
(2007) 05 BOM CK 0027

In the Bombay High Court

Case No : Writ Petition No. 6565 of 2005

Municipal Council

APPELLANT

Vs

Sanjay Dhanraj Yenorkar

RESPONDENT

Date of Decision : 04-05-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 23A
Constitution of India, 1950 — Article 227
Industrial Disputes Act, 1947 — Section 7
Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 — Section 10, 11, 28, 33

Citation : (2007) 4 ALLMR 700 : (2008) 2 BomCR 910 : (2007) 4 MhLj 258

Hon'ble Judges : A.B. Chaudhari, J

Bench : Single Bench

Advocate : Anjan De, for the Appellant; K.R. Lambat, for the Respondent

Final Decision : Dismissed

Judgement

A.B. Chaudhari, J.—Rule returnable forthwith. Heard finally by consent of parties.

2. By the present petition, the petitioner has questioned the validity of judgment and order dated 15-4-2005 in Complaint U.L.P. No. 316/2000, passed by the Industrial Court, Nagpur. This petition is treated as one under Article 227 of the Constitution of India looking to the nature of the order made by the Industrial Court.

3. FACTS : -- The respondent had filed complaint before the Industrial Court u/s 28 read with Item Nos. 5, 6 and 9, Schedule IV of the M.R.T.U. and P.U.L.P. Act, 1971. He averred in his complaint that he was initially appointed as a peon on 4-10-1994. On 28-2-1997 he was appointed to work as Chowkidar in the school on night duty and since then he has been working with the petitioner. Council on daily wages. On the date of filing of the complaint, he has been working as a mate. He then submitted that he completed more than 240 days of service and in accordance with Model Standing Orders Rule 4-C, he became permanent. He

has been continuously working and was entitled to be conferred with the status of permanent employee. He then submitted that juniors to him were made permanent in service by the petitioner intentionally ignoring his claim. The continuance of the respondent for years together in service as daily wage amounts to unfair labour practice. The petitioner filed written statement before the Industrial Court and set up a defence that the respondent worked in Social Forestry Scheme, implemented by the petitioner-Municipal Council and the said scheme was closed down in the year 1995 and as such he was not employee of the Municipal Council. It was then stated that he was engaged as Chowkidar during night and there is no sanctioned post of Chowkidar in primary school. It was then stated that upon completion of Government scheme, the provisions of industrial law do not apply. It was then submitted that Octroi department of Municipal Council was abolished w.e.f. 1-5-1999 and several class-IV employees were in excess. There is no post available with the petitioner for absorbing the complainant-respondent particularly because the respondent was a scheme worker. It was then stated that in the absence of any sanctioned post, it was not possible to make the respondent permanent. It was then stated that the establishment expenditure of the petitioner-Council exceeded 42% and financial position of the Municipal Council was not sound. The Industrial Court framed five issues. The respondent-complainant tendered his evidence on affidavit and he was cross-examined. The respondent filed several documents on record and proved them and the same were exhibited. The respondent tendered his evidence and categorically stated that he is a handicapped person with 40% handicap and there was reservation provided by the Government for handicapped persons in the establishment of the petitioner-Municipal Council. He produced certain Government resolutions on record. There was absolutely no challenge in the cross-examination to his handicap and his registration in the employment exchange in that category. The learned Industrial Court heard parties and passed the impugned judgment and order. Hence, this petition.

4. ARGUMENTS :-- Shri Anjan De, learned Counsel for the petitioner made following submissions.

(i) The point involving conferral of permanency by the Industrial Court is under challenge in number of writ petitions filed by the petitioner-Municipal Council in this Court and all those petitions have been admitted by this Court and, hence, this petition ought to be admitted. A list of these admitted matters is also placed on record.

Shri Anjan De, learned Counsel cited judgment of the Hon'ble Apex Court in the case of *Bir Bajrang Kumar v. State of Bihar and Ors.* reported in AIR 1987 SC 1345, wherein the Hon'ble Supreme Court has held that if one case is admitted on identical point another should not be dismissed by the same High Court.

(ii) Since no regular process of appointment was followed while appointing the respondent, he had no legal right to seek permanency as his appointment was illegal and by way of backdoor entry. He submitted that though there was no

pleading and evidence from the petitioner to that effect, the decision in the case of Umadevi (*supra*) should be applied.

