
(2005) 02 BOM CK 0121
In the Bombay High Court
Case No : Writ Petition No. 1273 of 1994

Municipal Council	Vs	APPELLANT
Ramesh Mukund Lokhande		RESPONDENT

Date of Decision : 11-02-2005

Acts Referred:

Industrial Disputes Act, 1947 — Section 17B, 25F, 25G, 33C2

Citation : (2005) 105 FLR 565

Hon'ble Judges : Naresh H. Patil, J

Bench : Single Bench

Advocate : U.S. Malte, for the Appellant; S.J. Jain and S.C. Bora, for the Respondent

Final Decision : Allowed

Judgement

Naresh H. Patil, J.—The petition is directed against the judgment and order dated 6.8.1993 passed by the Labour Court in Ref. (IDA) No. 16/90.

A reference was made by the Deputy Commissioner of Labour, Nashik Division, Nashik vide its order dated 26.6.1990 to the Labour Court.

2. The respondent raised contention that he was working from 18.6.1983 to 30.2.1986 as Octroi Clerk for three years and he completed 240 days in each year. While he had gone to attend to his office duty on 1.4.1986, the petitioner-employer did not allow him to join his duties and orally terminated his services. The respondent was working from 14.12.1977 to 6.2.1978 in leave vacancy. He also worked in census department maintained by the Municipal Council from 9.3.1981 to 15.2.1982. It was further contended that the office of the Chief Officer issued a certificate that he was in service. His oral termination was wrong and illegal. Therefore, he prayed for reinstatement with back-wages.

3. The petitioner filed reply and denied the contentions raised by the respondent. It was stated that the respondent did not complete 240 days in the preceding year. He was not in continuous employment with the Municipal Council. The

respondent left the job on his own volition since 26.3.1986 and did not turn up thereafter. There was delay of near about four years in filing the reference, which, was not explained.

4. The Labour Court framed issues, accordingly. The petitioner examined the Chief Officer, Baliram Koli and one more employee Nathu Sonar who was working in Octroi Department to support its contentions. The respondent examined himself.

5. A list of document (Exh.U-10) was filed. The respondent placed reliance on xerox copy of the certificate 25.3.1986 (Exh.U-12) issued by the Chief Officer stating that he had worked from 18.6.1983.

6. The Presiding Officer of the Labour Court allowed the reference and directed reinstatement of the respondent with full back wages from 23.8.1989.

7. The learned Counsel for the petitioner states that the respondent worked in leave vacancy for sometime. He was not selected at any time by following selection procedure. He did not work on sanctioned post. He did not work for 240 days in the preceding year. The petitioner examined two responsible officers, one the Chief Officer and Mr. Sonar, whose evidence shows that the respondent did not complete 240 days in the preceding year. There was no regular work available with the Municipal Council. The muster register was also brought in record of the Trial Court which was scrutinised by the Trial Court, which reflected that the respondent had worked for 190 days only. The allegation of oral termination was baseless. According to the learned Counsel, the Trial Court committed an error in not discussing the evidence of witness Nathu Sonar for the petitioner-Municipal Council, which has caused serious prejudice to the case of the petitioner.

8. The Learned Counsel for the respondent submitted that the evidence led by the Municipal Council is doubtful. The burden to establish the case is on the employer. In calculating 240 days, holidays ought to have been included and if the holidays are included, then it can be seen that the respondent had worked for more than 240 days in the preceding year. On the available evidence, reasonable inference could be drawn by giving benefit to the respondent and that, is what was done by the Labour Court. The learned Counsel submitted that the petitioner did not comply with the order passed by this Court u/s 17-B of the Industrial Disputes Act. The petition bearing Writ Petition No. 2906 of 1997 filed against the order passed u/s 33-C-2 of the Industrial Disputes Act, was also rejected by this Court and this being the conduct of the petitioner, this Court shall not interfere with the impugned judgment and order.

9. The case of the respondent is based on foundation of non-compliance of the provisions of Section 25-F and G of the Industrial Disputes Act, by the petitioner employer. The respondent contended that he had completed 240 days in the preceding year. He filed two xerox copies of certificate issued by the Chief Officer and placed reliance on the same to say that he was in continuous service. The

petitioner examined two witnesses, the Chief Officer and an employee from Octroi Department namely, Sonar.

