

(2008) 11 BOM CK 0026

In the Bombay High Court

Case No : Writ Petition No. 5087 of 2006

Divisional Secretary, Maharashtra State Board of Secondary
and Secondary Education and Chairman, Maharashtra State
Board of Secondary and Secondary Education

APPELLANT

Vs

Mohd. Naim

RESPONDENT

Date of Decision : 26-11-2008

Acts Referred:

Constitution of India, 1950 — Article 12, 14

Industrial Disputes (Central) Rules, 1957 — Rule 77, 81

Industrial Disputes Act, 1947 — Section 11A, 2, 25B, 25F, 25G

Citation : (2008) 111 BOMLR 147

Hon'ble Judges : B.P. Dharmadhikari, J

Bench : Single Bench

Advocate : T.D. Khade, for the Appellant; P.D. Meghe, for the Respondent

Final Decision : Dismissed

Judgement

B.P. Dharmadhikari, J.—By this Writ Petition, the employer Maharashtra State Board of Secondary and Higher Secondary Education, Nagpur has challenged the order dated 02.08.2006 passed by the Industrial Court, Nagpur in ULPA Revision No. 90/2004, as also the judgment and order dated 07.07.2004 passed by the First Labour Court, Nagpur in ULPA Complaint No. 174/1996. The Labour Court directed the petitioner / employer to reinstate the respondent / employee with continuity and full backwages. The employer then approached the Industrial Court in above mentioned revision and Industrial Court has quashed and set aside the grant of backwages, but maintained the direction to reinstate the complainant / employee with continuity. This Court has on 13.10.2006 while issuing notice in the matter, directed maintenance of status quo and while issuing Rule in the matter on 10.04.2008 this Court granted interim relief in terms of prayer clause (ii), i.e. it stayed the operation and effect of order dated 02.08.2006 passed by the Industrial Court.

2. The facts in brief are that, the complainant / employee claimed that he was engaged on daily wages from October, 1990 by oral order as class-III employee. He was issued identify card and was being paid daily wages @ Rs. 20/-. He rendered continuous services and completed 240 days while working as clerk. But then his services were not regularised and along with other employees he filed ULPA Complaint before the Industrial Court for permanency. On 30.08.1991 when he went to perform his duties as usual, he was not permitted to resume his duties and was told that his services were terminated. Complaining that this oral termination was in violation of Section 25F and 25G of the Industrial Disputes Act, 1947 the complainant approached the Labour Court on 2.12.1991 alleging unfair labour practice under Item 1 Schedule IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (hereinafter referred to as .MRTU & PULP Act.). As the complaint was belated, he moved application vide Misc. ULP No. 64/1992 for condonation of delay, which was granted by the Labour Court on 12.10.1995. The employer then filed written statement and contended that it was not an Industry. It further stated that the complainant was not appointed on any clear vacant post and it was only within the power of the State Government to create or to sanction a post. It was also stated that the complainant was being engaged on daily wages as clerk during examinations when there was additional work load and regular staff was unable to cope up with it & that discontinuation of his services became necessary because of reduction of work and also for avoiding unnecessary expenditure and for maintenance of secrecy of the regular work of the Board. Board also contended that because of continuation of such workers, the regular employees used to shirk their responsibilities and practice resulted into nepotism and daily wagers therefore, used to exert pressure for their regularisation or to absorb them on temporary establishment. On 30.08.1991 in all 118 daily rated employees including 76 clerks were discontinued. It was also pleaded by the employer that the complainant moved Industrial Court for very same relief by filing ULPA Complaint No. 972/1991, which was withdrawn by him and thereafter he filed another complaint No. 1401/1992 which was pending before the Industrial Court for same relief. The Labour Court then framed issues and on 7.7.2004 delivered the judgment in favour of the complainant, directing his reinstatement with full backwages, as mentioned above after finding that the employer had indulged in unfair labour practice falling under item 1(b,d and f) of Schedule IV of the MRTU & PULP Act. Industrial Court has in revision only set aside the grant of full backwages but maintained the rest of the judgment of Labour Court.

3. In this background I have heard Advocate Mrs. T.D. Khade, for petitioner / employer and Advocate Shri P.D. Meghe, for respondent / employee.

