) 5 Supreme 202 .

Proposition :-

The question of class to which the employees belong is to be decided not on the basis of grade in which they were placed, but on the basis of their duties, responsibilities and powers as laid down in Section 2(s) of the Industrial Disputes Act.

[3] D.P. Maheshwari Vs. Delhi Administration and Others, AIR 1984 SC 153 : (1983) 2 LLJ 425 : (1983) 2 SCALE 313 : (1983) 4 SCC 293 : (1983) 3 SCR 949 : (1983) 2 SLJ 542 .

Proposition :-

Occasional entrustment of supervisory managerial or administrative work will not take a person mainly discharging clerical duties out of purview of Section 2(s) of the Industrial Disputes Act.

On facts of the case, Hon"ble Supreme Court had interfered with the judgment of

High Court where the judgment was rendered without dealing with the crux of the matter involved.

[4] Malabar Industrial Co. Ltd. Vs. Industrial Tribunal, Trivandrum, AIR 1958 Ker 202 : (1958) 2 LLJ 722 .

Proposition :-

Whether the employee concerned is a workman being a jurisdictional fact and issue, it can be scrutinized in proceedings under Article 226 of Constitution of India.

Main feature, pith and substance of his employment must be manual or clerical before the definition of "workman" under section 2(s) is attracted.

[5] S.K. Maini Vs. M/s. Carona Sahu Company Limited and others, AIR 1994 SC 1824 : (1994) 68 FLR 1101 : (1994) 3 JT 151 : (1994) 2 LLJ 1153 : (1994) 108 PLR 492 : (1994) 1 SCALE 889 : (1994) 3 SCC 510 : (1994) 2 SCR 333 : (1994) 1 UJ 735 .

Proposition :-

Predominant nature of work is to be seen, and entrustment of some supervisory or other work, which is incidentally done -only a fraction of his entire work, will bring the employee within the purview of definition of the "workman" under section 2(s) of the Industrial Disputes Act.

[6] Standard Chartered Bank Vs. Andhra Bank Financial Services Ltd. and Others, AIR 2006 SC 3626 : (2006) 5 SCALE 384 : (2006) 6 SCC 94 : (2006) 68 SCL 109 : (2006) 3 SCR 1 Supp : (2006) AIRSCW 3460 : (2006) 4 Supreme 238 .

Proposition :-

When entire evidence has come on record, burden of proof, whether it shifts etc., becomes immaterial.

Moreover, this judgment does not render any direct guidance on the facts of the case.

[7] State of Punjab Vs. Modern Cultivators, Ladwa, AIR 1965 SC 17 : (1965) 67 PLR 117 : (1964) 8 SCR 273 .

Proposition :-

Failure to produce documents would lead to only conclusion that if produced, those would have gone against the party who has withheld the documents and hence adverse inference against such party is liable to be drawn.

[8] Badat and Co. Vs. East India Trading Co., AIR 1964 SC 538 : AIR 1963 SC 538 : (1964) 4 SCR 19 .

This judgment is not relevant. Hence, it is not referred.

[B] Respondent's citations and the Propositions therein :-

1. Somnath Tulshiram Galande Vs. Presiding Officer, IInd Labour Court and Others, (2008) 2 ALLMR 628 : (2008) 5 BomCR 865 : (2008) 117 FLR 149 : (2008) 2 LLJ 767 : (2008) 4 MhLj 163 .

Proposition :-

Onus to prove that the claimant is a workman and to prove the test to satisfy all essential ingredients lies on one who claims said status. Unless proof of such a fact is emerging from evidence, it cannot be held that he is a workman.

2. Management of Sonepat Cooperative Sugar Mills Ltd. Vs. Ajit Singh, AIR 2005 SC 1050 : (2005) 3 ESC 305 : (2005) 105 FLR 1 : (2005) 2 JT 370 : (2005) 1 LLJ 1122 : (2005) 140 PLR 645 : (2005) 3 SCC 232 : (2005) 2 SCR 105 : (2005) 2 SLJ 188 : (2005) AIRSCW 1005 : (2005) 2 Supreme 26 .

