

(2009) 10 BOM CK 0043

In the Bombay High Court

Case No : Writ Petition No. 3289 of 2002 and Civil Application No's. 4641 of 2005 and 710 of 2009

Godawari Marathwada Patbandhare thorough the Sub
Divisional Officer, Minor Irrigation Survey, Sub Division

APPELLANT

Vs

Devidas Pawar

RESPONDENT

Date of Decision : 07-10-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 2, Order 1 Rule 8
Industrial Disputes Act, 1947 — Section 10(1), 12(5), 15, 17B, 2
Maharashtra Godawari Marathwada Irrigation Development Corporation Act, 1998 —
Section 15

Citation : (2009) 111 BOMLR 4191 : (2010) 124 FLR 816

Hon'ble Judges : S.S. Shinde, J

Bench : Single Bench

Advocate : T.B. Bhosale, for the Appellant; M.G. Kolshe Patil, for the Respondent

Judgement

S.S. Shinde, J.—This writ petition is filed challenging the judgment and award dated 11.7.2001 passed in Reference IDA No. 11 of 1993 by the learned Judge, Labour Court, Ahmednagar.

2. The background facts of the case are as under:

The office of Deputy Commissioner of Labour Nashik submitted the said Reference under Sub-section 1 of Section 10 r.w. Sub-section 5 of Section 12 of the Industrial Dispute Act 1947 to the Labour Court.

A demand notice was issued on 4.9.1991 alleging that second party i.e. respondent herein was engaged since last about six years in the employment of the petitioner, prior to his termination from the service. His services were terminated w.e.f. 26.7.1991 without pre intimation and illegally. It is further stated that the justification of claim was also submitted, however, due to failure of counsel, the reference was submitted. As per the contention of the first party i.e. the present petitioner, second party i.e. present respondent has not served

for 240 days in a calender year. The statement of claim is filed by the respondent, which was at Exh.U-3 before the Labour Court. It was specifically pleaded by the respondent that he was engaged on daily wages w.e.f. 21.5.1985. He was continued till 26.7.1991. His services were terminated w.e.f. 26.7.1991 without compliance of Section 25F of the Industrial Dispute Act. It is the case of the respondent that actually he has worked for more than 240 days in each calender year. According to the respondent, his termination was illegal. The persons, who are juniors to the respondent, are also made permanent. New candidates were also appointed after termination of service of the respondent.

The petitioner herein filed written statement before the Labour Court contending that the respondent herein was engaged since 21.5.1986. It is denied that the respondent has worked continuously for more than 240 days in a calender year. It is denied that no juniors were continued and no new candidates were appointed. As per the contention of the petitioner, the second party i.e. respondent was appointed as Choukidar on daily-wages for temporary work during the period from 1.4.1986 to 26.7.1991. After completion of the said work the services of the second party were terminated w.e.f. 26.7.1991. The respondent was provided work whenever his services were required. No any written order of appointment or termination was issued in favour of the respondent. He was discontinued as and when the work was completed. No any Choukidar was appointed. It is further contended that reference is not filed within prescribed time of limitation.

It appears that the lower court framed as many as nine issues for its consideration and determination. While answering issue Nos. 1 to 5, the labour court has recorded the findings that it is not disputed that the second party is workman and first party is an industry. It is further recorded that the counsel for the first party could not satisfy the court as to on what ground the present reference is not maintainable as well as how the Labour Court has no jurisdiction to entertain the reference. It is further recorded that when there is dispute between the workman and the employer, then the labour court is certainly has jurisdiction to entertain the reference. While answering issue No. 4, the court held that on perusal of the chart submitted by the Conciliation Officer the engagement of the second party was for the period from 1.4.1986 till 25.7.1991. While answering issue No. 5, the court held that the respondent was continuously in service till 25.7.1991 in the employment of the petitioner. While answering the said issue, this Court has discussed the proof of service put in by the respondent and came to the conclusion that the respondent has completed 240 days service before his alleged termination. While answering issue No. 7 the court has come to the conclusion that there is no any record to show by the first party that the juniors were not made permanent. While answering issue No. 8, the trial court held that the second party i.e. respondent herein is entitled for continuity of service and back wages with reinstatement. By answering issue No. 9 the court allowed the reference and the petitioner herein was directed to reinstate the respondent within eight months from the date of passing of award

with continuity of service with full back wages w.e.f. 26.7.1991. It was further declared that the termination of services of the second party w.e.f. 26.7.1991 is illegal and contrary to the provisions of law and therefore, the same is set aside.

Being aggrieved by the judgment and order passed by the Labour Court, the petitioner has filed the instant writ petition.