4. Advocate Mrs. Khade, has contended that the Labour Court & the Industrial Court lost sight of the fact that ULPA Complaint as filed before the Labour Court was hopelessly barred by limitation and there was no application for condonation of delay, as also the Labour Court did not condone the delay. On merits, she has

relied upon the judgment of Hon''ble Apex Court in the case of Secretary, State of Karnataka and Others Vs. Umadevi and Others, , to point out that the respondent in the present matter did not enter the services through any open competition or selection process, as required by law, and therefore, had no right to post. Thus the only contention is that therefore relief of reinstatement as granted by the Labour Court and upheld by the Industrial Court was not available and the complaint filed by the respondent ought to have been dismissed.

5. Advocate Shri Meghe, for respondent / employee has contended that submission about not condoning the delay is factually incorrect. He states that the delay was condoned by the Labour Court and thereafter ULPA Complaint was registered. He further states that the constitutional bench judgment of Hon''ble Apex Court in Secretary State of Karnataka (supra) does not deal with the aspect of violation of Section 25F of the Industrial Disputes Act and reinstatement, but it only considers the question of regularisation. He contends that Section 25F is applicable to casual employee as also part time employee and hence it is not necessary for the respondent to show that he was holding any post or that he had any right to post. He contends that the employment provided to respondent / complainant and the fact that he rendered 240 days continuous service is also not in dispute & hence, when Section 25F has not been complied with, the relief of reinstatement as granted by the Labour Court and Industrial Court does not call for any interference in exercise of writ jurisdiction. He points out that before Labour court large number of such complaints were filed by various employees, and all of them have been reinstated back in service. After that adverse order of Industrial Court employer . Board approached this Court in Writ Petitions and this Court (learned Single Judge) dismissed those writ petitions. That dismissal was questioned in various Letters Patent Appeals by the petitioner Board, and those Letters Patent Appeals have also been dismissed vide judgment reported at 2008 (2) CLR 301.Maharashtra State Board, Amravati v. Sanjay Krishnarao Shrugare . According to him, therefore, the present respondent is also entitled to similar benefits and the issue in so far as this Court is concerned, clearly stands covered by the judgment of Division Bench dated 08.04.2008, in the LPA referred supra. In the alternative, he has placed reliance upon following judgments, to point out how the issues settled by the Hon''ble Apex Court in case of Secretary, State of Karnataka v. Umadevi (supra), has been explained and applied by the Hon''ble Apex Court itself, as also by other High Courts.

(A) 2007 2 CLR 699 State of Punjab v. Anil Kumar.

(B) 2008 3 CLR 588 Divisional Manager, New India Assurance Co. Ltd. v. A. Sankaralingam.

(C) U.P. State Electricity Board Vs. Pooran Chandra Pandey and Others,

(D) AIR 2007 SCW 667 Oil and Natural Gas Corporation Ltd. v. Engineering Mazdoor Sangh.

(E) 2007 2 CLR 555. Export Inspection Council of India v. Madhukar Arun Sapkale and Ors.

(F) 2007 LIC 1936 . AIIMS v. Raj Singh and Ors.

(G) 2008 1 CLR 900 . Gujarat Pollution Control Board v. Jagadish Nathabhai Chavda.

(H) 2007 1 CLR 404 . Kheda District Panchayat v. Jashubhai Devabhai Gohel.

He states that, violation of Section 25F in present circumstances entitles the respondent to grant of relief of reinstatement. He has also pointed out that not only violation of Section 25F, but violation of Sections 25F, 25G and 25H of the Industrial Disputes Act is also found to be proved on record by both the courts. Therefore, as juniors were continued in service or were later on provided work by superseding the better claim of the present respondent, relief of reinstatement granted to him needs to be maintained. He contends that the petition as filed therefore, needs to be dismissed.

In the alternative and by way of abundant precaution, he contends that if this Court finds that the relief of reinstatement could not have been given to the present respondent, the respondent should be given adequate compensation considering the fact that his colleagues similarly situated have already been reinstated back in service by the petitioner . Board.

6. There is no reply to these arguments on behalf of the petitioner. The fact that there was delay in filing ULPA Complaint and that delay was condoned by the Labour Court has been incorporated by the Industrial Court in its order dt. 2.8.2006 in paragraph No. 3. In view of this, it is apparent that arguments of petitioner about absence of condonation of delay in the matter are misconceived.

7. The length of service of present respondent /complainant is not in dispute in any way. He joined services on daily wages as clerk / class -III employee in October, 1990 and he was not permitted to resume his duties as usual on 30.08.1991. Thus, from October 1990 till 30.08.1991 he has put in about 11 months service. It is not the case of the present petitioner that he did not complete 240 days during this period. The fact of completion of 240 days therefore found to be proved by both the Courts below, is not in dispute in present Writ Petition. The finding of lower courts about juniors being continued in service is not even touched during arguments by the petitioner.

