
(2013) 07 CAL CK 0033

In the Calcutta High Court

Case No : Writ Petition No. 17363 (W) of 2013

Gloster Limited and Another

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 24-07-2013

Acts Referred:

Citation : (2013) 4 CALLT 27 : (2013) 4 CHN 488 : (2014) 140 FLR 255 :
(2014) 1 LLN 88

Hon'ble Judges : Harish Tandon, J

Bench : Single Bench

Advocate : Partha Bhanja Chowdhury and Mr. S.K. Singh, for the Appellant;
Jayanta Dasgupta, Balaram Patra for the Respondent No. 3, Mr. N.C.
Bhattacharjee and Mr. Syed Moshir Rahman for the State, for the Respondent

Final Decision : Allowed

Judgement

Harish Tandon, J.—The petitioner has assailed the award dated 05.10.2012 passed by the First Industrial Tribunal, West Bengal at Calcutta directing the reinstatement of the respondent No. 4 with 75% back wages from 17.06.2003 till the actual reinstatement in service. Admittedly, the petitioner was a Registered Badli Worker and was entrusted to the work of twist job. It is also not in dispute that the respondent No. 4 worked in such capacity between 09.01.1991 and 16.06.2003. Subsequently, the petitioner was struck off from the list of the Registered Badli because of his continuous long absence. The management of the petitioner, subsequently, re-inducted the respondent No. 1 and admitted in the list of a Registered Badli and offered him the job on 23.01.2005 for three hours. However, according to the respondent No. 4, he was unreasonably and illegally denied the employment since 17.06.2003, although he reported to the window of the Badli Worker. On 15th March, 2005, the petitioner raised a dispute u/s 2A of the Industrial Dispute Act alleging his termination on 17.06.2003 before the Conciliation Officer of the State of West Bengal. Since the Conciliation proceeding could not yield any fruitful result, the certificate was issued by the said

Conciliation Officer and an application u/s 10(1)(B) of the Industrial Dispute Act was filed by the respondent No. 4 before the First Labour Court, West Bengal. The application relating to the claim filed before the Labour Court reveals that the respondent No. 4 was registered as per the standing orders of the Company as Badli and have continuously worked from 09.01.1991 till 17.06.2003 when the alleged termination was made by the petitioner. The said respondent claimed to be a workman within the definition of the Industrial Dispute Act and the entire claim laid upon the assertion that he has continuously worked more than 240 days in a year and, therefore, the alleged termination of service by way of a refusal to employment is unjustified and should be re-instated with full back wages.

2. The petitioner in the written statement not only denied that the petitioner has not worked continuously for 240 days in a year but have also took a plea that the Badli Workers does not have any right to claim the regular employment and/or work. The Labour Court allowed the respective parties to adduce evidence in support of their respective stands and passed an award directing the reinstatement of the respondent No. 4 in service with 75% back wages from the date of termination till the actual reinstatement is made.

3. Mr. Partha Bhanja Chowdhury, the learned Advocate appearing for the petitioner attacked the said award on two fold grounds, firstly, the Labour Court has wrongly fastened the onus to prove that the respondent No. 4 has not worked 240 days in a year preceding his termination and secondly, the Badli Workers have no right to be employed and consequently not entitle to any compensation. In support of his first point of attack, he placed reliance upon a judgment of the Apex Court in case of *The Range Forest Officer Vs. S.T. Hadimani*, and *Municipal Corporation, Faridabad Vs. Siri Niwas*, So far as the second point of attack is concerned, Mr. Partha Bhanja Chowdhury relied upon the judgment of the Apex Court in case of *Rajasthan State Ganganagar S. Mills Ltd. Vs. State of Rajasthan* and *Another, Bangalore Metropolitan Transport Corpn. Vs. T.V. Anandappa*, and *Prakash Cotton Mills Pvt. Ltd. Vs. Rashtriya Mills Mazdoor Sangh*,