3. Learned Counsel appearing for the petitioner submitted that the petitioner herein is a statutory body and legal entity which is established by virtue of the provisions of the Maharashtra Godavari Marathwada Irrigation Development Act No. 23 of 1998 and has come into existence w.e.f. 1.10.1998. By virtue of the Section 15 of the said Act all the development works, property rights and liabilities of Government concerning development works are transferred to the petitioner Corporation including the wages and salary of the servants, who are taken on deputation from the Government. The petitioner Corporation is liable to pay the past and future liabilities in respect of the lands which are acquired by the Government for the project which are transferred to Corporation from Minor Irrigation Division II, Sangamner, which is nucleus of the subject matter of the present writ petition is also one of the project which is transferred to this Corporation.

Learned Counsel submitted that the respondent herein was engaged for one of the project which came to be transferred by the Government of Maharashtra to the petitioner Corporation. Learned Counsel submitted that the respondent was engaged on temporary basis to work as watchman at Pachegaon project on daily wages on 1.4.1986 and from 25.7.1991 in Minor irrigation Survey Sub-Division at Shrirampur. It is further argued that the respondent has never completed 240 days continuous service with the Corporation in one calender year. The respondent was appointed as daily wages worker for a specific period purely on temporary basis. After completion of the said work, there was no work available with the petitioner Corporation and therefore, the services of the respondent have been terminated orally in the year 1991. Since 1991 till this date, the respondent is not in the service of the petitioner Corporation. Neither appointment order nor termination order issued by petitioner Corporation in writing to the respondent. According to learned Counsel, the petitioner Corporation does not fall within the definition of Industry. Learned Counsel further submitted that the Labour Court failed to appreciate that the respondent was not appointed as permanent employee, as he has not completed continuous service of 240 days in one year, at any point of time. Hence, he is out of service from the year 1991 and there is no question of his reinstatement and continuity of service. The complaint is not at all tenable under Maharashtra Recognition of Trade Union and Prevention of Unfair Labour Practice Act, 1971 (hereinafter for the sake of brevity referred to the MRTU and PULP Act). According to the learned Counsel, the findings recorded by the court below is not according to the facts of the case and evidence on record as well as the provisions of law does not support the case of the respondent, therefore, the judgment and award passed by the

Labour Court deserves to be set aside. It is further submitted that since 1991 till date the respondent is out of service. His services have been orally terminated and therefore, there is no question of payment of full back wages and continuity of service as directed by the Labour Court. According to the learned Counsel for about 18 years the respondent is not in service of the petitioner and therefore, there is no question of continuity and full back wages as directed by the Labour Court. Learned Counsel invited my attention to the fact that the Corporation, as per Section 17B of the Industrial Dispute Act, has deposited 50% of the amount as per the interim order passed by this Court the same has been withdrawn by the respondent. According to the learned Counsel in fact the respondent is not entitled to withdraw single pay from the amount deposited by the petitioner. According to the learned Counsel, termination of the respondent is oral one. The chart submitted at page 19 in the writ petition, clearly shows that the working days of the respondent with Executive Engineer, Shrirampur and from its perusal it reveals that the respondent never completed 240 days continuous service in one calendar year. The work allotted to him during the said period is not by any written order. Learned Counsel further submitted that there are catena of decisions, on the subject matter involved in the writ petition. This Court as well as the Hon'ble Supreme Court, in number of cases held that the person, who was not appointed on sanctioned post, has no right to continue in the service and any directions of continuation of his services and daily wages, is not sustainable in law. In support of his contention learned Counsel placed reliance on the following judgments;

- i) Dnyandeo Sonvane Vs. The Executive Engineer, Sarvajani Bandkam Vibhag (Public Works Division) and The Hon'ble Judge, Labour Court,
- ii) NRK House Vs. P.V. Tommy C/o. Akhil Bhartiya General Kamgar Union and Another,
- iii) General Secretary, Van Shramik Sangh Vs. The Director, Social Forestry, Maharashtra State and Others,
- iv) Chairman, Oil and Natural Gas Corporation Ltd. and Another Vs. Shyamal Chandra Bhowmik,
- v) State of Orissa v. Balaram Sahu reported in 2002 AIR SCW 4421
- vi) The Range Forest Officer Vs. S.T. Hadimani,
- vii) Haryana State F.C.C. W. Store Ltd. v. Ram Niwas reported in 2002 AIR SCW 2804
- viii) National Aluminum Co. Ltd. v. Deepak Kumar Panda reported in 2002 AIR SCW 2808
- ix) R. Ganeshan v. Union of India and Ors. reported in 1993 Mh.L.J. 506
- x) Madhyamik Siksha Parishad, U.P. Vs. Anil Kumar Mishra and others etc.,

xi) W.P. No. 3368 of 1993 The Executive Engineer, Nandur Madmeshwar Canal Division Vaijapur v. Sk. Abdul Sk. Babu and Ors.