(iii) Shri Anjan De, learned Counsel then submitted that a Single Judge of this Court has remanded some matters to the Industrial Court for fresh trial having found absence of pleadings and proof in the light of the judgments of the Supreme Court in the case of Secretary, State of Karnataka and Others Vs. Umadevi and Others, and Indian Drugs and Pharmaceuticals Ltd. Vs. Workman, Indian Drugs and Pharmaceuticals Ltd., and, therefore, this Court should also adopt the same course of action.

(iv) The expenditure of the Municipal Council has gone beyond permissible limit of 42% and for the year 2002-03 it was 93.81% and in the year 2003-04 it was 90-92% and, therefore, the financial condition of the Municipal Council was unsound and the Court should not have ordered grant of permanency to the respondent.

(v) There is no power to the Municipal Council to create post. The respondent had no legal right to seek regularization when he was on daily wages and was appointed in the scheme.

5. Counsel for respondent though served, remained absent.

6. CONSIDERATION :-- Having considered the submissions made by Shri Anjan De, learned Counsel for petitioner and having gone through the records and proceedings at the outset, I find that the argument advanced by Shri Anjan De, learned Counsel that since other writ petitions involving identical point have been admitted by this Court, this writ petition should also be admitted for final hearing does not appeal to me, since I had put the parties on notice that the petition itself would be decided finally on merits at the admission stage instead of admitting the same and keeping it pending for years together. Hence, I do not think that in this situation the judgment of the Supreme Court in the case of Bir Bajrang Kumar, cited *supra*, would have application.

7. There is neither any pleading nor any evidence on the record of the trial Court that no regular process of appointment was followed when respondent was appointed and that therefore he had no right to claim regularization. The respondent tendered his evidence before the Industrial Court and deposed in accordance with the averments in the complaint. He also deposed that he is a handicapped person to the extent of 40% and there was a reservation for handicapped persons and he was entitled to be regularized in service in accordance with the said reservation. There is absolutely no challenge to his evidence regarding handicap and the various documents filed and proved by him. Neither there was any objection to his evidence to that effect nor to the exhibition of documents filed by him in support of his case. Now perusal of the documents from Exh. 13-A to 13-S show that the respondent worked in various departments of the Municipal Council and even on the election duty. Exh. 13-T is a document issued by Civil Surgeon, Wardha declaring his disability to the extent

of 40% and, thus, he has proved that he is a handicapped person. Exh. 13-DD is the order appointing one Balkrushna Vinayak Satpute in a vacant post of Coolie in Garden department. Exh. 13-EE is a Government resolution dated 19th September, 1989 providing for 3% reservation to the handicapped persons. Exh. 15-A is the Circular dated 19th July, 2000 issued by the Government, asking the Municipal Council in the State of Maharashtra to provide reservation to the extent of 3% in accordance with the Central Act, namely, "The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995". Exh. 15-B is the direction issued by the Collector, Wardha to the petitioner-Council for implementing the provisions of the said Act. It is clear from the record that the petitioner did not even enter into witness box despite grant of time as observed by the Industrial Court. Now in the wake of the categorical evidence tendered by the respondent and the documents filed by him including the reservation of 3% to the handicapped persons, I fail to understand why the entire evidence of the respondent should not be believed as has been done by the Industrial Court. The petitioner did not at all lead any oral or documentary evidence in rebuttal and, therefore, I do not think that in the absence of any evidence having been led in rebuttal, the petitioner can be heard to say that the Industrial Court did not act according to law. The stand taken by the petitioner that respondent was appointed in a scheme which was closed down in 1995 is wrong and misleading. The Industrial Court has on the evidence recorded the following findings;

Nothing has been produced by the respondent to show that the appointment was under a particular scheme. In any case, when the scheme was closed down in 1995, the complainant should have been discontinued but that did not happen and the complainant continued to serve till this day. The complainant besides examining herself, has produced a number of documents on record which have all been specifically admitted by the learned Counsel representing the respondent No. 1. The complainant had also served the respondent No. 1 with a notice to produce documents especially the muster rolls for the entire period since 1994 etc., but nothing has been produced. To put it simply, the oral as well as documentary evidence adduced by the complainant is totally un rebutted.