8. At this juncture, it would be appropriate to note the case law cited by Adv. Meghe.

A. In the judgment in case of State of Punjab v. Anil Kumar (supra), the daily wager challenged his termination initially before the Civil Court and having failed there, approached the machinery under Industrial Disputes Act, which resulted in reference after about 13 years of his termination. Labour Court in award found his termination to be illegal and granted him reinstatement with 40% backwages

from the date of his termination i.e. from 29.09.1988. Against the award of Labour Court, the employer filed Writ Petition and that Writ Petition came to be dismissed after noticing that the employee had worked for more than 240 days. Before that, the employee had filed Writ Petition before the High Court seeking direction to the employer to implement the award of Labour Court and the employee joined the duties accordingly on 01.04.2005. It is in this background that the contention of the employer about application of Section 2[oo][bb] of the Industrial Disputes Act and reference after 13 years of termination were considered and the Hon''ble Apex Court denied the backwages to the employee, but maintained direction to reinstate him.

B. In judgment in the case of Divisional Manager, New India Assurance Co. Ltd. v. A. Sankaralingam (supra), the question before the Hon''ble Apex Court was whether part time employee who also worked elsewhere was covered by definition of Section 2[s] of the Industrial Disputes Act. The reference was answered in negative i.e. against the employee by the Labour Court but the learned Single Judge of High Court at Madras held that he was workman and his removal from service in breach of Section 25F of the Industrial Disputes Act, to be bad. He was granted relief of reinstatement with full backwages. The Division Bench of Hon. High Court confirmed these findings of learned Single Judge and Hon''ble Apex Court while rejecting the appeal of employer held that part time employee is also a workman entitled to benefits of Section 25B and 25F of the Industrial Disputes Act.

C. In case of U.P. State Electricity Board v. Pooran Chandra Pandey and Ors. (supra), a daily wager employee of a Cooperative Electric Supply Company absorbed in service of electricity board upon its take over, claimed regularisation from 04.05.1990. It appears that the Board before take over has decided to regularise the services of its employees accordingly. The Single Judge of Allahabad High Court allowed the claim and the Hon''ble Apex Court upheld the view observing that the employees of the Society upon take over by the Board were deemed to have been appointed in the services of the Board from the date of their original appointment and therefore, could not have been denied the benefit of decision dated 28.11.1996 of the Board. The Hon''ble Apex Court also noticed that the petitioners before the High Court were working for about 22 years and it was unreasonable to deny their claim for regularisation. The perusal of this judgment reveals that question of entitlement of daily wager to reinstatement or whether they were holding any post so as to enable them to claim such relief did not need any consideration by the Hon''ble Apex Court there as the employee was deemed to be in Board.s service from 4/5/1990. Hon''ble Apex Court has considered the judgment of its Constitutional Bench in Secretary, State of Karnataka v. Umadevi (supra), in paragraph No. 11 and have distinguished it by observing that it cannot be applied to a case where regularisation has been sought for in pursuance of Article 14 of the Constitution of India.

D. In the case of Oil and Natural Gas Corporation Ltd. v. Engineering Mazdoor Sangh (supra), the Hon''ble Apex Court has found that though seasonal workers could not have been treated at par with regular employees or their services could not have been treated as notionally regularised from a particular date, direction to consider their claim for regularisation in descending order as and when vacancy in regular post arise was proper. The proceeding arose out of reference and during pendency of the reference, Union of workmen filed a complaint u/s 33A of the Industrial Disputes Act, stating that their employer (ONGC) had started giving work to contractors in preference to casual, contingent and temporary workers and thus altered the terms of service in breach of Section 33 of the Industrial Disputes Act, 1947. The complaint was tried and Tribunal by its award dated 30.10.1993 held that it was not permissible for the Tribunal to examine whether work of ONGC was seasonal work or not, and whether ONGC has breached the terms and conditions. However, ONGC was directed to follow the principle of last come first go. Thereafter on 25.4.1994 ONGC sought permission to terminate the services of casual/temporary workmen and its notice was served upon the Union, and after hearing Tribunal directed ONGC to terminate the services of casual, contingent, temporary workmen, except 189 out of 269 who were mentioned in the list filed by the Union. The Tribunal came to the finding that only temporary workmen who had put in less than 240 days of attendance in periods of two consecutive months were entitled to conversion as regular employees. The Tribunal took recourse to Certified Standing Orders and on its strength observed that actual workmen who had put in 180 days or more in 12 consecutive months automatically became temporary workman who could after completion of 240 days of attendance, if qualified needed to be considered for conversion as regular employee. List of 269 workmen submitted by the Union stating that they had completed 240 days was rejected by the Tribunal and 189 workmen were arranged in descending order as per number of days put in by each workman. Union challenged this order of Tribunal before Gujarat High Court and the learned Single Judge found that though regularisation could not be effected in absence of availability of permanent post, but there was no bar for treating a person to be regular even if the permanent post is not available. The employer ONGC then approached Division Bench of High Court in Letters Patent Appeal and during pendency of that appeal, the respondent Union gave up its claim for modification of award as per first direction given by the learned Single Judge and pressed for implementation of second direction given by the Tribunal. The Division Bench disposed of the appeal by directing that the workmen concerned should be notionally treated as regularised from 1.5.1999 and as most of the benefits were already given to the workmen, a further direction was given to give to them actual benefits at par with regular employees, and it was made applicable to surviving employees out of 189 employees who were accepted to have acquired temporary status. It is in this background that the employer ONGC moved the Hon''ble Apex Court, and the Hon''ble Apex Court found that considering the nature of employment and period during which the field workers were employed, the directions of Single Judge would create various difficulties, if