Therefore, learned Counsel would submit that impugned judgment and award passed by the Labour Court is not sustainable in law.

Learned Counsel further invited my attention to the interim order passed by this Court and submitted that this Court by interim order has already protected the interest of the petitioner, therefore, the learned Counsel would submit that person who has no work from 1991 till date cannot be reinstated and no daily wages can be paid or no continuity of any service can be granted to such person as directed by the Labour Court and therefore, he prayed that this writ petition deserves to be allowed.

4. Learned Counsel appearing for the respondent invited my attention to the affidavit in reply filed by the respondent in the writ petition and submitted that the petitioner has not approached this Court with clean hands and not given detailed particulars regarding his authorization to file the instant writ petition. According to the learned Counsel, the petitioner has not complied procedure under Order 1 Rule 2 of C.P.C. to file the writ petition in representative capacity on behalf of the irrigation department. Learned Counsel further submitted that the petitioner has not followed seniority list while allowing the claim of the workmen, who were juniors to the respondent, as per the Kalelkar award. The petitioners have not followed the rules and regulations and the provisions of Industrial Dispute Act, which are applicable to the case of the respondent. According to the learned Counsel the respondent has completed 240 days service in a calendar year since the date of appointment and upto the date of retrenchment as per the muster roll maintained by the petitioner. The petitioner has suppressed material fact regarding permanent appointment of the employees who are juniors to the respondent those are i) Dattatraya Suryabhan Shelar, ii) Dattatraya Ambadas Kanse, iii) Balasaheb Bhairavnath Narode and iv) Mahadeo Tolaji Datir. Therefore, the labour Court has given findings on this point that the petitioner department has failed to produce material evidence on record before the Labour Court. Learned Counsel further submitted that it is admitted position that junior employee to the respondent are made permanent by the petitioner as per the findings given by the labour court, therefore, the petitioner has clearly violated the provisions of Industrial Dispute Act which are applicable to the irrigation department and more particularly in the case of the respondent. Learned Counsel further submitted that since the date of retrenchment, the respondent is jobless and in spite of the several steps taken by the respondent, the office of the petitioner declined to accept the request. According to the learned Counsel the petitioner have violated the provisions of Industrial Dispute Act u/s 25F. The petitioner have also not produced any kind of evidence before the labour court. The nature of work which was given to the respondent was of permanent nature. According to the learned Counsel, the labour court has given finding on all aspects and therefore, the in view of pronouncements of the

Hon''ble Apex Court in the case of Deep Chandra v. State of U.P. reported in 2001 AIR SCW 4862 (2), writ petition deserves to be dismissed.

It is further submitted that the findings recorded by the Labour Court are based on the action of the petitioner thereby violating the provisions of Industrial Dispute Act. According to the learned Counsel the Labour Court has correctly come to the conclusion that the respondent has completed 240 days service in a calender year and therefore, he is entitled for continuity in service. It is submitted that the provisions of Industrial Dispute Act are squarely applicable in the present case. Learned Counsel invited my attention to the reported judgment of the Supreme Court in the case of Des Raj and Ors Vs. State of Punjab and Ors, to contend that the department of irrigation can be termed as an Industry. Learned Counsel further placed reliance on the reported judgment of the Hon''ble Supreme court in the case of Bangalore Water Supply and Sewerage Board Vs. A. Rajappa and Others, to contend that the petitioner department is an industry.

It is further submitted that the Executive Engineer of Irrigation department had orally appointed the respondent as Choukidar in the year 1985 on daily-wages, without issuing any written order. The respondent subsequently worked, he was continued on same post from 1.4.1986 by taking his name in muster roll and continued till 26.7.1991 without any break in the service for about six years. According to the learned Counsel the respondent issued legal notice to the petitioner due to oral retrenchment on 26.7.1991 stating therein that the services of the respondent are not terminated by following due procedure prescribed u/s 25-F of the Industrial Dispute Act. He has completed 240 days service in a calender year in last six years. It is further submitted that the Labour Court after framing necessary issues has come to the conclusion that the respondent is entitled for continuity in service and accordingly it was directed to the petitioner to pay back wages to the respondent. Learned Counsel further submitted that the petitioner was not party to the proceeding before the learned Labour Court. The Corporation has filed this petition before this Court without taking leave from this Court under Order 1 Rule 8 of C.P.C. as per the law laid down in the case of Ramchander Sunda v. Union of India, (1999) 9 SCC 105 . It is further submitted that there is clear breach in maintaining seniority list by the petitioner and the candidates who are juniors to the respondent have been appointed. It is further submitted that the seniority list produced on record clearly shows that there are four workmen appointed on same post as Choukidar, who are juniors to the respondent, are continued in service. All persons who are mentioned in the list are juniors to the respondent and they have taken CRT on 25.10.2004. Learned Counsel invited my attention to the list of the candidates placed on record and submitted that all 43 workmen are juniors to the respondent, who are given appointment as Choukidar. Learned Counsel further submitted that the department has passed resolution and made all these 43 workmen referred above permanent on CRT on the post of Choukidar and they are made permanent in the service. Learned Counsel further submitted that the Labour Court has rightly observed that the working days of the respondent are

