

(1984) 01 GUJ CK 0011
In the Gujarat High Court
Case No : Spl. C.A. No. 5519 of 1983

Kheda District Central Co-operative Bank Ltd.

APPELLANT

Vs

Bhargav Balwantraai Vyas

RESPONDENT

Date of Decision : 31-01-1984

Acts Referred:

Industrial Disputes Act, 1947 — Section 25B, 25F

Citation : (1984) GLH 379 : (1984) 2 GLR 789 : (1984) 2 LLJ 330

Hon'ble Judges : R.C. Mankad, J; R.A. Mehta, J

Bench : Division Bench

Judgement

R.A. Mehta, J.—The petitioner-employer, a Co-operative Bank has preferred this petition under Art. 227 of the Constitution against the concurrent orders of the Labour Court and the Appellate Industrial Court directing reinstatement of the respondent workman with full back wages.

2. The respondent workman had made an application dated 1st March, 1980 for employment in the petitioner-Bank. In pursuance of that application and the subsequent interview, the respondent was appointed as a temporary clerk in this Co-operative Bank on a Monthly Salary of Rs. 186/- plus D.A. The respondent was also required to furnish a cash or personal surety of Rs. 5,000/- and also to execute a form of declaration of fidelity and security. The respondent joined the services of the petitioner Bank on 5th May, 1980 and he was relieved from his services on 31st January, 1981 by an order dated 30th January, 1981.

3. The workman raised an industrial dispute by an application under S. 79 of the Bombay Industrial Relations Act, 1946 before the Labour Court. The Labour Court considered the rival contentions whether the appointment was temporary, probationary or permanent and came to the conclusion that the appointment was not temporary as defined in the Standing Orders applicable to this Bank and, therefore, it had to be treated as a regular appointment on probation and since the workman has completed six months in service, he has become permanent. The relevant Clause 4 of the Standing Order is as follows :

"4. Classification of employees :

(1) Employees shall be classified as -

- (a) Permanent Employees;
- (b) Probationers;
- (c) Temporary Employees;
- (d) Apprentices.

(2)(a) "Permanent employee" means an employee who has been appointed as such in writing by the Bank and includes an employee who has completed a total probationary period of six months" service with the Bank.

(b) "Probationer" means an employee who is provisionally employed to fill a permanent vacancy or post and who has not completed six months" service in the aggregate in that post.

(c) "Temporary employee" means an employee who has been appointed for a limited period for work which is of an essentially temporary nature, or who is employed temporarily as an additional employee in connection with a temporary increase in work of a permanent nature.

(d) "Apprentice" means an employee who is a learner and is paid an allowance during the period of his training : Provided that no employee shall be classified as an apprentice if he has had training for an aggregate period of six months."

The definition of "temporary employee" limits the scope of the definition only to appointments for a limited period for work which is of an essentially temporary nature or who is employed temporarily as an additional employee in connection with a temporary increase in work of a permanent nature. There is no evidence led by the Bank to show that the appointment was for a limited period for work which was of essentially temporary nature or that the workman was employed temporarily as an additional employee in connection with temporary increase in the work. In the absence of any evidence so as to satisfy that definition, it cannot be said that the lower courts have committed any error of law in holding that the workman was not a temporary employee. Only those employees would be temporary employees who are employed specifically for a limited period or specifically as additional employees in connection with temporary increase in the work, there is nothing in the appointment order to satisfy these condition of definition of temporary employee. Since he was not a temporary employee but he was appointed to do regular and permanent work of the Bank, it would be reasonable to presume that he was provisionally employed to fill a permanent vacancy and, therefore, he has to be treated as a probationer while being appointed.

4. Regarding termination of service the relevant portion of Clause 22 of the Standing Order applicable to the Bank reads as follows :

"22. Termination of Employment :

1) The employment of a permanent employee or probationer may be terminated by one month's notice or on payment of one month's wages (including all allowances) in lieu of notice.

2) The reason for the termination of service under Clause (1) of this Standing Order shall be recorded in writing and shall be communicated to him, if he so desires, at the time of discharge unless such communication, in the opinion of the Manager is likely directly or indirectly to lay any person open of civil or criminal proceedings at in instance of the employee.

3) xx xx xx xx 4) xx xx xx xx 5) The service of any other employee may be terminated or he may leave service, on one week's notice.

