
(2015) 06 BOM CK 0245

In the Bombay High Court

Case No : Letters Patent Appeal No. 116 of 2006 (Arising out of Writ Petition No. 3029/1998)

Narendra Annaji Patle

APPELLANT

Vs

The Sub Divisional Officer

RESPONDENT

Date of Decision : 12-06-2015

Acts Referred:

Evidence Act, 1872 — Section 114

Industrial Disputes Act, 1947 — Section 10, 12(5)

Citation : (2015) 06 BOM CK 0245

Hon'ble Judges : B.R. Gavai, J;I.K. Jain, J

Bench : Division Bench

Advocate : A.S. Kilor, for the Appellant; T. Khan, A.G.P., Advocates for the Respondent

Final Decision : Partly Allowed

Judgement

B.R. Gavai, J—The appeal challenges the judgment and order passed by the learned Single Judge of this Court in Writ Petition No. 3029/98 dated 8.2.2006, thereby allowing the appeal filed by the respondent State and setting aside the award passed by the learned Presiding Officer, Labour Court, Akola in Ref. I.D.A. No. 68/93.

2. A Reference was made by the Deputy Commissioner of Labour, Nagpur under Section 10 read with Section 12(5) of the Industrial Disputes Act for adjudication of dispute between the respondent (hereinafter referred to as "Party No. 1") and the appellant (hereinafter referred to as "Party No. 2").

3. After receipt of the reference, notices were served to both the parties. The Party No. 2 filed his statement of claim below Exh. 3 stating therein that he was in the employment of Party No. 1 at Malegaon since May, 1986. It was further contended that the Party No. 1 had without any intimation terminated the services of Party No. 2 with effect from 30.4.1988. It was further contended that though the Party No. 2 had approached Party No. 1 on several occasions, he was

told that on account of Zero budget, he cannot be given work and after the implementation of Zero budget is stopped, he will be provided with the work. Notices sent by Party No. 2 to Party No. 1 went unreplied. A reply was filed by Party No. 1 thereby denying the claim of the Party No. 2. It further appears that after the evidence was led by the Party No. 2, an application was made by him directing the Party No. 1 to produce certain documents on record. The said application was allowed by the learned Labour Court vide order dated 20.8.1997. However, inspite of the order passed by the learned Labour Court, the Party No. 1 did not produce the documents on record as was directed to be placed on record. The learned trial Court, therefore, drawing an adverse inference held that the Party No. 2 had established that he had completed 240 days and as such, passed an award granting reinstatement to Party No. 2 along with all the back wages.

4. Being aggrieved thereby, the Writ Petition was filed by the Party No. 1 which is allowed. Hence, the present appeal.

5. Mr. A.S. Kilor, learned Counsel for the appellant, submits that an interference by the learned Single Judge would have been warranted only when the learned Single Judge would have found that the view taken by the trial Court was perverse or impossible. He submits that no impossibility or perversity could be seen in the approach adopted by the learned Labour Court. He further submits that the view taken by the learned trial Court is in consonance with the law laid down by the Apex Court in the case of Gopal Krishnaji Ketkar Vs. Mahomed Haji Latif and Others, AIR 1968 SC 1413 : (1968) 3 SCR 862 .

6. Ms. T. Khan, learned Assistant Government Pleader for the respondent, on the contrary submits that the learned Single Judge has rightly held that burden lay upon an employee to establish that he had completed 240 days. She submits that since the employee had utterly failed to discharge the burden which lay upon him, the learned Single Judge has rightly relying on the judgment of the Apex Court in the case of The Range Forest Officer Vs. S.T. Hadimani, AIR 2002 SC 1147 : (2002) 93 FLR 179 : (2002) 2 JT 238 : (2002) LabIC 987 : (2002) 1 LLJ 1053 : (2002) 2 SCALE 242 : (2002) 3 SCC 25 : (2002) 1 SCR 1080 : (2002) 3 SCT 382 : (2002) 2 SLJ 316 : (2002) AIRSCW 909 : (2002) 2 Supreme 58 has allowed the petition of the employer.

7. The perusal of the material on record would reveal that the Party No. 2 in his evidence has specifically stated that he had worked continuously till 30.4.1988. In his cross-examination, it has been brought on record that for the period between 1.8.1986 to 31.8.1986, his name was on nominal muster roll. In his further cross-examination, he has stated that he was in establishment section since 1st May, 1986. He has denied a suggestion given to him that he has not completed 240 days.

8. The respondent had examined Manikchand Sarode, who was working as a Sub-Divisional Officer on its behalf. It could be seen that the said witness has

categorically admitted in his examination-in-chief that the employee had worked as a Labourer on muster-roll since 1.8.1986 till 31.8.1986. He has further admitted that after 31.8.1986 the Party No. 2 has been given the work Job Settlement basis as a labourer. He has admitted that he was given the work of supply of water to trees, copying of documents, cleaning the premises, etc. He has further admitted that payments were made on hand receipts. In his cross-examination, he has admitted that after 1986 no seniority was maintained. In his cross-examination, he has further admitted that he could not assign any reason as to why the documents as directed are not produced before the Court. He has further admitted that the record of actual days of work was not maintained.