Ex. 13-EE is a Government circular of 19-9-1981 relating to the reservation in posts for physically handicapped persons. Then Ex. U-15A is the letter of Urban Development Department addressed to the Director of Municipal Administration and all Municipal Councils informing about providing 3% reservation for physically handicapped persons in the matter of recruitment. On the same subject instructions were given to the respondent No. 1 by Collector, Wardha by his letter dated 29-8-2000 by Ex. 15-B.

The complainant has proved by oral as well as documentary evidence that he is physically handicapped and there is reservation for physically handicapped persons. The respondent has not shown that in the category of physically handicapped person the recruitment has already been made in Class IV cadre. The complainant is therefore entitled to be regularized in the Class IV cadre. The

respondent No. 1 it appears had sent some proposal in the past which was not accepted on the ground that establishment expenditure was higher. That was in the year 2001. The position thereafter has not been brought on record, though there is some admission that financially the Council is not in good shape.

The complainant had impleaded the Collector, Wardha and the Regional Director of Municipal Administration, Nagpur as parties but despite notice the two authorities did not come forward to resist the claim. In fact, the respondent No. 1 Council has also not led any evidence to show the vacancy position, availability of work, or to justify its objections raised in the written statement.

8. From the above, it is clear that the Industrial Court has on evidence recorded the findings of facts which I find are strictly in accordance with the evidence on record and there is absolutely no perversity. The argument of Shri Anjan De, learned Counsel for petitioner that the expenditure of the Municipal Council is 93.81% and 90.92% is wholly misconceived as such no data was placed before the Industrial Court by tendering appropriate evidence. None prevented the petitioner from tendering oral as well as documentary evidence before the Industrial Court. Even in the writ petition, this data regarding expenditure is not at all furnished and perusal of writ petition shows no proper pleadings for challenging the order of the Industrial Court. The Parliament enacted the Act for the handicapped persons in the year 1995 with a great hope that the States and its instrumentalities would implement the provisions of the said Act. It is, however, really unfortunate that the provisions of the said Act for handicapped persons are not being implemented. In this case also there is absolutely nothing to show how the petitioner has complied with the reservation of handicapped persons and how many handicapped persons have been given regular employment in the Municipal Council, Hinganghat. It appears that the petitioner Municipal Council is not at all interested in implementing the provisions of the said Act. In the wake of the fact that the respondent being a handicapped person is entitled to regular appointment in 3% reservation, and the petitioner having not shown any compliance of the reservation, whether the respondent is a daily wager is irrelevant. No evidence was tendered by the petitioner about the details of sanctioned posts or non-availability thereof.

9. As regards the alternative submission made by Shri Anjan De, learned Counsel that remand should be made to the Industrial Court to enable the petitioner to make appropriate pleadings particularly in the light of the Constitution Bench judgment of the Hon'ble Supreme Court in the case of Umadevi (cited supra) and as per the said course having been adopted by another single Judge of this Court, I find that the argument is misconceived. In its order dated 5-2-2007 in W. P. Nos. 6551, 6562 and 6563 of 2005, a learned Single Judge of this Court observed as under ;

I have perused the impugned orders. It appears that issues considered by the Hon'ble Apex Court and the law laid down by the Apex Court has not received any attention of the Industrial Court because there was no such argument

advanced before it....

Proceedings in complaint (ULP) No. 322, 363 and 156 of 2000 are restored back to respective Industrial Court for fresh trial after giving opportunity to parties to amend their pleadings and to lead their respective evidence.

Now insofar as jurisdiction to remand a matter is concerned, remand cannot be made at mere askance. This Court will have to record a finding that the impugned judgment is illegal because it is not according to the pleadings and evidence tendered by the parties and the materials available on record. Having gone through the entire record, this Court is unable to find out any fault with the impugned judgment. In my opinion, availability of a latter decision of the Hon"ble Supreme Court after the judgment and order impugned cannot be a ground to allow the parties to amend the pleadings in the Industrial Court to bring them in conformity with such latter judgment. The same is wholly impermissible and that too under the supervisory jurisdiction under Article 227 of the Constitution of India. The parties cannot be allowed to fill up the lacuna, if any, in their respective pleadings or evidence. The jurisdiction under Article 227 of the Constitution is limited to see whether on the basis of available pleadings and proof before the subordinate Court it has acted within its bounds or not. I, therefore, do not subscribe to the argument praying for remand of the matter.