10. Record and proceedings was called for by this Court and with the assistance of the learned Counsel for the parties, I have gone through some of the relevant documents. In the evidence, the Chief Officer Mr. Koli, stated that he had verified the attendance register. He further stated that chart filed in Court was correct or not, cannot be stated. Exh. U-16 which, according to the Chief Officer, had the seal of the Municipal Council but, which of the Chief Officers signed the same, could not be ascertained. The exhibition of the said certificates was objected by the learned Counsel for the petitioner.

11. In the cross-examination, the Chief Officer stated that it was true that the workman was working since 18.6.1983 to 30.3.1986 on daily wages, but was not in continuous service.

12. Another witness examined on behalf of the petitioner-Municipal Council was Nathu Sonar who was working since 1970 in Octroi Department. This witness gave detail account of the days on which the respondent worked in leave vacancy. In cross-examination he stated that holidays are not shown in muster. Regarding reference to other workmen like Arjun Choudhari, A.R. More, R.D. Choudhari, Sanjay Badgujar, it was stated that their names were forwarded by Employment Exchange and they were selected by the Municipal Council. The respondent was also called for interview but, he was not selected. He denied that the muster was false and less number of working days were shown against the name of the respondent.

13. The respondent was cross-examined by the Municipal Council and in his evidence, he admitted that he was given work as per exigency. He worked in Census office which is separate from Municipal Council. The respondent admitted that there was no document with him to show that the juniors to him were retained in service and no evidence to show that he met the Chief Officer with the request to provide him work. His relations with the Chief Officer were cordial and he issued notice dated 24.7.1987 belatedly as he was expecting that work would be provided to him.

14. In the pleading, the respondent contended that he was working in leave vacancy of other employees. Muster register was produced on record and on the basis of the muster register, a chart was drawn, stating the number of days on which the respondent had worked in the previous year. It showed that the respondent worked for 192 days. There is some discrepancy regarding working of one Chaudhari but, the same would not materially affect so as to arrive at a conclusion that the respondent had worked for more than 240 days in a preceding year. The xerox copies of the certificates allegedly issued by the Chief Officer of the petitioner-Municipal Council, at Exhs. U-12 and U-16 were produced by the respondent who stated that those certificates were issued by the Chief Officer. The originals of the same were not produced on record. An

objection was raised to this effect and the Lower Court was to decide the said objection at the time of hearing of the arguments.

15. The Labour Court placed much reliance on the statements made by the Chief Officer in his evidence and drew inference that the respondent worked for 240 days in the preceding year. The learned Judge, Labour Court placed reliance on the circular issued by the State Government indicating some concessions which were given to the workers who had worked in strike period in the year, 1977-78.

16. The Labour Court left out the vital piece of evidence from consideration i.e. the evidence of Natha Sonar who was working in Octroi Department since 1970. In the evidence, the said witness Sonar has given details of number of days on which the respondent worked and supported the record maintained by him. He admitted some minor mistakes, The calculation of number of days on which the respondent worked does not show that he had worked for 240 days in the preceding year.

17. In sum and substance, the Presiding Officer, Labour Court, Jalgaon placed heavy reliance on some statements made by the Chief Officer without considering the evidence of other witness Sonar, who was examined by the Municipal Council and arrived at a conclusion that there was non-compliance of Section 25-F and G of the Industrial Disputes Act.

18. The learned Counsel for the petitioner placed reliance on the reported judgments, in the cases of Range Forest Officer v. S.T. Hadimani 2001 (1) CLR 922 and Deputy Executive Engineer, I and P, RC Department and Another Vs. Padamati Balaramiah and Another, , to support his contention that the workman, who asserted that he completed 240 days, which was denied by the management, has a responsibility and burden to prove that he had in fact, worked for 240 days in a year preceding his termination.