Proposition :-

A person, principally a workman, should be employed in an industry, and must be performing manual, skilled, unskilled, technical, operational, clerical or supervisory work and merely because the employee has not been performing any managerial or supervisory duties, ipso facto he would become a workman.

3. Northcote Nursing Home Pvt. Ltd. Bombay & another Vs. Zarine H. Rahina (Dr.) (Mrs.) and another[(2005) 3 SCC 232].

Proposition :-

Burden of proving that a person is a workman lies on the person who claims to be a workman.

4. H.R. Adyanthaya Vs. Sandoz (India) Ltd., etc. etc., AIR 1994 SC 2608 : (1994) 5 JT 176 : (1995) 1 LLJ 303 : (1994) 3 SCALE 816 : (1994) 5 SCC 737 : (1994) 3 SCC 737 : (1994) 2 SCR 573 Supp : (1994) 3 SLJ 145 .

Proposition :-

Even if it is proved that the complainant does not do any managerial or supervisory work, unless it is proved that he does work of the nature of manual, supervisory, technical and clerical, he does not become a workman under Section 2(s) of the Industrial Disputes Act.

5. Mukund Staff and Officers" Association Vs. Mukund Ltd., (2007) 6 ALLMR 312 : (2007) 6 BomCR 75 : (2007) 115 FLR 553 : (2008) 2 LLJ 221 : (2008) 2 MhLj 416 .

Proposition :-

The burden to prove that a person is a workman lies on the workman. The basic

rule that who approaches the Court should prove the case is not departed in any of the provisions of Industrial Disputes Act.

6. Electronics Corporation of India Ltd. Vs. Electronics Corporation of India Services Engineers Union[2006 III CLR 704],

7. Bank of Baroda Vs. Ghemarbhai Harjibhai Rabari, AIR 2005 SC 2799 : (2005) 105 FLR 383 : (2005) 3 JT 312 : (2005) 2 LLJ 475 : (2005) 10 SCC 792 : (2005) SCC(L&S) 963 : (2005) 2 UJ 1020 , and

8. Arvind Anand Gaikwad Vs. Uni Abex Alloy Products Ltd. and Others, (1994) 3 LLJ 684 .

Proposition :-

The onus of proof was on the workman, though the employer had raised a dispute about his status."

"36. The law as to basic test as to facts to be proved for holding a person to be a workman under Section 2(s) of the Industrial Disputes Act can be said to be settled and can be summarized as follows:-

(a) The person does menial, ministerial or clerical work.

(b) If any of the parts of his duties involves any sort of supervision, which is on the material and not on the men.

(c) The predominant nature of duties discharged by the person i.e. the part of supervisory duties, if any, is not predominant.

(d) What is seen to be is not the designation and/or nomenclature, but performance of duties."

13. The grievance of the Petitioner in addition to the above is that the issue of workman was not framed. This Court in the matter of Permanent Magnets Ltd., Mumbai Vs. Vinod Vishnu Wani, (2002) 1 ALLMR 797 : (2002) 1 BomCR 310 : (2002) 4 BOMLR 6 : (2002) 93 FLR 32 : (2002) 3 MhLj 413 has held in paragraph 12 as under:-

"12. The contention sought to be raised by the respondent in this regard is that the prayer to frame issue is restricted to the validity and legality of the Domestic Enquiry and, therefore, right reserved by the petitioner to lead evidence was only in case the enquiry is held to be not in accordance with the principles of natural justice. It cannot be disputed that strict interpretation of the pleadings would disclose a prayer to frame issue in relation to validity and legality of the Domestic Enquiry. The pleadings do not disclose a specific prayer for framing of any other issue. However, it is always to be remembered that framing of issue is primarily the function of the Court and it is not for the party to make prayer in that regard. The issues are to be framed based on the pleadings of the parties. Merely, because the party does not pray for framing of an issue, the Court is not absolved of its duty of framing the issues, which otherwise arise from the

