

(1999) 02 BOM CK 0056
In the Bombay High Court
Case No : Writ Petition No. 510 of 1996

Patel Engineering Works

APPELLANT

Vs

Shri Shridhar Babaji Chaukekar and another

RESPONDENT

Date of Decision : 23-02-1999

Acts Referred:

Constitution of India, 1950 — Article 226
Industrial Disputes Act, 1947 — Section 2

Citation : (1999) 3 ALLMR 120 : (1999) 4 BomCR 203 : (1999) 2 BOMLR 466 :
(1999) 82 FLR 580 : (1999) 2 MhLj 876

Hon'ble Judges : N.J. Pandya, J

Bench : Single Bench

Advocate : P.K. Rele, instructed by, S.S. Pakale, for the Appellant; A.P. Rege and M.S. Lad, for the Respondent

Judgement

N.J. Pandya, J.—The petitioner is aggrieved by the order passed by the Industrial Court, at Mumbai in Complaint U.L.P. No. 1206 of 1993. The respondent No. 1 workman had moved the Court with the prayer that unfair labour practice is adopted by the petitioner-company in respect of the complainant-workman inasmuch as he has been working with the company since the year 1989 and before original respondent No. 4 of the trial Court since 1983, he has not been made permanent as a fitter.

2. The stand of the company all along has been to the effect that the workman was employed by the company from amongst the casual labourers who would be waiting for the opportunity to get the job for the day at the gate of the company. This would necessarily mean that whenever there is job available with the company from amongst the casual workers if somebody is to be assigned the job the concerned workman has to be available at the gate of the company. The company is engaged in ship repairs works. This would mean that any vessel which is small or reasonably big is being repaired by the company. Same is the work done by the original respondent No. 4 in the trial Court.

3. It is further the case of the company that by very nature of this work, so far as load thereof is concerned, it keeps on fluctuating according to the season. Through out the year there would be work available but its volume will increase particularly during monsoon when it will be too rough for the vessel to venture out into the sea. The ship/boat owners wait upto the onset of monsoon to get the repair works carried out.

4. This leads to increase in the work of the company necessitating engagement of extra working hands in different fields of the work involved. In the field where fitters are concerned, the company admits that it did employ the workman as a fitter as and when work was available and also depending upon the availability of the workman himself at the time when the work is to be given to casual labourers.

5. In the aforesaid background, therefore, if the permanency is sought, it has to be shown that the workman had worked for the required number of days in a given calender year. However it is an admitted position that the workman had never completed 240 days in any of the years starting with 1983 ending with the year 1989. His own evidence as per tabular form, pages 93 to 95 would indicate that for the shortest duration that he had worked was for a period of 15 days in the year 1989 and the longest duration was in the year 1991 of 184 days. Rest of the years, the days are fluctuating. It is interesting to note that while claiming the work since the year 1983 all through as per the aforesaid details set out in pages 93 and 94 for the first two years he comes out with a case that he could not complete 240 days because of the unfair labour practice adopted by the company though all through before the trial Court it has been repeatedly stated that he was prevented from completing 240 days and that breaks were given to him. It is not his case that there was mala fide on the part of any one connected with the companies activities of assigning job to casual workers. The unfair labour practice, if proved, would thus at best amounts to mala fide in law but not in fact.

6. At this juncture, it may also be mentioned that the petitioner was not without the aid of assistance of a union. There was a union of the workers, that too was headed by late Dr. Datta Samant. It is the workman who has filed the complaint in his individual capacity. We are not concerned as to why the union did espouse his case. However, the fact remains that during the period under discussion i.e. from the year 1989 to 1993, the workman was member of the union and apparently that union has also not done anything for him.

7. Thus it is the case of the workman that he has approached the trial Court with a complaint under the provisions of the Maharashtra Recognition of Trade Unions & Prevention of Unfair Labour Practices Act, 1971, Schedule IV, Item Nos. 5 and 6. Item No. 5 relates to showing favouritism or partiality to one set of workers, regardless of merits. Item No. 6 relates to employ employees as "badlis", casuals or temporaries and to continue them as such for years, with object of depriving them of the status and privileges of permanent employees.