rendered by the petitioner employer on the basis of the financial year and not on the basis of calendar year and same calculation is made by excluding weekly off and public holidays and therefore, the Labour Court came to the conclusion that the respondent has completed 240 days service in one calendar year including the weekly off and public holidays. Learned Counsel further submitted that the Labour Court has rightly found that the petitioner has not produced any evidence on record to hold that the respondent was not in continuous service of the petitioner. It is further submitted that the respondent was continued on the post of Choukidar till his services were orally terminated. Learned Counsel submitted that while terminating the services of the respondent, the provisions of Sections 25-F and 25-G of the Industrial Dispute Act are not followed by the petitioner. Learned Counsel in support of his contention has placed reliance on the judgment of the Hon'ble Supreme Court in the case of Deep Chandra (supra) and in the case of M.C.D. Vs. Praveen Kumar Jain and Others, . According to the learned Counsel, the irrigation department is an industry as per the settled principle in the case as held by the Supreme court in reported judgment in the case of Des Raj etc. (supra) and in the case of Sham v. State of Maharashtra reported in 2007 1 All M.R. 810 as well as in the case of Bangalore Water supply (supra). Learned Counsel further submitted that the ratio laid down by the Hon'ble Supreme Court in the case of The State of U.P. Vs. Ram Chandra Trivedi, , and contented that para 22 is binding on this Court. It is further submitted that the point involved in this petition has been adjudicated by the Division Bench of this Court in L.P.A. No. 53 of 2005 filed by the petitioners herein and by judgment and order dated 2.3.2005 the L.P.A. came to be rejected and the petitioners have not filed any proceeding before the Hon'ble Apex Court challenging the said decision rendered by the Division Bench of this Court in the said L.P.A. Therefore, learned Counsel would submit that this petition also deserves to be dismissed. Learned Counsel further submitted that one Ashok Kondiram Ragh, who was also working with the petitioner employer, was junior to the petitioner, filed complaint before the Labour Court against the oral retrenchment. His complaint was allowed by the labour Court. The petitioner therein filed writ petition before this Court which also came to be rejected. Thereafter SLP was filed before the Supreme Court the same was also rejected. Learned Counsel submitted that the parties were directed to maintain status during pendency of the writ petition. This Court allowed the respondent to withdraw the amount deposited in this Court towards the compliance of Section 17-B of the Industrial Dispute Act. Learned Counsel further submitted that respondent is now age barred and therefore, if his case is thrown out he will be face starvation and therefore, the learned Counsel would submit that the judgment and award passed by the Labour Court needs no interference by this Court. Learned Counsel placed reliance on the various judgments of the Supreme Court in support of his contention i.e. i) V.O. Corporation Ltd. v. Hindustan Veg. Oils Corporation Ltd. and Ors. reported in 2001 AIR SCW 2282, ii) Haryana Urban Development Authority v. Devi Dayal reported in 2002 AIR SCW 1128, iii) M.C.D. Vs. Praveen Kumar Jain and Others, , iv) Ramchander Sunda v. Union of India, (1999) 9 SCC

105 , v) Des Raj and Ors Vs. State of Punjab and Ors, , vi) The Custodian of Evacuee Property v. Smt. Rabia Bai reported in AIR 1976 2557, vii) Shashikant Govind Malgaonkar Vs. State of Maharashtra and Others, and viii) Bangalore Water Supply and Sewerage Board Vs. A. Rajappa and Others, .