6) xx xx xx xx 7) xx xx xx xx 8) xx xx xx xx

Thus the Standing Order provides for termination of the employment of permanent employee or probationer by one month's notice or on payment on one month's wages in lieu of notice. It is admitted position that on notice or wages in lieu thereof have been paid or offered to the workman. Sub-clause (2) requires for the termination of services to be recorded in writing; that has also not been done in the present case, no such reasons have been recorded. Sub-clause (5) provides for one week's notice for termination of services of any other employee. Therefore, a temporary employee also is entitled to at least one week's notice. In the present case that has also not been given. Thus, there is a clear breach of Clause 22 of the Standing Order Since the condition precedent of giving notice or wages in lieu thereof has not been satisfied the termination is void and ineffective and the respondent is deemed to be continued in service and entitled to order or reinstatement with full back wages and the lower courts were fully justified in ordering so.

5. There is one more reason in support of the order or reinstatement. The lower appellate court, namely, Industrial Court has pointed out that since the workman was in continuous service from 5th May, 1980 to 31st January, 1981, he was in continuous service for 272 days i.e. more than 240 days and the workman was entitled to the protection of S. 25-F of one month's notice and retrenchment compensation, and in the present case since admittedly such conditions precedent have not been fulfilled, the workman is entitled to be reinstated. This finding is sought to be attacked by the Bank on the ground that the requirement of S. 25-B of the Industrial Disputes Act is actual working for not less than 240 days. If Sundays (Holidays) are excluded, the requirement of 240 days would not be fulfilled and, therefore S. 25-F would not be applicable. According to the petitioner Bank continuous service for 240 days would mean 240 actual working days. However, it is not necessary for us to decide this question, because there is another similar provision in Bombay Shops and Establishments Act, 1948 in S. 66 which directs that no employer shall dispense with the services of an employee who is in continuous employment for more than three months without giving

such a person at least 14 days notice in writing or wages in lieu of such notice. In the present case there is no dispute whatsoever that the employee had been in continuous employment for more than 3 months (in fact nearly 9 months). It is also not in dispute that no notice of 14 days or wages in lieu of such notice have been offered or paid to the workmen. In fact no notice or wages have been offered, admittedly. Thus, there is a clear breach of S. 66 of the Bombay Shops and Establishments Act.

6. At the hearing on 30th December, 1983 when this new point was raised by the respondent, the petitioner Bank had resisted the same because it was an absolutely new point raised for the first time and the petitioner Bank was taken by surprise. Therefore, the matter was adjourned to 17th January, 1984 to enable the petitioner Bank to raise its objections and meet the point. At the hearing on 17th January, 1984, the learned counsel for the petitioner argued that this new point should not be allowed to be raised for the first time in writ petition. However, we do not find any force in that contention. The question allowed to be raised is a pure question of law not requiring any investigation of facts. Moreover time of reasonable opportunity has been granted to the petitioner Bank meet with the new point. The learned counsel for the petitioner has also ascertained and informed the court that the Bombay Shops and Establishments Act applies both to Nadiad as well as Anand townships, where the head office and branch office of the petitioner Bank are situate. The respondent was working in Anand branch. There is a direct decision of this Court in *Shanabhai Desai bhai Patel v. Chhotabhai Shankerbhai Patel* 16 G.L.R. 256. In that case, C. V. Rane, J. held as follows :

"It has been specifically provided in S. 66 of the Act, the language of which is unambiguous and plains, that no employer shall dispense with the services of any employee who has been in his continuous employment for more than three months without giving him notice of specified duration or wages in lieu of such notice as indicated in Clause (a) and (b) of that section. The use of the word "shall" in the above section and the manner in which the section is worded clearly show that, the provisions thereof are mandatory. This shows that, according to the provisions of S. 66 of the Act, the services of an employee who has been in continuous service for not less than a year cannot be terminated without giving him at least thirty days" notice in writing or wages in lieu of such notice. Similarly, the services of an employee who has been in continuous employment for less than a year but more than three months cannot be terminated without giving him at least fourteen days notice in writing or wages in lieu of such notice ... if the provisions of the above section are not complied with strictly, the very object of that section would be frustrated. Thus, looking to the plain language as well as the object of S. 66, it should be held that, the order in question is not only illegal, but, also void."

7. In view of the admitted position that the respondent workman has been in continuous service for more than three months and that he has not been given

any notice or wages, the above mandatory condition precedent of S. 66 is not complied with and there is breach of S. 66 and, therefore, also the impugned termination is illegal and void and the respondent workman is entitled to be reinstated. Thus, there is no reason to interfere with the orders for reinstatement with full back wages.

8. In the result, the petition fails and is dismissed. Rule discharged with costs.