8. Needless to say, the aspect dealt with in Item No. 5 if proved will have a direct bearing on the practice referred to in Item No. 6.

9. So far as alleged favouritism or partiality is concerned, the workman has referred to the case of four other employees of the company whose names are Rane, More, Salvi and Chandrashekar.

10. It is an admitted position that the workman was amongst casual workers and as per statement produced by the company in the casual workers list at page 89, he is at Sr. No. 2. This list also contains the helpers. It is as on 1-1-1995. The complaint was filed in the year 1993. From amongst the casual list of helpers, apparently these four persons were given permanent job of a fitter.

11. How were they juniors to him and on what basis this amounts to favouritism, the workman has not been able to establish.

12. It is an admitted position that as per the attendance record produced by the company, on some of the days where against the name of the workman dash(-) is put referred to as hyphen by the trial Court, work could be available but the workman was not available to do same. It may be recalled that it is not the case of the workman that there is an action of mala fide in fact.

13. Once this aspect is borne in mind and the evidence is scanned as led before the trial Court and the judgment of the trial Court we have to consider whether the conclusion drawn by the learned Judge can be said to be on the basis of the material on record. The learned Counsel for the respondent-workman has been at pains to submit that this being the matter under Article 226 of the Constitution of India it is not open to this Court to reappraise the evidence. I agree with the learned Counsel. I also agree with him that merely because the second view is possible, the Court not sitting in appeal would not interfere with the finding of the trial Court if it is supported by the material on record and the material so placed can reasonably be capable of leading to the conclusion drawn by the trial Court.

14. At page 126, the impugned order, internal page 9, two issues are framed and they are correctly worded keeping in mind the aforesaid Item Nos. 5 and 6 of Schedule IV. About the workman having prevented from completing 240 days there is nothing else except the assertion made by the workman himself. Interestingly this very workman has sought interim relief and that was rejected for which purpose one may turn to page 79 of the petition. At paragraph 10 at page 79 prima facie it has been held that the alleged act of juniors having promoted is not established. Contrary to it is the finding at page 142 internal page 25.

15. It is no doubt true that the trial Court having taken one particular view at interim stage may take contrary view on the basis of the evidence that would be before it when it decides the matter finally. The material before the trial Court as stated above on the part of the workman is the assertion referred to above. This

assertion no doubt gets further support when the company's witness Mr. Dave also accepts the fact. However, Mr. Dave contends that after the names were recommended by the immediate superior and were approved by the union, in consultation with the union this promotion has been given. By promotion one would mean casual workers from amongst the helpers getting the benefit of permanency. So far as the workman is concerned, it has been the stand of the said witness Shri Dave that because of his less attendance, the union also agreed that he may not be given this benefit.

16. This material is discarded by the trial Court on the ground that the union could not have dictated the management and the management could not have acted only on the basis of the view expressed by the union and in any case there has to be record in the form of minutes or exchange of correspondence in this regard. It is nobody's case that there was any such practise of keeping minutes or exchange correspondence. Now comes the question of worker having been prevented from completing 240 days. Going by the details as set out at pages 93 to 95 starting with the year 1989, the workman had to be prevented from completing 240 days in the year 1989 by about 225 days because he has worked only for 15 days in that year. In the year 1990 he has worked for 138 days. Therefore for 102 days he was prevented according to his case. On this basis if one refers to the subsequent year also there is substantial gap of more than 100 days to 200 days to make out the total of 240 days.

17. Going by this case it would mean that though he was a member of the union he silently suffered the discrimination and high-handedness on the part of the employer and for almost 5 to 6 years and only in the year 1993 he filed the complaint. Tested on the principle of preponderance of probabilities and that would be the principle that would govern the matter of this nature, obviously this attempt would fail. The learned trial Judge unfortunately has been carried away by the fact that with regard to the work being seasonal in the sense that there is increase in the monsoon though all documents would be available with the company they are not produced. It is not correct. The documents are produced. Page 85 is the list of documents filed before the trial Court and at Item No. 5 Work Orders pertaining to repairs, assignment of company along with the work done certificates are produced.