5. I have heard learned Counsel appearing for the petitioner and the learned Counsel appearing for the respondent at great length. On perusal of the impugned judgment and award it would disclose certain facts, which are necessary to be taken a note at the beginning itself. In para 8 of the judgment, the Labour court has taken a notice of the evidence produced on behalf of the respondent herein which was at Exh.C-4 and also evidence of the petitioner herein was placed at Exh.C-5. The labour Court has recorded that it is not disputed that the second party is workman and the first party is an Industry. The court further recorded that the counsel for the petitioner herein appearing before the Labour Court could not satisfy the court as to on which ground the reference is not maintainable as well as the Labour Court has no jurisdiction to entertain the reference. The Court has further recorded that when there is an industrial dispute between the workman and the employer, then the Labour Court has jurisdiction to entertain the reference. The court has also held that the reference is not barred by limitation.

In para 9 of the judgment, the court has recorded that it is not seriously disputed by the petitioner herein that the respondent is working since 1985. The Labour Court has referred to the chart submitted by the Conciliation Officer of the first party alongwith the acknowledgment of the second party in which it is clearly mentioned that since 1.4.1986 till 25.7.1991 the respondent was engaged. The court has also taken a note that the Exh.C-5 which is extract filed by the first party at Exh. C-5/1. The chart filed alongwith Exh.C-5 is also similar to the chart submitted by the Conciliation Officer. Therefore, the Labour Court recorded the findings that the respondent herein was in service of the petitioner since 1.4.1986 till 25.7.1991. In para 10 the Labour Court has recorded that service chart shows that the certain breaks given to the second party and the respondent is serving with the certain breaks till 25.7.1991. In para 11 the court has observed that the Conciliation chart submitted by Conciliation Officer is not according to the calender year however, is according to financial year. The Labour Court has further recorded to total number of days of services by the present respondent in a financial year from April 1986 to March, 1987 in which the respondent has put in service of 195.05 days from 1.4.1987 to 31.3.1990 of 73 days, from 1.4.1992 to 1.3.1994 is 72 days. The court has further recorded that it is admitted by the witness for the petitioner herein that the services of the second party were terminated w.e.f. 25.7.1991. The Labour Court further recorded that the working days to be calculated of the preceding year before the termination i.e. since August, 1990 to July, 1991 and during this period, the actual working days of the second party are 232 days. The court has also recorded that there was break from 26.8.1990 to 25.10.1990 and from 25.5.1991 to 25.6.1991. However, the Labour Court has observed that there is

no evidence that this break of account of the second party. The court further observed that in view of definition of continuous service, as defined in the Industrial Dispute Act if the break is there the burden was on the first party to show that the said break was on account of second party. But that evidence is lacking in this case. It is further observed that in the cross examination it is admitted by the first party that the service extract does not disclose weekly off and public holidays therefore, the Labour Court concluded that the respondent has completed more than 240 days in the preceding year before his termination and recorded finding that the second party has served 240 days in preceding year prior to his termination.

In para 12, the Labour Court observed that the services of the second party were terminated w.e.f. 26.7.1991. The provisions of Section 25 of the Industrial Dispute Act are not followed while terminating the services. The Labour Court has recorded the findings that it was obligatory on the part of first party to comply with the Section 25-F of the Industrial Dispute Act, however, that is not done in this case. No written appointment order was issued in the name of the second party to show appointment of second party was with stipulation i.e till completion of the work. The court further observed that except the oral evidence of the first party, no any documentary evidence produced on behalf of the first party on record to show that the work was completed on 26.7.1991. It has also been observed that the second party has produced on record certain documents to show that juniors to the respondent were made permanent and they are i) Dattatraya Suryabhan Shelar, ii) Dattatraya Ambadas Kanse, iii) Balasaheb Bhairavnath Narode and iv) Mahadeo Tolaji Datir. As per the cross examination these junior persons were continued in the services from 1991. The court has further recorded that the first party has undertaken the working of construction of Bhandardara at Punatgaon. The court further observed that the first party has not produced anything on record to show that i) Dattatraya Suryabhan Shelar, ii) Dattatraya Ambadas Kanse, iii) Balasaheb Bhairavnath Narode and iv) Mahadeo Tolaji Datir, were not juniors to the second party. Therefore, the court came to the conclusion that the termination of the respondent w.e.f. 25.7.1991 is illegal and contrary to the provisions of law. The Labour Court in para 13 has observed that in spite of several steps the respondent is jobless since his termination and there is no evidence from first party that he was in gainful employment. The second party is entitled for continuation of service with back wages with reinstatement and therefore, the Labour Court allowed the reference and it was declared that the termination of service of second party w.e.f. 26.7.1991 is illegal and contrary to the provisions of law and therefore, the same came to be set aside and the petitioner herein was directed to reinstate the second party within eight months from the date of publication of award with continuity of service w.e.f. 26.7.1991.