In the case of Smt. Umrao Bai and Others Vs. Sardarilal Khatri, , the High Court of Madhya Pradesh in paragraph 9 ha stated as under;

9. ...The powers of this Court for remanding the appeal would be governed by Order XLI, Rule 23A of Code of Civil Procedure. These powers can be exercised by this Court under the conditions mentioned in the rule. This rule substitutes what was earlier assumed to be part and parcel of inherent powers of the Court. It is well established that powers of remand cannot be exercised to fill up the lacuna of one or other party. They can be exercised for curing a radical defect in trial or hearing in the appeal resulting in miscarriage of justice.

10. Argument advanced by Shri Anjan De, learned Counsel on the strength of the decision of the Hon"ble Supreme Court in the case of Umadevi, cited supra, is without any foundation by way of pleadings and evidence before the Industrial Court. I do not think that the ratio of the Apex Court judgment should be straightway applied to a case adjudicated on merits on the basis of pleadings and evidence of the parties by the Industrial Court in its original jurisdiction. There is absolutely nothing on record of the Lower Court to show that even a single proposition of law stated in the said case of Umadevi was either founded on the basis of pleadings and/or proof before the Industrial Court. In my opinion, the parties cannot be permitted to raise such grounds for the first time in writ petition before this Court that too in its supervisory jurisdiction.

11. Now insofar as the submission made by Shri Anjan De, learned Counsel to consider the present case in the light of the judgment in the case of Umadevi even in the absence of pleadings and any evidence on the ground that the

petitioner is a statutory body and, therefore, that this Court should interfere even in the absence of pleadings and proof before the Industrial Court is concerned, I find that the following judgments of the Hon"ble Apex Court would not allow me to adopt such a course.

(i) In the case of J.K. Iron and Steel Co. Ltd., Kanpur Vs. The Iron and Steel Mazdoor Union, Kanpur, , in which the Hon"ble Supreme Court in paragraph 24 has stated thus;

24. Now the position in the present case is this. The Tribunals are directed by Section 7, Industrial Disputes Act to adjudicate industrial disputes "in accordance with the provisions of the Act" and Section 11 directs them to follow "such procedure as may be prescribed". The procedure for the Uttar Pradesh Tribunals is laid down by the U. P. State Industrial Tribunal Standing Orders, 1951.

Very broadly it follows the pattern of the Civil Courts. Once the reference is made by Government, the Tribunal has to take the pleadings of the parties in writing and to draw up issues. Then it takes evidence, hears arguments and finally pronounces its "judgment" "in open Court". It is evident from this that though these tribunals are not bound by all the technicalities of Civil Courts, they must nevertheless follow the same general pattern.

Now the only point of requiring pleadings and issues is to ascertain the real dispute between the parties, to narrow the area of conflict and to see just where the two sides differ. It is not open to the Tribunals to fly off at a tangent and, disregarding the pleadings to reach any conclusions that they think are just and proper.

(ii) In the case of Shankar Chakravarti Vs. Britannia Biscuit Co. Ltd. and Another, , in which the Hon"ble Supreme Court in paragraphs 31, 32 and 33 has stated thus;

31. If such be the duties and functions of the Industrial Tribunal or the Labour Court, any party appearing before it must make a claim or demur the claim of the other side and when there is a burden upon it to prove or establish the fact so as to invite a decision in its favour, it has to lead evidence. The quasi-judicial tribunal is not required to advise the party either about its rights or what it should do or omit to do. Obligation to lead evidence to establish an allegation made by a party is on the party making the allegation. The test would be who would fail if no evidence is led. It must seek an opportunity to lead evidence and lead evidence. A contention to substantiate which evidence is necessary has to be pleaded. If there is no pleading raising a contention there is no question of substantiating such a non-existing contention by evidence. It is well settled that allegation which is not pleaded, even if there is evidence in support of it, cannot be examined because the other side has no notice of it and if entertained it would tantamount to granting an unfair advantage to the first mentioned party. We are not unmindful of the fact that pleadings before such bodies have not to be read strictly, but it is equally true that the pleadings must be such as to give

sufficient notice to the other party of the case it is called upon to meet. This view expressed in *Tin Printers (Private) Ltd. Vs. Industrial Tribunal and Another*, , commends to us. The rules of fair play demand that where a party seeks to establish a contention which if proved would be sufficient to deny relief to the opposite side, such a contention has to be specifically pleaded and then proved. But if there is no pleading there is no question of proving something which is not pleaded. This is very elementary.