seasonal workman were to be treated at par with regular employees and it would be even more difficult for the employer to adjust the workmen in permanent employment when the need for them was only seasonal. The Hon''ble Apex Court found that direction given by the Tribunal were reasonable and therefore restored the same. It is therefore, obvious that the question of retrenchment or right to post or then the issue arising out of illegal/back door recruitment did not arise for consideration in the matter at all.

E. The judgment of learned Single Judge of this Court in the case of Export Inspection Council of India v. Madhukar Arun Sapkale and Ors. (supra), considers the constitutional bench judgment of Hon''ble Apex Court in case of Secretary, State of Karnataka v. Umadevi (supra), but then in paragraph No. 15 it has been found that the employees were working for more than 10 years in regular vacancy on a permanent post and they were not appointed in irregular manner and they have not worked as a result of any orders of stay passed by any Court. The Tribunal's order directing their regularisation was therefore, found to be justified. It is thus apparent that in facts of said matter such recourse was found permissible as per case of Secretary, State of Karnataka v. Umadevi (supra) .

F. In judgment in case of AIIMS v. Raj Singh and Ors. [supra], the question of termination of service of a daily wager was being considered, and Hon. Delhi High Court found that post held by him was permanent and his termination was malafide and with a view to accommodate cleaner working in the Institute as driver in his place. In this background in paragraph No. 17 the Delhi High Court observes that reliance before it on judgment in case of Secretary, State of Karnataka v. Umadevi (supra), was misconceived as said case considers only issue of regularisation. It is therefore apparent that this ruling has also no application in the present matter.

G. In Gujarat Pollution Control Board v. Jagadish Nathabhai Chavda [supra], the learned Single Judge of Gujarat High Court has considered the grant of relief in facts where Section 25F was found to be violated and Section 2[oo][bb], was found to be not applicable. The judgment shows that question of entitlement to particular relief to employee in the light of the constitutional bench judgment above, did not arise for consideration before the Hon''ble Gujarat High Court there.

H. In the case of Kheda District Panchayat v. Jashubhai Devabhai Gohel [supra], the learned Single Judge of Gujarat High Court was again not required to consider the judgment of Hon''ble Apex Court in case of Secretary, State of Karnataka v. Umadevi (supra). There, the challenge was to award made by the Labour Court granting reinstatement with continuity and 25% backwages and the contention raised in petition were about delay in reference, workmen voluntarily leaving the job and not completing 240 days. The contention relevant for this purpose was as employee was working on daily wages, he was not entitled to any relief. The contention was rejected by the Gujarat High Court. It is therefore, apparent that this ruling has no relevance in the present facts.

9. I feel that the following judgments of Hon. Apex Court are also relevant here.

A. In the judgment in case of Mahboob Deepak Vs. Nagar Panchayat Gajraula and Another, , the Hon"ble Apex Court has held that the relief of reinstatement cannot be given automatically and in paragraph No. 7 has also mentioned factors relevant for grant of such relief of reinstatement. The Hon"ble Apex Court found that there the employee was entitled to compensation, notice and notice pay. The earlier judgment in case of Madhya Pradesh Administration Vs. Tribhuban, , has been relief upon in paragraph No. 11 for the purpose of granting monetary compensation.

B. In Uttaranchal Forest Hospital Trust Vs. Dinesh Kumar, part time employee was not given the relief of reinstatement for violation of Section 25F.