6. On careful perusal of the pleading in the petition as well as the averments in the written statement filed by the respondent herein, it is not in dispute that there was no any appointment order was issued in favour of the respondent by

the petitioner. Therefore, it is an admitted position that the services of the respondent came to be engaged without issuing any appointment letter. It is also not in dispute that there was no any written termination order by the petitioner and it is also not in dispute that the Labour Court has not made endeavor to discuss the issue of completion of 240 days service from 1986 till further four years period. The Labour Court has only made endeavor to discuss about the completion of 240 days service in preceding year prior to termination of services of the respondent. Even according to the findings recorded by the labour court, on actual calculation of the services rendered by the respondent in preceding year of the termination, he had completed 232 days service. The Labour Court had taken into consideration weekly off and other public holidays and came to the conclusion that the respondent herein has completed 240 days service. In fact there is no serious endeavor by the Labour Court to come to the conclusion that the respondent has completed more than 240 days service. Even on its own findings the court has recorded that the respondent has completed 232 days service in the preceding year prior to termination of service of the respondent. While awarding payment for back wages to the respondent, it appears that the Labour Court has concluded that first party has failed to produce on record any evidence to show that the respondent was in gainful employment during the period when he was out of employment of the petitioner.

7. It appears that before the Labour Court the Executive Engineer Minor Irrigation Division, Sangamner, District Ahmednagar was the first party. The present petitioner was not party before the Labour Court. The petitioner herein has challenged the judgment and award passed by the Labour Court through the S.D.O. M.I. Sub Division, Shrirampur. It appears that the petitioner Corporation is statutory body and legal entity which is established by virtue of the provisions of Maharashtra Godavari Marathwada Irrigation Development Act 1998 (23 of 1998) and has come into force on 1.10.1998 and by virtue of the provisions of Section 15 of the said Act, all development act, property and the employees of the Government concerned, are transferred to the petitioner Corporation including the wages and salaries of the servants who are taken on deputation from the Government. Therefore, the Corporation is liable to pay the past and future liability of the government in respect of the land which are acquired by the Government for project which took transfer to the Corporation, Minor irrigation division-II, Sangamner.

Therefore, the Corporation has stepped into the shoes of the Executive Engineer, Minor Irrigation Division, Sangamner, District Ahmednagar. Therefore, there is no force in the contentions of the counsel appearing for the respondent that it was necessary for the petitioner to take permission from the Court for filing present writ petition.

The lower court in para 8 has recorded that it is not disputed that the second party is workman and the first party is industry. In fact on perusal of the written statement filed before the Labour Court by the Executive Engineer, Minor

Irrigation Division, Sangamner, in para 9, it is clearly stated that, "the second party was not appointed on the post. so as the work done by the second party was not of permanent nature. The employment provided to the second party was not employment in an industry, as it does not create relationship of employer and employee between the parties.

Therefore, mere perusal of the written statement filed by the petitioner herein before the Labour Court would show that in clear terms, it was stated before the Labour Court that the petitioner is not an industry and therefore, there is no question of relationship as employer and workman between the petitioner and respondent. Therefore, the findings recorded by the labour court in para 8 that it is not in dispute that the second party is workman and first party is an industry, is contrary to the record and perverse. In fact when there was assertion by the employer in written statement that the establishment is not an industry, it was incumbent for the labour court to adjudicate that issue and come to the definite conclusion that the petitioner department is an industry and the respondent is workman working in the said industry. It is relevant to refer to the judgment of the Hon"ble Apex Court in the case of State of Gujarat and Others Vs. Pratamsingh Narsinh Parmar, , in which the Apex Court has clearly held that the complainant approaching the court has to assert in his complaint that the establishment in which he is working is an industry and work which is assigned to him is not part of the sovereign function discharged by the department of the State Government.

Therefore, in my considered view, the Labour Court should have undertaken exercise to appreciate the rival contention of the parties and to record the findings whether the petitioner is an industry or not and respondent can be said workman within the meaning of provisions of Section 2(s) of the Industrial Dispute Act. Even to record the findings that the respondent is workman, it was necessary for the labour court to appreciate the provisions of Section 2(s) of the Industrial Dispute Act. Therefore, the findings recorded by the Labour Court that it is undisputed position that the petitioner department is an industry and respondent is working therein is workman, cannot be sustained.

8. It is not in dispute that no appointment letter was issued to the respondent. It was the contention of the petitioner that project was transferred by the State Government to the Corporation and the respondent was working in the said project. The Hon"ble Apex Court while interpreting the provisions of Section 25H, 25G and other relevant provisions of Industrial Dispute Act in the case of Regional Manager, S.B.I. Vs. Rakesh Kumar Tewari, , in para 18 has observed thus;

Admittedly, no procedure whether in law or under any award or settlement was followed in appointing either of the respondents in both the appeals. No conditions of services were agreed to and no letter of appointment was given. The nature of the respondents employment was entirely ad hoc. They had been appointed without considering any rule. It would be ironical if the persons who

have benefited by flouting of the rules of appointment can rely upon those rules when their services are dispensed with.