9. It could thus be seen that though a specific order was passed by the learned Labour Court directing the employer to produce the relevant record and documents, the employer has not done so. The witness examined on behalf of the employer has also failed to assign any reason as to why the orders passed by the learned Labour Court were not complied with. It is further to be noted that in his examination-in-chief as well as cross-examination, the employee had categorically stated that he was working from May, 1986 continuously till 30.4.1988, on which date he was terminated. It could thus be seen that the initial burden which lay on the employee was discharged by him. In view of this and specifically when the order was passed by the learned Labour Court directing the respondent to produce the record, the respondent ought to have produced the record as directed by the learned Labour Court. Not only this, but the witness examined on behalf of the respondent has also failed to assign any reason for not complying with the directions as issued by the learned Labour Court. It would be relevant to reproduce the following observations of the Apex Court in the case of Gopal Krishnaji Ketkar vs. Mohamed Haji Latif and others (cited supra):

".....Even if the burden of proof does not lie on a party the Court may draw an adverse inference if he withholds important documents in his possession which can throw light on the facts at issue. It is not, in our opinion, a sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the best evidence which is in their possession which could throw light upon the issues in controversy and to rely upon the abstract doctrine of onus of proof. In *Murugesam Pillai vs. Manickavasaka Desika Gnana Sambandha* AIR 1917 6 (Privy Council) Lord Shaw observed as follows:-

"A practice has grown up in Indian procedure of those in possession of important documents or information lying by, trusting to the abstract doctrine of the onus of proof, and failing, accordingly, to furnish to the Courts the best material for its decision. With regard to third parties, this may be right enough - they have no responsibility for the conduct of the suit, but with regard to the parties to the suit it is, in their Lordships' opinion, an inversion of sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the written evidence in their possession which would throw light upon the proposition."

This passage was cited with approval by this Court in a recent decision - *Biltu*

Ram v. Jainandan Prasad, Civil Appeal No. 941 of 1965. D/- 15.4.1968 (SC). In that case, reliance was placed on behalf of the defendants upon the following passage from the decision of the Judicial Committee in Bilas Kunwar vs. Desraj Ranjit Singh and Others¹⁹ CWN 1207 (Privy Council) .

"But it is open to a litigant to refrain from producing any documents that he considers irrelevant; if the other litigant is dissatisfied it is for him to apply for an affidavit of documents and he can obtain inspection and production of all that appears to him in such affidavit to be relevant and proper. If he fails so to do, neither he nor the Court at his suggestion is entitled to draw any inference as to the contents of such documents."

6. But Shah, J. speaking for the Court, stated:

"The observations of the Judicial Committee do not support the proposition that unless a party is called upon expressly to make an affidavit of documents and inspection and production of documents is demanded, the Court cannot raise an adverse inference against a party withholding evidence in his possession. Such a rule is inconsistent with illustration (g) of S. 114 of the Evidence Act and also an impressive body of authority."

10. It can thus be seen that the Apex Court has held that even if a burden of proof does not lie on a party, the Court may draw an adverse inference if he withholds important documents in his possession which can throw light on the facts of the issue. The Apex Court has further observed that it is not a sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the best evidence which is in their possession which could throw light upon the issues in controversy and to rely upon the abstract doctrine of onus of proof.

11. In view of the specific observations of the Apex Court, we find that there was no error committed by the learned Labour Court in drawing an adverse inference specifically when the Labour Court had directed the Party No. 1 to produce the aforesaid documents.

12. Though this judgment was cited before the learned Single Judge, the learned Single Judge relying on an order passed by the Apex Court in the case of Range Forest Officer vs. S.T. Hadimani (cited supra) held that he was bound by the judgment of the Apex Court in the case of Hadimani, since it was a judgment of the Supreme Court. It could thus be seen that in the said case the learned Tribunal whose order fell for consideration before the Apex Court had observed that the burden was on the management to show that there was justification in termination of the service and that the affidavit of a workman was sufficient to prove that he had worked for 240 days in a year. As already observed, in the present case, the employee had discharged the initial burden. After that a specific direction was issued by the learned Labour Court to the employer. The same was not complied with. A question regarding an adverse inference did not arise for consideration in the case of S.T. Hadimani. In any case, the judgment

delivered by the Apex Court in the case of Gopal Krishnaji Ketkar vs. Mohamed Haji Latif and others (cited supra) is delivered by a Bench comprising of three Hon"ble Judges, whereas order passed by the Apex Court in the case of S.T. Hadimani is by two Hon"ble Judges. Between two judgments of the Apex Court, this Court would be bound to follow a judgment by larger Bench. In that view of the matter, we find that the learned Single Judge has erred in interfering with the award passed by the learned Labour Court.

13. As already discussed hereinabove, the learned Single Judge could have been justified in interfering with the award passed by the learned Labour Court only if he would have come to the conclusion that the view taken by the learned Labour Court was either perverse or impossible. Even if the view taken by the learned Labour Court was a possible view, an interference would not have been warranted merely because a writ Court found that another view was more correct view. In the present case, apart from the fact that there is no perversity or impossibility in the approach adopted by the learned Labour Court, there is not even a finding to that effect by the learned Single Judge.

14. In that view of the matter, we find that no interference is warranted with the award passed by the learned Labour Court in so far as direction of reinstatement is concerned. However, we find that in so far as direction to pay back wages is concerned, now it is a settled principle of law that a burden lies upon an employee to establish that he was not gainfully employed and was out of employment. In that view of the matter, we find that the direction in so far as the payment of back wages is concerned, is not sustainable in law.

15. In the result, the Letters Patent Appeal is partly allowed. The judgment and order passed by the learned Single Judge is quashed and set aside. The award passed by the learned Labour Court in so far as it directs reinstatement with continuity of service is upheld. However, it is made clear that the appellant would not be entitled for any back wages. The respondents are directed to in fact reinstate the appellant with effect from 1.7.2015 and start paying the salary from the said date. No order as to costs.