C. In judgment in the case of Uttaranchal Forest Development Corporation Vs. M.C. Joshi, in paragraph No. 6 the Hon"ble Apex Court has held that the question whether appointment was in terms of recruitment rules is one of the relevant consideration for grant of relief of reinstatement. There, the employee had worked for about 12 years and hence he was given compensation of Rs. 50,000/-. In paragraph No. 9 it has been observed that the legal position even in respect of grant of reinstatement underwent a change after the Constitutional Bench judgment in case of Secretary, State of Karnataka v. Umadevi (supra). Observations in AIIMS v. Raj Singh and Ors. [supra], expressing a view to the contrary therefore can not be accepted to be correct after this judgment.

D. In case of Jaipur Development Authority Vs. Ram Sahai and Another, , only for violation of Section 25G and 25H of Industrial Disputes Act, 1947 the relief of reinstatement was not granted after noticing that the employee did not complete 240 days of service & no juniors were retained. Compensation of Rs. 75,000/- was granted to the employee. Following observations therein are important:

28. We would, therefore, proceed on the basis that there had been a violation of Sections 25G and 25H of the Act, but, the same by itself, in our opinion, would not mean that the Labour Court should have passed an Award of re-instatement with entire back wages. This Court time and again has held that the jurisdiction u/s 11A must be exercised judiciously. The workman must be employed by a State within the meaning of Article 12 of the Constitution of India, having regard to the doctrine of public employment. It is also required to recruit employees in terms of the provisions of the rules for recruitment framed by it. Respondent had not regularly served Appellant. The job was not of perennial nature. There was nothing to show that he, when his services were terminated any person who was junior to him in the same category, had been retained. His services were dispensed with as early as in 1987. It would not be proper to direct his reinstatement with back wages. We, therefore, are of the opinion that interest of justice would be subserved if instead and in place of re-instatement of his services, a sum of Rs. 75,000/- is awarded to Respondent by way of compensation as has been done by this Court in a number of its judgments. [See

State of Rajasthan and Anr. v. Ghyan Chand Civil Appeal No. 3214 of 2006, disposed of on 28th July, 2006.].

10. The Division Bench of this Court in Maharashtra State Board, Amravati v. Sanjay Krishnarao Shrugare (supra) was not called upon to consider similar challenge. The Appellant there did not use law as laid down in Secretary, State of Karnataka v. Umadevi (supra) at all. The Hon. Division Bench has considered the challenge in the light of arguments & upheld the relief of reinstatement by observing that completion of service of 240 days was established, the plea of seasonal or casual nature of employment was not raised before lower authority. Thus, question of relevance of the backdoor recruitment was not placed before the Hon. Division Bench at all. The ruling therefore can not be held as clinching the issue raised before me.

11. It therefore follows that the mode or manner of entry into service is one of the relevant factors to be considered here and distinction between cases of prayer for regularisation & reinstatement being made earlier is now not available after the constitutional bench verdict of Hon. Apex Court in case of Secretary, State of Karnataka v. Umadevi (supra). In public employment therefore mere violation of Section 25F or Section 25G or Section 25H by itself may not be sufficient to sustain reinstatement if employment is not secured in accordance with relevant rules for recruitment or Article 14 of the Constitution Of India. But then if it is proved by the complainant/employee that after terminating him in violation of Section 25F or without publishing seniority list as required by the Rule 77 or 81 of Industrial Dispute Rules (Central or State), the work continued or his juniors were retained in service, and he could have performed work had he not been terminated, the grant of relief of reinstatement is justified.

12. In present matter as already stated above, the Labour Court has found in paragraph 11 of its judgment that employees junior to the complainant/employee continued in service. The complainant disclosed 5 such names and witness examined by petitioner employer admitted that Pramod Kaship, Prakash Kalode & Ku. Sadhana Waghmare appointed after complainant were then continuing in service. Complainant was recruited in October,1990 & these three were subsequently recruited in December,1990. Thus after termination of employee in breach of Section 25F & 25G in present case the work was available. The relief of full backwages granted by the Labour Court is set aside by the Industrial Court. The only relief maintained is of reinstatement with continuity so that the complainant gets benefits, if any, as derived by his juniors. This order of Industrial Court dated 2/8/2006 in Revision (ULPN) No. 90 of 2004 is neither perverse nor it suffers from any jurisdictional error warranting interference in exercise of the writ jurisdiction. With the result, I don.t find any merit in present writ petition.

13. Writ Petition 5087 of 2006 is accordingly dismissed. Rule discharged. However, there shall be no order as to costs.