Therefore, in the present case, there was no appointment letter issued in favour of the respondent and consequently there were no any conditions which would govern the services of the respondent.

The Labour Court itself in para 11 of its judgment has recorded the findings that as a matter of fact, calculating the working days of the preceding year i.e. since August, 1990 to July, 1991, during this period the actual working days of the second party are 232 days. That itself indicates that the respondent has rendered actual services of 232 days in preceding year of his termination. The Labour Court further in the said para has observed thus;

Breaks in the preceding year are not on account of the second party i.e. present respondent and in view of the definition of continuation of service has given in Industrial Dispute Act, if break is there, the burden was on the first party to show that the said break was on account of second party.

9. In fact the burden to prove whether the respondent was in continuous service of one year preceding of his termination was entirely upon the respondent. The Supreme Court in *Mohan Lal Vs. Management of Bharat Electronics Ltd.*, , held that before the workman can claim retrenchment and being inconsonance with Section 25-F of the Industrial Dispute Act, he has to show that he has been in continuous service of not less than one year with the employer who had retrenched him from service. Yet in another case in *Range Forest Officer v. S.T. Hhadimant* (supra), the Hon"ble Supreme court held thus,

In our opinion, the Tribunal was not right in placing 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 of 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.

The same view is reiterated by the Apex Court in the case of *Rajasthan State Ganganagar S. Mills Ltd. Vs. State of Rajasthan and Another*, . In the case of *Municipal Corporation, Faridabad Vs. Siri Niwas*, and in the case of *M.P. Electricity Board Vs. Hariram etc.*, .

10 In the case of *Municipal Corporation Faridabad* (supra), in para 14, the Apex Court has interpreted the provisions of Section 25B of the Industrial Dispute Act.

The Court has observed thus;

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 herein before, 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 Dispute 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 therein 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.

It follows from the said observations made in the above judgment, by the Apex Court that it is for the complainant to convincingly prove that prior to his termination in preceding year he has actually worked for a period of more than 240 days in the said year. From the above quoted observations, it also contemplates that apart from the muster roll, the aggrieved person would have shown terms and conditions of his offer of appointment the remuneration received by him for working during the period which he claimed to be in service.

11. The Labour Court while calculating the 240 days continuous service in preceding year of the termination of the respondent, by placing reliance on the cross examination of the witnesses of the petitioner has jumped to the conclusion that the second party has served 240 days. The Labour court itself has come to the conclusion that the respondent has served for 232 days in preceding year prior to his termination, without referring to the details of cross examination of the witness of the petitioner and for how many days the petitioner was entitled for weekly off and public holidays, the Judge of the Labour court jumped to the conclusion that the respondent herein served for 240 days. In fact the burden was on respondent to prove convincingly that he has continuously worked for one year in preceding year of his termination. It was for him to establish that he has actually worked continuously for more than 240 days in preceding year of his termination.

The Hon"ble Apex Court in the case of Surendranagar District Panchayat Vs.

Dahyabhai Amarsinh, , relying on the number of earlier judgments of the Apex Court in para 19 held that it was for the workman to produce relevant material to prove that he has worked with the employer for not less than 240 days during the period from 12 calendar months preceding the date of termination.

The Court has in so many words observed in para 19 that what was required to be done by the workmen was to discharge the burden that he has completed 240 days service during the preceding year of on the date of termination of his service. The Apex Court has further observed that the courts below have wrongly drawn an adverse inference for non production of the record of the workmen for ten. The scope of inquiry before the labour Court was confined only to 12 months preceding date of termination to decide the question of continuous service for the purpose of Section 25-F of the Industrial Dispute Act.

It is an admitted position that the respondent was not regular employee by giving appointment letter. The Labour Court while adjudicating the reference, should not have travelled beyond the pleading in the petition or written statement as the case may be. The Labour Court should have recorded the findings itself in terms of the reference.

12. The Apex Court in the case of Executive Engineer Zilla Parishad Engg. Division and Anr. v. Digambara Rao etc. reported in AIR 2004 SC 4839, while interpreting the provisions of Section 25-F of the Industrial Dispute Act, held that the regularization of the service under the project, a worker employed against particular scheme, on completion of 240 days in a year, cannot by itself be a ground for regularization.