19. The learned Counsel for the petitioner further placed reliance on paragraph 10 of the judgment reported in the case of Union of India, through Divisional Railway Manager, Mumbai v. Jairaj N. Shetty 2003 (3) CLR 374, which reads thus,

10. The rulings of the Apex Court referred to above would disclose that merely because temporary employee working on daily wages is engaged on the need basis, he does not acquire a right to claim relief in terms of Section 25(f) of the said Act. The burden of proving the fact that the employee has rendered services for 240 days in a year lies upon employee when such claim is denied by the employer. The completion of 240 days has to be in the year preceding the termination of the employee to avail the benefit u/s 25(f) read with Section 25(b) of the said Act. For the purpose of computation of period of 240 days in a year, it is not necessary for, the employee to be in service of the employer for the whole one year and secondly that the period of 240 days may not be a period of continuous 240 days and it is sufficient if total number of 240 days is calculated with reference to a period of twelve months. In other words, an employee should render service for total number of any 240 days in a period of continuous 365

days.

20. On the issue whether Sundays are paid holidays and can be taken into account while calculating 240 days, the Counsel placed reliance on the judgment of the Apex Court in the case of Workmen of American Express International Banking Corporation Vs. Management of American Express International Banking Corporation, , in which expression "actually worked under the employer" was considered. It was observed in paragraph 5 of the judgment that the expression "actually worked under the employer" cannot mean those days only when the workman worked with hammer, sickle or pen, but must necessarily comprehend all those days during which he was in the employment of the employer and for which he had been paid wages either under express or implied contract of service or by compulsion of statute, sanding orders etc.

21. The learned Counsel further placed reliance on reported judgment in the case of Haryana State F.C.C.W. Store Ltd. and Another Vs. Ram Niwas and Another, , and stated that whenever there was leave vacancy, the workman worked during the said period on leave vacancy and the contract concluded no sooner the exigency of the vacancy ended.

22. In the case of Himanshu Kumar Vidyarthi and Ors. v. State of Bihar and Ors. 1997 (76) FLR 237 (SC), it was observed that when the appointments are regulated by statutory rules, the concept of "industry" to that extent stands excluded and disengagement from service of the employees in the said case, who were working temporarily on daily wages, could not be considered to be a "retrenchment" under the Industrial Disputes Act, It was further observed that the concept of "retrenchment" cannot be stretched to such an extent as to cover those employees.

23. The learned Counsel for the respondent placed reliance on the following decisions:

(1) In the case of H.D. Singh Vs. Reserve Bank of India and Others, , it was observed that striking off the name of. a workman from the rolls by the employer amounts to termination of service and such termination is retrenchment within the meaning of Sub-section (oo) if effected in violation of the mandatory provision contained in Section 25-F of the Industrial Disputes Act.

(2) By placing reliance in the case of Shriram Bearings Ltd. v. Shantilal B. Parikh 2004 LIC 222, it was submitted by the learned Counsel for the respondent that unless there is error, apparent on the face of record, this Court in exercise of its powers in writ jurisdiction, cannot interfere in the impugned judgment and order, even if two views are possible.

24. Considering the evidence which was brought on record and the submissions advanced by the learned Counsel for the parties, I am of the view that the workman did not discharge the burden by establishing that he worked for 240 days in a preceding year of his termination. The employer has brought on record,

reasonable and sufficient evidence, in the shape of oral testimony of the Chief Officer and another witness Sonar, and the documentary evidence in the shape of muster roll extracts which showed that the respondent did not work for 240 days in the preceding year.

25. The respondent pleaded that he worked in leave vacancy. The Chief Officer though stated that the respondent worked from 1983 to 1986, stated that he did not work continuously. I do not find this to be fit case to draw an inference in favour of the respondent and arrive at a conclusion that there was violation of Section 25-F and G of the Industrial Disputes Act. Reference to the other proceeding which was contested between the parties should not have any bearing on the filial outcome of this petition.

26. In the light of the discussions made above, I am of the view that the Labour Court committed an error, which is apparent on the face of the record and which needs to be corrected by this Court in exercise of its writ jurisdiction.

27. The writ petition is allowed. The impugned judgment and order dated 6.8.1993 passed by the Presiding Officer Labour Court, Jalgaon in Ref. (IDA) No. 16/1990, is quashed and set aside,

Rule made absolute, accordingly. No order as to costs.