18. Stand of the company has been that on an average there would be work of repairs of almost 100 ships. However, the repair works of each of the ship would vary so far as time spent on the repair is concerned. It would depend obviously on the extent of repairs as also the nature of repairs. Some ship may be cleared within couple of days or week and some may have to be retained for a longer period. It is in this sense the company has been saying right from the beginning and admitting also that there is work available all throughout the order. However, as the volume of work would fluctuate in accordance with the season of the year, the requirement for additional hands would accordingly vary. There might be period where no additional hands are required as against the period when the

company cannot function without them.

19. The requirement thus being directly connected with the volume of work available, the permanency of workman for the post of fitter has to be considered in that light. Without the help of casual labours, if the work can be carried out and in the course thereof if there is a need for the fitter to complete the job at hand, obviously there is permanent work available that could be done by a fitter. However, when additional hands in the category of fitter is required because of the increase of the volume of the work the employment thus generated cannot be linked up with the permanent requirement of the company in the category of a fitter in relation to its work requirement as seen in the light of the fluctuation in the volume of work.

20. The learned Judge at various places in his judgment has repeatedly referred to the fact that according to the said witness Shri Dave, the work of a fitter is always available in the company. This is bound to be so. Only question is whether additional hands that were required from time to time can be said to be doing the work which is available permanently but the company in order to escape its liability under the various labour legislation is deliberately resorting to practice of getting the work in such a way as to keep its work going on one hand and on the other denying the work to the workmen for their legitimate dues. Needless to say there is nothing on record to suggest that this has been the position. If that be so, obviously there is no question of interfering with the labour practice of the nature urged by the workman.

21. It is not that the workman is unaware of the said fluctuation. He does admit as such in his deposition. It has been recorded by the learned Judge in paragraph 15 at page 132. Thereafter no doubt the workman has asserted that the work was always available in the company and there is no shortage of work. Availability or shortage has to be considered in the light of the fact that workman who has been casually employed as the present workman was in connection with this casual requirement, was the work available? Or was there any shortage of work? The evidence of Shri Dave has been discussed by the learned Judge in paragraph 18 onwards starting with observation that he has made vital admission during the course of his cross examination. In cross examination seems to be a new case sought to be developed while putting question to him about the requirement of promotion. How it is done and so on. In this background Shri Dave has come out with the requirement of educational qualification etc. This has led the learned Judge to observe that the company has been trying to paint the workman as black as it could be. This is at the end of paragraph 23, page 138. In the course of his cross examination, there was a reference to an interview and based on that the learned Judge draws an inference that from time to time the workman has been given job. From where he gets this material on record is not possible to gather.

22. Before passing the final order, the learned Judge had referred to the arguments of the learned advocate of the workman as to the question of

permanency being given with effect from which date. Rightly in keeping with the case of the workman it was urged that it be given from the date of the workman having completed 240 days. However, it was not possible to fix any date on this basis. Reason is that as noted above there has been a gap of considerable length during which the workman was not getting any work. May be, as it has come on record that for sometime he was not well or not available for whatsoever reason. It is in this background that the learned Judge decided to give the benefit of permanency with effect from 1-11-1993, the date on which the complaint is filed.

23. There is a slight controversy as to the age of superannuation raised before the trial Court. However, the petitioner here in this Court in the affidavit in reply with reference to paragraph 15 of the petition, the workman has admitted the averment thereof. This is to be found in paragraph 26, internal page 11 of the said affidavit in reply. This has no bearing on the date given in the matter but this is referred to because this controversy was raised before the trial Court. Two judgments were cited on behalf of the workman. One relates to the power of judicial review referred to above and it redresses the well-known principle. The judgment is reported in D.P. Maheshwari Vs. Delhi Administration and Others, .

24. The second matter is pertaining to employees engaged in some forest activities initiated by the Forest Department in the State of Maharashtra. The Apex Court in the judgment reported in 1996 (1) S.C. SLJ 113 categorically held on fact that workers who have worked more or less for five years continuously are entitled to regularization in view of Piara Singh's case.

25. As noted above, the worker has not come with the case that he has completed the requisite number of days. His case has been that of not allowed to complete 240 days which according to him would amount to unfair labour practice. If this case is established, certainly it would amount to unfair labour practice. As it has not been done, obviously the petition has to be allowed and the rule is made absolute.

26. Petition allowed.