It would be relevant to mention in the present case that the case of the petitioner is that the respondent was employed under a particular project. Therefore, the findings recorded by the Labour Court that the respondent has worked for 240 days continuously in preceding year of his termination, is not based upon the concrete evidence produced by the respondent. The Labour Court itself has recorded that the respondent has actually worked for 232 days in preceding year of his termination. In case the Labour court wanted to hold that respondent has worked for 240 days or more than that, there should have been serious exercise undertaken to come to the definite conclusion that the respondent has actually worked for 240 days. On careful reading of the findings recorded by the Labour Court in para 11 it clearly appears that the findings recorded by the Labour Court that the respondent has worked for 240 days is without any detail calculation and concrete evidence and the said finding is perverse.

13. It is an admitted position that the respondent herein is not in employment from 1991. The Labour Court has ordered continuity in service and full back wages w.e.f. 26.7.1991. In para 13 of the judgment by cryptic reasoning, the Labour Court has jumped to the conclusion that the respondent is entitled for 100% back wages. If the case of the respondent is accepted that the juniors to

him are retained in service, the result would be that those persons will have to be disturbed/distablized. The petitioner has asserted that the juniors to him have been retained in the service by virtue of their continuity in service of 240 days for five years and by virtue of Kalelkar settlement, they are taken on CRT. Therefore, the case of the present respondent, who has not completed more than 240 days service in five years, cannot be compared with other persons though the respondent has claimed that they are juniors, since they stand on different footing.

The Hon''ble Apex Court while interpreting the provisions of Section 25-H of the Industrial Dispute Act, in the case of Central Bank of India Vs. S. Satyam and others, , has held thus,

all retrenched workmen involved in the present case were employed for short periods between 1974 to 1976. It was actually in 1982 that a writ petition was filed by them to claim the benefit of Section 25-H for reemployment. The other persons employed in the industry during the intervening period of several years have not been impleaded. Third party interests have arisen during the interregnum. These third parties are also workmen employed in the industry during the intervening period of several years. Grant of relief to the writ petitioners (respondents herein) may result in displacement of those other workmen who have not been impleaded in these proceedings, if the respondents have any claim for re-employment.

In the instant case also though there is allegations by the respondent in the complaint that the juniors to him are retained, they were not party to the reference before the labour court, therefore, if the relief is to be granted to the respondent after 18 years i.e. date of his termination on the basis that the juniors to him are retained in the service, necessarily the position of the juniors will have to be disturbed in their absence, since they are not party either before the labour court or before this Court.

13. Taking over all view of the matter, it is to be concluded that the appointment of the respondent was without any written order, the respondent was working in the same project transferred by the first party to the petitioner herein, there are no findings given by the Labour Court to hold that there is relationship of employee and workman between the petitioner and the respondent and the finding recorded by the Labour Court that there is no dispute that the first party is an industry and second party is workman, is perverse finding. The respondent did not discharge the burden on him to prove that he has continuously worked for one year as provided u/s 25-F of the Industrial Dispute Act in preceding year of his termination and the findings recorded by the Labour Court that the respondent herein has worked for 240 days perverse finding. The juniors against whom the allegations are made by the respondent are admittedly not party before the Labour Court or before this Court, therefore, no relief can be granted by displacing/disturbing services of those persons. The Labour Court without any detailed discussion, by cryptic observations had jumped to the conclusion that

the respondents are entitled for full back wages. The respondent is not in service from 1991 till the date and allowing his claim would result into displacing the persons who are in employment for considerable time. Paying full back wages without any work would cause heavy burden on the public exchequer to honour the person who has no appointment order to his credit. Though it is not relevant in this case but it would be some assistance to mention that the engagement of the respondent without any appointment order and without following any rules was dehorse to the Rules/norms prescribed for appointment in public department.

Therefore, for the reasons stated herein above, the impugned judgment and order of the Labour Court Ahmednagar is not sustainable and the same is quashed and set aside. Writ petition is allowed in terms of prayer clause "C". Rule is made absolute in the above terms.

14. It is needless to mention that the interim order is operating in favour of the petitioner during pendency of the writ petition stands merged in the final judgment and order.

15. It appears that during pendency of this writ petition, some amount was deposited by the petitioner in pursuant to the directions by this Court and on the application filed by the respondent u/s 17-B of the Industrial Dispute Act, and part of the amount was allowed to be withdrawn. The amount which is already withdrawn by the respondent should not be recovered from him by the petitioner. The petitioner will be entitled for refund of the remaining amount which is deposited with the registry of this Court.

16. In view of disposal of writ petition, Civil application No. 4641 of 2005 and civil application Nos. 710 of 2009 pending in the petition, do not survive and the same are disposed of accordingly.