pleadings of the parties. This does not mean that the parties are forbidden from rendering necessary assistance to the Court in framing of issues. However, it is primarily the duty of the Court to frame issues, based on the pleadings. Viewed from this angle, mere absence of the prayer to frame issue cannot result in any prejudice to the petitioner. The Apex Court in *Makhan Lal Bangal Vs. Manas Bhunia and Others*, AIR 2001 SC 490 : (2001) 1 JT 252 : (2001) 1 SCALE 11 : (2001) 2 SCC 652 : (2001) 1 SCR 17 : (2001) AIRSCW 90 : (2001) 1 Supreme 28 , has ruled that an obligation is cast on the Court to read the plaint/ petition and written statement/ counter, if any, and then determine with the assistance of the learned counsel for the parties the material propositions of fact or of law on which the parties are at variance. The issues shall be framed and recorded on which the decision of the case shall depend. The parties and their counsel are bound to assist the Court in the process of framing of issues. Duty of the counsel does not belittle the primary obligation cast on the Court. It is for the Presiding Judge to exert himself so as to frame sufficiently expressive issues."

14. It is well settled that the Court is under an obligation to frame proper issues after considering the pleadings of the litigating sides. Despite a specific pleading in paragraph 7 of the Written Statement of the Petitioners, the issue as to whether, the Respondent/ Complainant is a workman or not, had not been framed. For these reasons, the impugned judgment needs to be set aside only to enable the Petitioner to participate in the said proceedings and to enable the Industrial Court to deliver a judgment after a proper legal contest by the litigating sides.

15. I cannot be oblivious of the fact that this is likely to cause hardships to the Respondent and is also likely to increase rigours of litigation. This Court, in the matter of *The Manager, Siemens Limited v/s The Branch Secretary, Siemens Workers" Union* (Writ Petition No. 7269/2011 (Aurangabad Bench), dated 18.04.2012) had imposed costs of Rs. 1 lac to be paid to each of the Respondent/ Employee for a similar laxity on the part of the Management.

16. This Court in the matter of *Municipal Council Vs. Bhanudas Jayawanta Sonawane*, (2014) 141 FLR 430 : (2014) LLR 424 had also imposed costs of Rs. 1 lac on the Management/ Municipal Council.

17. By remitting the complaint back to the Industrial Court for a fresh adjudication, it would virtually amount to reversing the clock by 07 years. As such, though I am convinced that the impugned judgment needs to be set aside so as to enable a proper trial of the complaint on its merits before the Industrial Court, the rigours of litigation and hardship being suffered by the Respondent, need to be softened.

18. In the light of the above, the impugned judgment dated 12.02.2015 is set set aside and Complaint (ULP) No. 100/2008 is remitted back to the Industrial Court with the following directions:-

(a) The litigating sides shall appear before the Industrial Court on 29.08.2015.

(b) The Petitioner shall deposit an amount of Rs. 1 lac before the Industrial Court on or before 11.09.2015.

(c) Upon depositing the said amount, the Respondent/ Complainant shall withdraw the said amount without any condition as costs for softening the rigours of litigation and hardship being suffered by him on account of this remand.

(d) Only after the Petitioner has deposited the said amount, the Industrial Court shall re-cast the issues strictly in accordance with the pleadings of the respective sides on or before 23.09.2015.

(e) The oral and documentary evidence already on record shall not be discarded by the Industrial Court.

(f) Both the litigating sides shall be permitted to lead additional oral and documentary evidence after framing/ re-casting of issues.

(g) The Industrial Court shall endeavour to decide Complaint (ULP) No. 100/2008 as expeditiously as possible and preferably on or before the 31st May, 2016.

(h) Both the litigating sides shall be precluded from seeking adjournments on unreasonable and trivial grounds.

(i) If the said amount is not deposited as directed above, this order shall stand recalled, the petition shall stand dismissed and then the impugned judgment of the Industrial Court shall stand restored.

19. This Writ Petition is partly allowed and Rule is made partly absolute in the above terms.