4. Per contra, Mr. N.C. Bhattacharjee, the learned Advocate appearing for the respondent No. 4 submits that the Badli Worker who worked 240 days in any year and rendered continuous service cannot be retrenched by the employer except following the conditions engrafted u/s 25F of the said Act. According to him, section 25F of the said Act is couched in a negative form and, therefore, are mandatory in nature and unless the said provision is adhered to, the alleged termination is bad and placed reliance upon a judgment of the Supreme Court in case of *Devinder Singh Vs. Municipal Council, Sanaur*, . In support of his submission that the completion of 240 days in a year should be construed that if in any year, the employer gives the workman an actual work, the retrenchment can only be done by following the provisions of section 25F of the said Act, reliance is placed upon a judgment of the Supreme Court in case of *U.P. Drugs*

and Pharmaceuticals Company Limited Vs. Ramanuj Yadav and Others, . He audaciously submits that the categorical statement of the respondent No. 4 in the statement of claim filed before the Labour Court has been evasively denied in the written statement and, therefore, such statement shall be deemed to have been admitted. He further submits that long uninterrupted continuous service from 09.01.1991 till 17.06.2003 have not been denied and, therefore, the alleged retrenchment and/or termination are bad. He lastly submits that the Writ Court should not usurp the power of the Appellate Court under the power of judicial review and placed reliance upon a judgment of the Apex Court in case of Syed Yakoob Vs. K.S. Radhakrishnan and Others,

5. The standing order contains the classification of a workman which includes the Badli in Paragraph 2(iii) of Part-I thereof. The Badli has been defined as a workman who is appointed in a vacant post or in the post of a permanent workman or a probationary who is temporarily absent. Paragraph 5 of the second part of the standing order relates to the appointment of the Registered Badlis which requires the registration of the Badlis who will act as substitutes for permanent workmen or work in vacant posts and to receive employment in strict rotation. It further provides the removal from the list for any acts or omissions listed as misconduct in the standing orders i.e. failure to reach the standard of efficiency and conduct required by the job he does, and continued nonattendance or repeated absence when due for employment. From the aforesaid provisions, it could be culled out that the Badli Workmen get work only in absence of a regular employees and do not have any guaranteed right of employment. In other words, they are really a casual employees without any right to be employed. Chapter 5A of the said Act contains the provision relating to lay off and retrenchment and section 25C of the said Act, which is included in the said Chapter, excludes the Badli and Casual Workman to have right for compensation in case of a lay off. One must notice the provision contained u/s 25F of the said Act which is couched in a negative form containing the provisions relating to the conditions precedent to retrenchment of workmen. The said provision does not make any distinction between the workmen, in other word, does not exclude the Badli Workmen or the Casual Workmen as has been done u/s 25C of the said Act. In both the provisions, unless an employee has completed not less than one year of continuous service, the aforesaid provisions cannot be pressed. The continuous service has been defined u/s 25B as under:

25B. Definition of continuous service.-- For the purposes of this Chapter,-

(1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;

(2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in

continuous service under an employer-

(a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-

(i) one hundred and ninety days in the case of a workman employed below ground in a mine; and

(ii) two hundred and forty days, in any other case;

(b) for a period of six months, if the workman, during a period of six calendar months proceeding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-

(i) ninety-five days, in the case of workman employed below ground in a mine; and

(ii) one hundred and twenty days, in any other case.

Explanation.--For the purposes of clause (2), the number of days on which a workman has actually worked under an employer shall include the days on which-

(i) he has been laid-off under an agreement or as permitted by standing orders made under the Industrial Employment (Standing Orders) Act, 1946 (20 of 1946), or under the Act or under any other law applicable to the industrial establishment;

(ii) he has been on leave with full wages, earned in the previous years;

(iii) he has been absent due to temporary disablement caused by accident arising out of and in the course of his employment; and (iv) in the case of a female, she has been on maternity leave; so, however, that the total period of such maternity leave does not exceed twelve weeks.

6. The employee shall be deemed to be in continuous service for a period of one year if the workman has actually worked 240 days during the period of 12 calendar months preceding the date to which the calculation is to be made. Prior to the Industrial Dispute Amendment Act, 1964 which came into effect from 19 December, 1964, the definition of continuous service u/s 25B as it originally stood does not contain the word "preceding" which was subsequently introduced to give complete and meaningful benefit of the welfare legislation to the working class.

7. The legislature does not use any words in the statute unnecessarily or surpluses. Before the amendment is brought by reintroduction of section 25B of the Act incorporating the word "preceding" which was absent in the original section, the same should be construed in proper and meaningful manner. The Apex Court in case of Mohan Lal Vs. Management of Bharat Electronics Ltd., laid down that in order to ascertain whether a workman has done a continuous

service for a period of 240 days preceding the period of 12 months from the date of retrenchment, the date is to be ascertained moving back for a period of 12 months from the said relevant date of retrenchment. The point as sought to be agitated by the respondent No. 4 that if they have worked continuously for several years, he cannot be terminated and/or retrenched without following the provisions contained u/s 2F of the said Act is diluted to some extent because of the perennial nature of the work which he rendered as Badli Worker.