32. Can it for a moment be suggested that this elementary principle does not inform industrial adjudication? The answer must be an emphatic "no".

33. The employer terminates the service of a workman. That termination raises an industrial dispute either by way of an application u/s 33 of the Act by the employer or by way of a reference by the appropriate Government u/s 10. If an application is made by the employer as it is required to be made in the prescribed form all facts are required to be pleaded. If a relief is asked for in the alternative that has to be pleaded. In an application u/s 33 the employer has to plead that a domestic enquiry has been held and it is legal and valid. In the alternative it must plead that if the Labour Court or Industrial Tribunal comes to the conclusion that either there was no enquiry or the one held was defective, the employer would adduce evidence to substantiate the charges of misconduct alleged against the workman. Now, if no such pleading is put forth either at the initial stage or during the pendency of the proceedings there arises no question of a sort of advisory role of the Labour Court or the Industrial Tribunal, unintended by the Act to advise the employer, a party much better off than the workman, to inform it about its rights, namely, the right to lead additional evidence and then give an opportunity which was never sought. This runs counter to the grain of industrial jurisprudence. Undoubtedly, if such a pleading is raised and an opportunity is sought, it is to be given but if there is no such pleading either in the original application or in the statement of claim or written statement or by way of an application during the pendency of the proceedings there is no duty cast by law or by the rules of justice, reason and fair play that a quasi-judicial Tribunal like the Industrial Tribunal or the Labour Court should adopt an advisory role by informing the employer of its rights, namely, the right to adduce additional evidence to substantiate the charges when it failed to make good the domestic enquiry and then to give an opportunity to it to adduce additional evidence. This, apart from being unfair to the workman, is against the principles or rules governing the procedure to be adopted by quasi-judicial Tribunal, against the grain of adversary system and against the principles governing decision of a lis between the parties arrayed before a quasi-judicial Tribunal.

(iii) In the case of *Uttar Pradesh Gram Panchayat Adhikari Sangh and Others Vs. Daya Ram Saroj and Others*, , in which the Hon"ble Supreme Court in paragraph 34 has stated thus;

34. Another reason why the decision of the High Court is unsustainable is that

the High Court held that the tubewell operators can legitimately expect to remain as multi-purpose Gram Panchayat employees unless the whole concept is totally done away with. There is no pleading in the original petition, not even a whisper, about the legitimate expectation. It appears that the High Court, at the appellate stage made observations which induced some of the appellants at the last minute to urge the ground of legitimate expectation which was permitted and on the basis of it such finding has been recorded. Such an approach is not permissible. See National Buildings Construction Corporation v. S. Raghunathan.

(iv) In the case of National Buildings Construction Corporation Vs. S. Raghunathan and Others, , in which the Hon"ble Supreme Court in paragraph 31 has stated thus;

31. Incidentally in this case, the question of "legitimate expectation" was not raised in the petition and no foundation was laid in the pleadings for such a plea being advanced before the Court. Strangely, the High Court allowed this plea at the stage of argument and allowed the petitions only on the ground of "legitimate expectation" without the least realising that there was hardly any legitimacy in the claim of the respondents. In the absence of pleading and the affidavit of the respondents in support thereof, the whole exercise done by the High Court cannot but be termed to be speculative.

12. For all the reasons stated herein before by me, I find that the proceedings cannot be remanded to the Industrial Court for fresh trial, in the light of the law pronounced by the Hon"ble Apex Court. I further find that the observations made by the learned Single Judge of this Court in its order dated 5-2-2007 do not amount to a ratio decidendi and does not bind me. In the result, the present writ petition deserves to be dismissed. The petition is, therefore, dismissed with costs, quantified at Rs. 5,000/- (Rupees Five Thousand Only) to be paid to the respondent within a period of four weeks. Rule is discharged.