8. It would be noticed that section 25C of the Act excludes the Badli or Casual Workman for claiming a right of compensation in case of lay off. The explanation appended thereto defines the Badli Workman as a Workman who is employed in an Industrial Establishment in the place of another workman whose name is included on the master role of the establishment but shall cease to be regarded as such, for the purpose of the said section if he has completed one year continuous service in the establishment. The Badli Workman has not been excluded u/s 25F of the Act, which requires certain conditions to be adhered and/or followed for retrenchment of the workman. The conjoint reading of the aforesaid provisions would lead to inevitably conclusion that in the event, the Badli Worker has completed one year of continuous service in the establishment, he would cease to be so and cannot be retrenched unless the conditions embodied u/s 25F of the said Act is adhere to. The continuous service should be considered in the light of section 25B which provides that the workman should render service of 240 days preceding the date with reference to which the calculation is to be made.

9. Much emphasis is made in this regard to a judgment of the Supreme Court in case of U.P. Drugs & Pharmaceuticals Co. Ltd. (supra) that if the workman had actually worked more than 240 days in any year, the conditions as provided u/s 25F of the said Act should be strictly complied with. The Apex Court in the said report was considering a matter relating to the U.P. Industrial Disputes Act, 1947 wherein section 6N relates to the condition precedent for retrenchment of a workman like section 25F of the Industrial Disputes Act. Section 2(g) of the U.P. Act defines continuous service, which does not contain the word "preceding" as incorporated in the amended provisions of section 25B of the ID Act. The Case of Mahan Lal (supra) was noticed and was distinguished because of the special features appearing u/s 2(g) of the Act which does not contain the word "preceding" in following words:

Section 2(g) of the U.P. Act does not require a workman, to avail the benefit of the deeming provision of completion of one year of continuous service in the industry, to have worked for 240 days during "preceding" period of 12 calendar months. The word "preceding" has been used in section 25B of the ID Act as incorporated in the year 1964. Section 2(g) does not use the word "preceding".

10. Reliance can be placed upon a judgment of the Apex Court rendered in case of Prakash Cotton Mill Pvt. Ltd. (supra) where the Badli workers were held "to be casual employees without any right to be employed. The Apex Court in the said

report was considering the case of a closure of an industrial undertaking in the context of the standing orders 16 & 17 which does not provide the payment of any compensation to the employees for the period of closure due to the circumstances beyond the control of the industrial undertaking. In the above perspective, it is held that the Badli Workers are not entitled to be placed to the category of the other employees so as to entitle them with the compensation on account of closure.

11. The present case is not in fact a case of a closure but what the respondent No. 4 contends that the termination and/or retrenchment of the respondent No. 4 cannot be done without following the requirements of section 25F of the ID Act. Indeed, the name of the petitioner was registered on the role of the worker to act as a substitute of permanent workman or on vacant post and to receive the employment in strict rotation under Rule 5 of second part of the standing orders.

12. In case of Karnataka State Road Transport Corporation and Another Vs. S.G. Kotturappa and Another, the Apex Court held that the status of a Badli cannot be better than a probationer. Similar view is expressed in case of Bangalore Metropolitan Transport Corporation (supra) and the Labour Court was held to be not competent to adjudicate such dispute.

13. In view of the law as enunciated in the above noted cases, what could be culled out is that the Badli Workers are working in absence of a regular employee and are really a casual workman or a probationer without any right to be employed unless, they come within the purview of the continuous service as defined u/s 25B of the ID Act.

14. It leads to another point whether the respondent No. 4 has been able to establish that he has rendered continuous service for 240 days in a year preceding to the date with reference to which the calculation is to be made. It also imbibes within itself the ancillary point relating to the discharge of the onus.

15. It is undisputed that the respondent No. 4 has not produced any document relating to the continuous service for 240 days preceding the alleged termination and/or retrenchment. Before the Conciliation Officer, the petitioner has indicated the number of days actually worked by the respondent No. 4 between the year 1991 to 2003. As already indicated above, the section 25B has faced a sea change and the newly introduced section contains the word "precedent" which was absent in the original section. If the case of the respondent No. 4 is that the alleged termination took place on 17th June, 2003, the record produced by the petitioner before the Conciliation Officer reveals that preceding 12 months from the alleged date, the respondent has not actually worked for 240 days. The Labour Court has drawn an advance adherence against the petitioner in not producing the relevant records wherefrom it could be deciphered as to how many days the respondent No. 4 has actually worked. In this context, it would be apt to record that a computerized downloaded information was produced by the petitioner which was refused to be taken into consideration by the Labour Court.

as it does not contain the date, sign and the seal of the petitioner. This Court does not delve to go into those questions as answer is to be made with regard to the onus. According to the petitioner, the Labour Court has wrongly shifted the onus upon the Industrial Establishment to prove that the respondent No. 4 has not actually worked for 240 days in a preceding year. In case of Range Forest Officer (*supra*), it has been clearly laid down that the onus cannot be imposed upon the management to prove that the workman has not worked for more than 240 days in a year preceding in his termination notes in these words:

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.

16. In case of *Rajasthan State Ganganagar S. Mills Ltd. (supra)*, the Court held:

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. Even if that period is taken into account with the period as stated in the affidavit filed by the employer, the requirement *prima facie* does not appear to be fulfilled. The following period of engagement which was accepted was 6 days in July 1991, 15-1/2 days in November 1991, 15-1/2 days in January 1992, 24 days in February 1992, 20-1/2 days in March 1992, 25 days in April 1992, 25 days in May 1992, 7-1/2 days in

June 1992 and 5-1/2 days in July 1992. The Labour Court demanded production of muster roll for the period of 17-6-1991 to 12-11-1991. It included this period for which the muster roll was not produced and came to the conclusion that the workman had worked for more than 240 days without indicating as to the period to which period these 240 days were referable.

(emphasis supplied)

17. Similar view has been expressed the Apex Court in case of Sri Niwas (supra) in these words:

14. For the said purpose it is necessary to notice the definition of "continuous service" as contained in section 25-B of the Act. In terms of sub-section (2) of section 25-B if a workman during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for 240 days within a period of one year, he will be deemed to be in continuous service. By reason of the said provision, thus, a legal fiction is created. The retrenchment of the respondent took place on 17-5-1995. For the purpose of calculating as to whether he had worked for a period of 240 days within one year or not, it was, therefore, necessary for the Tribunal to arrive at a finding of fact that during the period between 5-8-1994 to 16-5-1995 he had worked for a period of more than 240 days. As noticed hereinbefore, the burden of proof was on the workman. From the award it does not appear that the workman adduced any evidence whatsoever in support of his contention that he complied with the requirements of section 25-B of the Industrial Disputes Act. Apart from examining himself in support of his contention he did not produce or call for any document from the office of the appellant herein including the muster rolls. It is improbable that a person working in a local authority would not be in possession of any documentary evidence to support his claim before the Tribunal. Apart from muster rolls he could have shown the terms and conditions of his offer of appointment and the remuneration received by him for working during the aforementioned period. He did not even examine any other witness in support of his case.

18. The law enunciated in the aforesaid reports lead to an inevitable conclusion that the onus is on the workman to prove that he actually worked for 240 days in a year preceding the alleged date of termination/retrenchment. Once the said onus is initially discharged, it would shift on the Industrial Establishment to prove that the workman has not actually worked 240 days in a preceding year. This Court, therefore, finds that the Labour Court has wrongly shifted the onus on the petitioner, which is contrary to the proposition of law as laid down in the aforesaid reports.

19. The contention of the respondent No. 4 that section 25F of the ID Act imposes the restriction on the Industrial Undertaking to retrench the workman who has been in continuous service without one month notice or pay in lieu thereof as laid down in case of Devinder Singh (supra) cannot be doubted at all.

The said provision can be pressed if the workman has successfully proved that they have rendered continuous service as defined u/s 25B of the ID Act and not otherwise.

20. The Court in exercising of the power of superintendence does not act as a Court of an appeal but exercises such power to correct the error of jurisdiction committed by Subordinate Courts or the Tribunals. It is held in case of Syed Yakoob (supra) that the Court can definitely correct the error of law apparent on the face of the record but not an error of the fact which necessarily includes the refusal to admit the admissible and the material evidence.

21. I have already discussed the manner in which the Labour Court has proceeded which appears to have been acted contrary to the settled law and, therefore, there is no impediment on the part of the Writ Court to interfere with such order.

22. On the basis of the findings made herein above, the award passed by the Labour Court cannot be sustained.

23. The same is hereby quashed and set aside. The writ petition succeeds.

However, there shall be no order as to costs.

Urgent photostat certified copy of the judgment, if applied for, be given to the parties on priority basis.